UNITED STATES COURT OF APPEALS
FOR THE EIGTH CIRCUIT

ANNEX MEDICAL, INC.; **STUART LIND**, and **TOM JANAS** *Appellants*, *v.* **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 GEITHNER**, in his official capacity as Secretary of the United States Department of the Treasury; **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR;** and **UNITED STATES DEPARTMENT OF THE TREASURY**, *Appellees*.	Civ. No. 13-1118 **REPLY BRIEF IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL**

Reply Brief in Support of Emergency Motion for Preliminary Injunction Pending Appeal

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

Absent relief from this Court, Annex Medical, Inc. and Stuart Lind (together, "Lind") must comply with the Mandate in violation of Lind's religious beliefs, or discontinue Annex Medical's group plan, thereby violating Lind's religiously-held duty to provide for his employees. In short, Lind will be irreparably harmed. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (the deprivation of First Amendment rights constitutes irreparable harm). Appellees maintain that Lind must be forced to violate his beliefs to ensure that women receive cost-free insurance coverage for contraceptive services. Yet Appellees are content to permit group health plans covering millions of women nationwide to omit the same coverage indefinitely. Appellees' conscious choice to "leave[] appreciable damage to [its] supposedly vital interest[s] unprohibited," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), "completely undermines any compelling interest in applying the … mandate to [Lind]." *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, *22 (D. Colo. July 27, 2012).

Argument

I. Lind is Likely to Succeed Under this Court's Order in *O'Brien v. HHS*.

The district court erred in not applying this Court's order enjoining the Mandate pending appeal in *O'Brien v. HHS*, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012), despite the fact that the order did not elaborate on its decision.

(Appellees' Br. at 4.) There is no plausible basis for the *O'Brien* panel's order except the *O'Brien* appellants' satisfaction of their burden for a preliminary injunction. As Lind is similarly situated to O'Brien, a fact not contested by Appellees, he is likewise likely to succeed on the merits of his appeal.

II. The Mandate Substantially Burdens Lind's Religious Exercise Under RFRA.

Appellees argue that because Annex Medical is a for-profit corporation, rather than a non-profit, religious organization, it is excluded from seeking the protection of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. (Appellees' Br. at 9-12.) Remarkably, Appellees ignore the statute at issue and support their position by citing case law interpreting Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act. (*Id*. at 10-11.)

By its text, RFRA is not limited to "religious organizations" as is Title VII.[1] Instead, RFRA protects "*any*" exercise of religion. 42 U.S.C. § 2000bb-2(4). Appellees nonetheless ask this Court to rewrite RFRA to include a "religious organization" requirement. To do so would not only run counter to RFRA's text, but would be contrary to the intent of Congress, which is presumed to have acted intentionally when it excludes language from a statute or a section of a statute. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (courts "generally

[1] RFRA protects a "person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Under federal law, a corporation, such an Annex Medical, is a "person." *See* 1 U.S.C. § 1.

presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *Ctr. For Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 701-02 (8th Cir. 2012) (citation omitted) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'")

Moreover, RFRA provides, "This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3. Appellees' observation that Congress enacted RFRA against the "backdrop" of Title VII thus undermines their position. (Appellees' Br. at 12.) All other laws, including Title VII, must be interpreted to be consistent with RFRA, not the other way around, as Appellees' suggest. *See United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (emphasis added) ("RFRA … *amended all federal laws*, including criminal laws, to include a statutory exemption from any requirement that substantially burdens a person's exercise of religion….").

The fact that *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 706 (2012), says that the Free Exercise Clause gives "special solicitude" to the rights of "religious organizations" does not mean that *only* churches can exercise religion. S*ee Stormans, Inc. v. Selecky*, 586 F.3d 1109,

1120 n.9 (9th Cir. 2009) ("[A]n organization that asserts the free exercise rights of its owners need not be primarily religious.") Indeed, "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of [African Americans]," *Nixon v. Condon*, 286 U.S. 73, 89 (1932), does not mean only African Americans may seek its protection. *Hosanna-Tabor* merely recognizes that certain kinds of organizations receive special "freedom of association" protection against state interference in their internal governance. 132 S.Ct. at 706. This principle in no way limits "secular" organizations' assertions of free-exercise rights.

Likewise, the legal separation between Lind, Annex Medical, and his group health plan, does not insulate Lind from the substantial burdens imposed by the Mandate. (Appellees' Br. at 12-18.) Appellees' rigid view wholly ignores that a corporation cannot act except through human agency. Lind, as the sole decision-maker for Annex Medical, must perform the acts necessary to purchase its group health plan. If Annex Medical is forced to comply with the Mandate or terminate its group health plan, *Lind* must likewise perform those acts. Under RFRA, the question is not whether Annex Medical and its group health plan are identical to Lind; the question is whether for *moral and religious* purposes the government coercion at issue is a violation of Lind's personal beliefs. As Lind has demonstrated, it is a violation of his religious beliefs to operate Annex Medical in a

way that violates those beliefs. (*See* Record at 16, ¶¶ 74-76.) Thus, to comply with the Mandate, Lind would have to violate his religious beliefs.

To accept Appellees' position would mean that a religiously-motivated business owner could *never* challenge a regulation that imposed a burden on his religious exercise no matter how severe that burden may be. Indeed, if the corporate form acted as an impenetrable barrier to an owner's free exercise claim as the government would prefer, the owner could not even challenge a government mandate that forced him, under penalty of law, to provide coverage for abortion or physician-assisted suicide. Nor could a Jewish business-owner challenge a government mandate that required his business to be open on his Sabbath. And it would be irrelevant whether the government's interest was compelling or insignificant for the absence of a substantial burden under RFRA relieves the government of satisfying strict scrutiny.

Appellees' recognition of the benefits afforded Lind by the corporate form, (Appellees' Br. at 13) actually demonstrates that Appellees' position is itself a substantial burden on an owner's exercise. If a business owner must give up the corporate form to assert his free exercise rights, it impermissibly forces her "to choose between following the precepts of her religion and forfeiting benefits." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

No case cited by Appellees legally separates an owners' *conscience* from his business activities. Several cases hold exactly the opposite. *Stormans v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) are indistinguishable from the present case. In both cases, the closely-held corporate plaintiffs were "merely the instrument through and by which [their owners] express their religious beliefs." *Stormans*, 586 F.3d at 1120. Their beliefs indistinguishable from their owners' beliefs, the court held each corporation "ha[d] standing to assert the free exercise rights of its owners." [2] *Id.*; *Townley*, 859 F.2d at 620 n.15. These cases recognize that even where a regulation impacts a business, the owner's religious beliefs are clearly implicated.[3]

The burdens imposed by the Mandate are in no way attenuated or *de minimis*, but are substantial. The Mandate requires Lind to pay for and facilitate access to contraception, sterilization, abortifacient drugs and related counseling and education. Lind's Catholic faith forbids him from doing exactly what the

[2] This was true even though "Townley's main function—manufacturing of mining equipment—was a secular activity." *Stormans*, 586 F.3d at 1120 n.9.

[3] Appellees' also misconstrue *United States v. Lee*, 455 U.S. 252 (1982). *Lee* did not hold that plaintiffs who "enter into a commercial activity" lose their free-exercise rights. Instead, the Supreme Court found the challenged law *did* create an "interfere[nce] with the[] free exercise rights" of the Amish employers. 455 U.S. at 257. Only *after* making this finding did the Court uphold the challenged law under the applicably scrutiny. *Lee* is clear: a court must apply the applicable scrutiny, and may not deny relief on the basis that the for-profit plaintiff is incapable of exercising religion.

Mandate requires. (*See* Record at 115, ¶¶ 5-7; Record at 120, ¶ 9.) Thus, the Mandate affirmatively compels Lind to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). And Lind faces substantial monetary penalties and lawsuits if he fails to perform these acts. 26 U.S.C. § 4980D; 29 U.S.C. § 1132(a).

Lind's "option" to terminate his health care plan without incurring monetary penalties does not eliminate the substantial burden on his religious exercise for the consequences of doing so likewise put "substantial pressure" on him to purchase insurance and provide contraception, sterilization and abortifacient drugs—in other words, to "modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

Appellees' arguments cannot be squared with their choice to exempt "religious employers" who object to covering contraception services, 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B), and their plan to further "accommodat[e] non-exempt, non-profit religious organizations' religious objections to covering contraception services." 77 Fed. Reg. 16501, 16503 (March 21, 2012). If Lind were instead the owner of a *non-profit* business, the religious beliefs he professes would likely entitle him to an exemption from the Mandate. Yet Appellees claim those *same beliefs* when professed by Lind as the owner of Annex Medical, cannot possibly constitute a substantial burden under RFRA. Appellees cannot have it both ways.

Lind has shown through the sworn testimony of his priest that the Mandate requires him, under penalty of law, to do exactly what his religious beliefs forbid. Appellees on the other hand resort to scare tactics and slippery-slope arguments.[4] (Appellees' Br. at 16-17.) The central flaw in these arguments is that they equate the ability to assert a RFRA claim with receiving a RFRA exemption. As one district court aptly noted in rejecting similar arguments, "[J]ust because a corporation is *allowed* to assert a RFRA claim does not mean that it will *succeed* on the claim." *Tyndale House Publrs. v. Sebelius*, 2012 U.S. Dist. LEXIS 163965, *31 n.13 (D.D.C. Nov. 16, 2012).

III. The Mandate is Not Narrowly Tailored to a Compelling Interest.

Appellees spend the majority of their argument urging this Court to reject Lind's claim that the Mandate substantially burdens his religious exercise. They do this because they know that their asserted interests in the Mandate cannot be considered compelling when they have consciously exempted group health plans

[4] Appellees attempt to draw an analogy between paying employees their salaries and paying for the contraceptive services the Mandate requires. Yet RFRA does not permit Appellees to determine for Lind where to draw the line with respect to his religious beliefs. *See Thomas*, 450 U.S. at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one"); *see also Ali*, 682 F.3d at 710-11 ("[I]n the RFRA context, the [district] court erred by evaluating the orthodoxy and sophistication of Ali's belief, instead of simply evaluating whether her practice was rooted in her sincerely held religious beliefs."). Appellees cannot minimize the burdens imposed by the Mandate by simply pointing to other regulations to which Lind has not objected.

covering millions of women from complying with the Mandate. In fact, to date, no court has found that the Mandate is supported by a compelling interest.

Appellees do not dispute that approximately 191 million people belong to health care plans that may be "grandfathered" under the ACA, and therefore exempt from the Mandate. *See Newland*, 2012 U.S. Dist. LEXIS 104835 at *19 n.9 (*citing* 75 Fed. Reg. 34538, 34550 (June 17, 2010)). Instead, Appellees try to avoid this fact by again claiming that the grandfathering provision is "transitional" and that Lind has not shown how many grandfathered plans actually exclude contraceptive services. (Appellees' at 19.) Neither of these things changes the fact that "this massive exemption completely undermines any compelling interest in applying the…mandate to [Lind]." *Newland*, 2012 U.S. Dist. LEXIS 104835 at 22.

In fact, the grandfathering exemption is not "transitional," but can be maintained 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 ("Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*.").

It is also irrelevant whether grandfathered plans include coverage for contraceptive services; what is relevant under the compelling interest test is whether those plans are *required* to include that coverage. If providing cost-free contraceptive services to women was as crucial as Appellees claim, the

government would have required *all* employers to include this coverage. Instead, the government has permitted employers covering millions of individuals to avoid the Mandate. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."[5] *Lukumi Babalu Aye*, 508 U.S. at 547 (quotations and citations omitted).

Appellees make nearly no attempt to explain how the Mandate survives the "least restrictive means" prong of RFRA. Appellees appear to believe that under RFRA, Lind must prove an alternative scheme would not unduly burden the government. To the contrary, "When a plausible, less restrictive alternative is offered … it is *the Government's obligation* to prove that the alternative will be ineffective to achieve its goals. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). The government has not met that burden here.

Conclusion

For the foregoing reasons, Annex Medical and Stuart Lind request this Court to enter an injunction pending their appeal.

[5] Appellees fair no better in justifying the government's unequal treatment of religious exercise under the "religious employer" exemption. (*See* Appellees' Br. at 19.) That the government may validly exempt non-profit organizations from certain tax laws does not mean it may pick and choose which organizations may exercise their free-exercise rights. The Mandate must survive strict scrutiny as applied to Lind or else it is invalid. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

Respectfully submitted this 29th day of January, 2013.

/s Noel H. Johnson

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