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.

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Argument

I. The Mandate Violates RFRA.

A. Annex Medical and Stuart Lind Are "Persons" Under RFRA.

Appellees argue that Lind cannot maintain a claim under the Religious Freedom Restoration Act ("RFRA") because Annex Medical, as a *for-profit* corporation, is not a "person" within the meaning of RFRA and therefore cannot engage in an "exercise of religion." (Opp. at 17.) Yet the claim that Congress intended RFRA's use of "persons" to be limited to only individuals and religious non-profits is not only defeated by RFRA's text, but contrary to Supreme Court precedent and accepted notions of corporate behavior.

The "analysis begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997); *Ctr. For Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 701 (8th Cir. 2012) ("The ordinary meaning of the statutory language accurately expresses the legislative purpose."). RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability…." 42 U.S.C. § 2000bb-1(a). RFRA's text does not exclude for-profit corporations, but protects "*any*" exercise of religion. 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4) (emphasis added); *see also Gonzales*, 520 U.S. at 5 ("Read naturally, the word 'any' has an expansive meaning[.]"). Nor does RFRA's text differentiate between

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for-profit and non-profit corporations; rather, RFRA uses the word "person," which on its face means all corporations. *See* Dictionary Act, 1 U.S.C. § 1 ("the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

Appellees attempt to overcome this glaring flaw in their argument by claiming that Congress implicitly "carried forward" the "principles" reflected in other federal statutes, such as Title VII, that grant certain privileges to religious employers. (Opp. at 17-18.) However, Congress was careful to remove all doubt as to RFRA's authoritative scope. RFRA "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; *see also United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (RFRA "*amended all federal laws* to include a statutory exemption from *any requirement* that substantially burdens a person's exercise of religion….") (emphasis added) (citations omitted).

Principles of statutory construction confirm that RFRA protects all persons, including for-profit and non-profit corporations. Courts "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). And "where Congress knows how to say something but chooses not to, its silence is controlling." *United States v. Webb*, 655 F.3d 1238, 1257 (11th Cir. 2011); *see also Olson*, 676 F.3d at 701-

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702 (“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.”) The federal statutes on which Appellees rely therefore cut against their argument by showing that where Congress intends to limit privileges to religious corporations, it knows how to do it. Congress was aware of existing federal law, including Title VII and the Dictionary Act, and declined to attach any limitations to RFRA.

First Nat’l Bank v. Bellotti, 435 U.S. 765 (1978) and *Citizens United v. FEC*, 130 S.Ct. 876 (2010) also foreclose Appellees’ attempt to categorically exclude for-profit corporations from the scope of RFRA. In *Bellotti*, the Supreme Court emphasized that courts must focus on the nature of the constitutional right rather than the person invoking the right. 435 U.S. at 775-76. “The proper question…is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [government regulation] abridges [rights] that the First Amendment was meant to protect.” *Id*. at 776. The fact that individuals and *non-profit* corporations may object to the Mandate under RFRA confirms that abstaining from cooperation with contraception is a religious exercise RFRA is meant to protect. It flies in the face of *Bellotti* to deny Annex Medical, a business

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objecting to the Mandate for the same reasons as those individuals and nonprofits, the protection of RFRA.

As Appellees recognize (Opp. at 17-18), "political speech does not lose First Amendment protection simply because its source is a corporation," *Citizens United*, 130 S.Ct. at 900 (citation omitted), and "the First Amendment does not permit Congress to make…categorical distinctions based on the corporate identity of the speaker," *id*. at 913. And the Court rejected Congress' attempt to allow some corporations to speak (media), but not others because such "differential treatment cannot be squared with the First Amendment." *Id*. at 906. This Court should likewise reject Appellees' attempt to allow some corporations (non-profit) to exercise religion, but not others.

B. Profit-making Is Not Incompatible with Religious Exercise.

Appellees do not suggest that non-profit corporations cannot exercise religion or avail themselves of the protections of RFRA and the First Amendment. Indeed, they could not. *See O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc), *aff'd by Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) ("a New Mexico corporation on its own behalf" and that of its members and officers prevailed on a RFRA claim before a unanimous Supreme Court); *Church of the Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S.520 (1993) (non-profit corporation successfully asserted free-exercise rights).

Yet Appellees do not explain why Annex Medical's for-profit nature precludes Lind from engaging in the same protected religious exercises engaged in by these non-profit entities and the individuals who operate them. Appellees cite cases showing that certain businesses, although their free-exercise rights were burdened, must still abide by certain laws *if* the government satisfies the applicable constitutional scrutiny. *See e.g.*, *United States v. Lee*, 455 U.S. 252 (1982). However, no case cited holds that "for-profit businesses" cannot maintain RFRA or free-exercise claims. In contrast, at least two federal courts have permitted incorporated businesses to maintain free-exercise claims. *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2d Cir. 2012) (incorporated "delicatessen and butcher shop" that "specialize[d] in kosher foods" permitted to raise free-exercise challenge to "New York State's kosher labeling and marketing statutes"); *Womens Servs., P.C. v. Thone*, 483 F. Supp. 1022, 1029 (D. Neb. 1979) ("Florida corporation authorized to do business in Nebraska" permitted to raise free-exercise challenge to abortion legislation.)

Appellees incorrectly claim that *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) rejected a free exercise claim *because* the corporate plaintiff was "not a religious corporation," but "a Minnesota business corporation

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engaged in business for profit." (Opp. at 22.) The quoted language merely explains why the for-profit corporate plaintiff did not satisfy the state law exemption for religious employers. *McClure*, 370 N.W.2d at 853. The court found that failure to qualify for that exemption merely denied the corporation "*absolute* freedom to exercise religious beliefs," not that it was *per se* barred from exercising those beliefs in the first place. *Id*. (emphasis added). In fact, the court explained that the "assertion that a corporation has no constitutional right to free exercise of religion" is "conclusory" and "unsupported by any cited authority." *Id*. at 850 (citing *Bellotti*, 435 U.S. 765; *Lee*, 455 U.S. 252; *Donovan v. Tony and Susan Alamo Foundation*, 722 F.2d 397 (8th Cir. 1983).) The court stated in no uncertain terms: "[W]e conclude that [the corporation] has 'standing' to assert its constitutional arguments." *Id*. The *McClure* plaintiffs were ultimately unsuccessful only because the challenged law withstood the applicable scrutiny. *See id*. at 852-853.

The purported non-profit limitation is certainly not "rooted in 'the text of the First Amendment'" as Appellees claim. (Opp. at 12.) 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* religious organizations can exercise religion. Indeed, "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of [African Americans]," *Nixon v. Condon*, 286

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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.

Appellees are equally wrong to suggest that business and the pursuit of financial gain are incompatible with religious exercise. (Opp. at 19-21.) The U.S. Supreme Court, in *Sherbert v. Verner*, 374 U.S. 398, 399 (1963), which forms the basis for RFRA, held an employee's religious beliefs were substantially burdened through not receiving unemployment benefits. *See also Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 709 (1981) (same). Just as Adell Sherbert exercised her religion by refusing to work on her Sabbath, a business and its owner exercise their religion by doing the same. *See Braunfeld v. Brown*, 366 U.S. 599 (1961) (adjudicating free-exercise claim of Orthodox Jewish business-owners who objected to Sunday mandatory-closing law).

Appellees misconstrue *United States v. Lee*. *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 a "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 applicable scrutiny. *Lee*

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is clear: a court must apply the applicable scrutiny, and may not deny relief on the basis that the plaintiff is incapable of exercising religion in business.

Federal law further illustrates that there is nothing incompatible between religion and business. According to the IRS, "Churches and religious organizations, like other tax-exempt organizations, may engage in income-producing activities unrelated to their tax-exempt purposes[.]" IRS, *Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law*, *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf (last visited April 22, 2013). Title VII permits "businesses" who otherwise do not qualify as "religious corporations" to engage in employment discrimination so long as religion "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business…." 42 U.S.C. § 2000e-2(e)(1). And the Patient Protection and Affordable Care Act ("ACA") itself recognizes that a "facility" can conscientiously object to providing abortion services without requiring the facility to be non-profit. 42 U.S.C. § 18023(b)(4).

There is nothing about Annex Medical's profit-making nature that disqualifies it from engaging in acts of religious exercise.[1] As recent scholarship observes,

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[1] That a corporation's "for-profit status is an objective criterion" under Title VII (Opp. at 20) is irrelevant here because by its text, RFRA is not limited to "religious corporations" as is Title VII, but protects "any" exercise of religion. 42 U.S.C. §

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For-profit businesses are widely understood as capable of forming subjective intentions for their actions. The law recognizes this capability in various ways, from allowing businesses to act on ethical principles, to finding them capable of forming mental intent for crimes, to holding them liable for racial, sexual, or religious discrimination, to acknowledging that they can speak with a particular viewpoint. There is no basis to view these same entities as incapable of forming and acting upon beliefs about religion.

Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?* (Mar. 7, 2013), at 8, *available at* http://ssrn.com/abstract=2229632; *see also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("[S]ome for-profit activities could have a religious character.").[2] Indeed, certain well-known businesses like Chipotle[3], Ben and Jerry's[4], and Chick

2000bb-2(4). But even if it were relevant, the EEOC Compliance Manual explains that profit-making is only *one* factor to consider, while "no one factor is dispositive." EEOC Compliance Manual, Section 12 (Religious Discrimination), *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359493 (last visited April 22, 2013).

[2] Society consistently lauds corporations for acting in accordance to values unrelated to profit maximization. In April, *CR Magazine* published its annual list of the "100 Best Corporate Citizens," which ranks companies based on seven categories: environment, climate change, employee relations, human rights, governance, finance, and philanthropy. *CR's 100 Best Corporate Citizens 2013*, CR Magazine, *available at* http://www.thecro.com/files/100Best2013_web.pdf (last visited April 22, 2013).

[3] Chipotle CEO Steve Ellis explains, "It's our promise to run our business in a way that doesn't exploit animals, people or the environment. It is the philosophy that guides every decision we make at Chipotle." http://www.chipotle.com/en-US/chipotle_story/steves_story/steves_story.aspx (last visited April 22, 2013).

[4] Ben and Jerry's website explains, "We have a progressive, nonpartisan social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our day-

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fil-a[5] have dedicated themselves to operating in accordance with certain ethical, philosophical, moral and religious values and regularly take action in accordance with those values.

Similarly, Annex Medical "conduct[s] business in a way that is pleasing to God and is faithful to Biblical principles and values." (JA-14, ¶ 71; JA-59, ¶ 12.) Annex Medical consistently engages in observable acts in furtherance of this system of religious values, including its belief in the sanctity of life and against cooperation with contraception and abortion. It discontinued a promising product line that was being used in medical procedures that prematurely ended the life of the patient (JA-60, ¶¶ 16-17); it ended relationships with business that support abortion services (JA-15, ¶ 76; JA-68–70); it formed relationships only with those businesses that agree not to use its products in abortion procedures (JA-15, VC ¶ 74; JA-72); and it discontinued its group health insurance to avoid subsidizing coverage it believes to be immoral and intrinsically evil. These acts are religious exercises. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("exercise of religion" is not constrained to "belief and profession" but includes the

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to-day business activities. Our focus is on children and families, the environment and sustainable agriculture on family farms." http://www.benjerry.com/activism/mission-statement (last visited April 22, 2013).

[5] Chick-fil-a has been closing it restaurants on Sunday since 1946. This decision was made for "spiritual" as well as "practical" reasons. http://www.chick-fil-a.com/Company/Highlights-Sunday (last visited April 22, 2013).

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"performance of (or abstention from) physical acts"); *United States v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1418 (8th Cir. 1996) (RFRA protects "religiously motivated as well as religiously compelled conduct"). They are no less so because Annex Medical's profits inure to the private benefit of its shareholder.

Appellees also do not explain what legal principle precludes Annex Medical from challenging government action—the Mandate—that unquestionably impedes the observance of its religious values. After all, Appellees concede that the Mandate imposes legal obligations on Annex Medical. (Opp. at 23.) And RFRA is explicit: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). To deny corporate standing here would enable blatant religious discrimination against business corporations, no matter how egregious, without recourse to federal court. Yet a for-profit corporation asserting a RFRA claim does not mean that corporate regulation will fall by the wayside or that employment discrimination will run rampant. As the challenges to the Mandate demonstrate, RFRA and Free-Exercise challenges are limited to plaintiff-corporations that can demonstrate they are operated in an authentically religious way. Besides, "just 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) (emphasis in original). Moreover, success under RFRA means a judicially-crafted exemption for the Plaintiff, not others. Regulations, even applied to a for-profit plaintiff, will be consistently upheld if government justifies them under the applicable scrutiny. *E.g.*, *Lee*, 455 U.S. at 259-60.

C. The Corporate Form Does Not Negate Stuart Lind's Religious Exercise.

In a Mandate challenge with nearly identical facts as these, the Eastern District of Michigan recognized that "a closely-held corporation may assert its owners' free exercise and RFRA rights where the corporate entity 'is merely the instrument through and by which the owners express their religious beliefs.'" *Monaghan v. Sebelius*, 2013 U.S. Dist. LEXIS 35144, *11 (E.D. Mich. March 14, 2013) (quoting *Stormans v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009)). The plaintiffs in *Monaghan*, as here, were a secular, for-profit corporation (Domino Farms) and its sole owner and shareholder (Monaghan). *Id.* at *1. In preliminarily enjoining enforcement of the Mandate, the court "[saw] no reason why [Domino Farms] cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of Monaghan, while at the same time being an instrument through which Monaghan may assert a claim under the RFRA." *Id.* at 15. The court observed that Domino Farms need not have the capacity to "pray, worship, [or] observe sacraments" in order to "express a

particular viewpoint on religion" as a pass-through instrumentality of its owner. *Id*.; *see also id*. at 16 ("The Court sees no reason why a corporation cannot support a particular religious viewpoint by using corporate funds to support that viewpoint.").

Monaghan relied primarily on two Ninth Circuit decisions—*Stormans*, 586 F.3d 1109 and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988)—that reached similar conclusions. In *Stormans*, a family-owned pharmacy objected on religious grounds to a Washington law that prohibited pharmacies from refusing to fill emergency contraception prescriptions. 586 F.3d at 1116. In *Townley*, a closely-held mining company asserted its free-exercise rights in defense of alleged Title VII violations. 859 F.2d at 612. The Ninth Circuit found that each corporate plaintiff was an "extension of the beliefs" of its owners and "merely the instrument through and by which [the owners] express their religious beliefs." *Stormans*, 586 F.3d at 1120; *Townley*, 859 F.2d at 619-20. Each corporation therefore standing to assert the free exercise rights of its owners. *Stormans*, 586 F.3d at 1120; *Townley*, 859 F.2d at 620 n.15 (citing *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985)).

Neither the corporate form nor the secular, for-profit nature of the corporate plaintiffs in *Monaghan*, *Stormans*, and *Townley* prevented free-exercise claims. Rather, these cases hold that a religious-motivated business owner may assert a

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free-exercise claim against a law that adversely affects her profit-seeking business if that law conflicts with the owner's religious beliefs and obligations. Lind, like the plaintiffs in these cases, strives to operate his business in accordance with his religious faith. Neither the corporate form nor the secular, for-profit status of Annex Medical precludes Lind from asserting a RFRA claim.[6] *Grote v. Sebelius*, 708 F.3d 850, 854-55 (7th Cir. 2013) ("[T]he Grote Family's use of the corporate form is not dispositive of the claim." (citing *Citizens United*, 130 S.Ct. 876)).

D. The Mandate Substantially Burdens Lind's Religious Exercises.

1. The Corporate Form Does Not Insulate Lind From Substantial Pressure to Violate His Religious Beliefs.

Rather than relying on precedent interpreting the "substantial burden" test under RFRA (and the Free Exercise Clause), Appellees rely extensively on principles of corporate structure and finances. (Opp. at 22-28). This reliance is misplaced. Lind does not dispute that Annex Medical is a separate legal entity upon which the Mandate places legal obligations. But the "substantial burden" inquiry does turn on how direct or indirect the burden is. *Thomas*, 450 U.S. at 718 ("While the compulsion may be indirect, the infringement upon free exercise is

[6] Under Appellees' theory, a Jewish business owner could not 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.

nonetheless substantial.”). Rather, the focus is on the substantiality of the “coercive impact,” on Lind. *Id*. Where a regulation “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,” a substantial burden on religion exists. *Id*.; *see also* Mark Rienzi, *Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 Virginia Law Review Online 10, 16 April 2013, http://www.virginialawreview.org/content/pdfs/99/Online/Rienzi.pdf (“RFRA’s protection turns not on a judicial assessment of the particular theological reasoning behind a believer’s religious exercise, but on whether the government is coercing the believer to stop.”).

When Lind became the sole shareholder of Annex Medical, (Br. at 9 n.10) the company reorganized as an S-corporation, which “elect[s] to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes.” IRS Small Business & Self-Employed Website, S Corporations, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations (last visited April 22, 2013). Lind reports Annex Medical’s income and losses on his personal return and pays income tax on it at the rate imposed on him individually. *See id*. For purposes of income taxation, the government does not treat Lind and Annex Medical as separate entities.

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It is not difficult to imagine how harm to Lind's company might harm Lind, the company's sole shareholder. Lind makes his livelihood through Annex Medical. If fines are imposed on Annex Medical, 26 U.S.C. § 4980D, or his company suffers competitively in the marketplace because Lind cannot offer insurance, it will have a direct, negative financial impact on Lind (and his family) with the same force it would if he were a sole proprietor. *Korte v. HHS*, 2012 U.S. Dist. LEXIS 177101, *18 (S.D. Ill. Dec. 14, 2012) ("Because K&L is a family-owned S corporation, the religious and financial interests of the Kortes are virtually indistinguishable."). A desire to avoid these harms certainly creates "substantial pressure" on Lind to act in ways contrary to his religious beliefs. *See Monaghan*, 2013 U.S. Dist. LEXIS 35144 at *27 ("[T]he Court finds that the mandate pressures Monaghan to modify his behavior and violate his beliefs because Monaghan would be forced to refrain from or change the way he exercises his faith through [Domino Farms]. His only other choice is to suffer severe financial harm to his company."); *Geneva College v. Sebelius*, 2013 U.S. Dist. LEXIS 56087, *25-27 (W.D. Pa. Apr. 19, 2013) (entering preliminary injunction against Mandate and remarking that forcing plaintiffs "to choose between violating their deeply held religious beliefs and being forced to cause [their company]—a closely held corporation controlled by the [plaintiffs]— to terminate their health insurance

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coverage, which also burdens their religious exercise…can have a significant impact on the health of those businesses and their owners.”).

Appellees’ “corporate form” argument also ignores that “a corporation cannot act except through the human beings who may act for it.” *Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989). Annex Medical cannot comply with the Mandate or terminate its group health plan unless Lind, contrary to his conscience, makes it performs the necessary acts. In other words, 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, 216 (1972). Appellees theory also ignores that the Mandate, like other laws, imposes financial penalties on non-compliant corporations precisely to pressure the humans that own them to operate them in accordance with the law. So while the Mandate expressly obligates “group health plan[s],” 42 U.S.C. § 300gg-13(a), Lind alone decides how Annex Medical will operate. It is therefore illogical to view Lind’s conscience as separate from Annex Medical’s business decisions.[7]

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[7] For purposes of Catholic moral theology it does not matter that the Mandate’s obligations technically apply to Annex Medical or its group health plan because compliance with those obligations cannot occur without Lind’s participation.

> [T]he Catholic tradition considers whether the objectionable action would have happened anyway without the believer’s participation, *i.e.*, whether the believer is a but-for cause of the objectionable action. It is particularly problematic for a Catholic believer knowingly to

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Appellees are wrong to suggest that Lind cannot assert his RFRA rights without disregarding the corporate form or piercing the corporate veil. (Opp. at 24-25.) The First Amendment will not permit such a condition to be read into RFRA. *Citizens United*, 130 S.Ct. at 905 ("It is rudimentary that [a] State cannot exact as the price of those special advantages [granted corporations] the forfeiture of First Amendment rights.") (citations and quotations omitted). Appellees' position means Lind must choose between receiving the benefits of the corporate form and freely exercising his religion in the operation of his business. However, that forced choice *is* a substantial burden for it "forces [Lind] to choose between following the precepts of [his] religion and forfeiting benefits." *Sherbert*, 374 U.S. at 404.

Moreover, the "many advantages" conferred by the corporate form on for-profit corporations, (Opp. at 24)—"such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," *Citizens United*, 130 S.Ct. at 905—are also enjoyed by non-profit corporations. Yet these advantages clearly pose no barrier to the assertion of free-exercise or RFRA rights by the individuals who operate these entities. *O Centro*, 546 U.S. 418; *Lukumi*, 508 U.S. 520. Nor can the Appellees' argument be squared with its decisions to exempt

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> assist in the destruction of innocent human life when such destruction would not occur without the believer's contribution.

Amicus Brief of Reverend W. Thomas Frerking *et al.*, Doc. 28 at 4.

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churches, 45 C.F.R. § 147.130(a)(1)(iv)(B), and to provide a "temporary enforcement safe harbor," 77 Fed. Reg. 16501, 16502-03 (March 21, 2012) and an "accommodation" for religious non-profits, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). These exemptions demonstrate that the government neither views the corporate form as a barrier to religious exercise or as sufficient to insulate the individuals who operate these entities from the Mandate's religious burdens.

To the extent principles of corporate veil-piercing have any relevance here, they support Lind. "The practice of piercing the corporate veil is generally...used to reach an individual who has used a corporation as an instrument to defraud creditors." *Roepke v. Western Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn. 1981). However, Minnesota, along with several other states, recognizes a "reverse pierce" of the corporate veil, whereby "an insider (or someone claiming through him) attempt[s] to pierce the corporate veil from within the corporation…so that the corporate shareholder and the corporate entity shall be considered one and the same." *Id*.

For example, in *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985), defendant Sam Hedge and his wife Annette had incorporated a 160-acre farm. *Id*. at 478. The farm corporation had failed to pay for supplies purchased from Cargill, and Cargill executed judgment on the farm, causing it to be sold. *Id*. Annette Hedge intervened in the case to protect her interests as sole shareholder of the

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farm. *Id*. Minnesota's "homestead exemption" exempted from seizure or sale the debtors' home and the land upon which it is situated; however, because the farm corporation was "an artificial entity needing no dwelling," it "is not entitled to a homestead exemption." *Id*.

However, because of the "close identity between the Hedges and their corporation," the Minnesota Supreme Court used the doctrine of reverse corporate veil piercing, *id*. at 479, to "disregard the [farm corporation]" and to "treat the Hedge farm as if owned by Sam and Annette Hedge," thereby holding them "entitled to claim a homestead exemption," *id*. at 480.

While no court has expressly applied the "reverse pierce" in any challenge to the Mandate, several courts have relied on its logic—specifically, the "close identity," *id*. at 479 of the corporation and its owners— to find that the corporate plaintiffs could assert the RFRA and free-exercise rights of their owners.[8] *See e.g.*, *Tyndale*, 2012 U.S. Dist. LEXIS 163965 at *25 ("[W]hen the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious purposes.").

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[8] Recent scholarship advocates for the use of reverse veil piercing in the challenges to the Mandate. Stephen B. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, UCLA School of Law – Law and Economics Research Paper Series, *available at* http://ssrn.com/abstract=2229414 (last visited April 22, 2013); *see also* Amicus Brief of Sharpe Holdings, Inc. and Charles N. Sharpe, Doc. 32 at 9-14.

Stormans and *Townley*, too, reflect this logic. Appellees incorrectly state that these cases mean *only* that a closely-held corporation has standing to assert its owner's beliefs. (Opp. at 27.) *Stormans* and *Townley* hold that laws regulating a corporation burden the free-exercise rights of its owners, *Townley*, 859 F.2d at 620 ("[T]he rights at issue are those of Jake and Helen Townley."); *Stormans*, 586 F.3d at 1120 ("[W]e will consider the rights of the owners as the basis for the Free Exercise claim."), and can do so to a substantial extent. Indeed, on remand in *Stormans*, the district court found that forcing pharmacies to dispense emergency contraception under threat of penalty "force[d] [the plaintiffs] to choose between their religious beliefs and their livelihood" and permanently enjoined the law after finding it failed under strict scrutiny review. *Stormans v. Selecky*, 844 F.Supp.2d 1172, 1185 (W.D. Wash. 2012).

2. The Burdens Imposed by the Mandate Are Substantial.

Appellees erroneously maintain that the pre-*Smith* Supreme Court cases do not support a finding of substantial burden because those cases involved "individuals" and not "corporate regulation or employee benefits." (Opp. at 26-28.) But this argument again ignores that "substantial burden" turns on the "coercive impact," *Thomas*, 450 U.S. at 718, of the Mandate on Lind, who is also an individual. The "coercive impact" of the Mandate is clear—it compels Lind to act contrary to his sincerely-held religious beliefs or permit his company to face

financial ruin or suffer competitively in the marketplace.[9] (*See* Br. at 27-36.) The "pressure on [Lind] to modify [his] behavior and to violate [his] beliefs," *Thomas*, 450 U.S. at 717-718, is no less "substantial" than in *Yoder* (five dollar fine) or *Sherbert* and *Thomas* (denial of unemployment benefits). In fact, the burdens imposed by the Mandate are greater than in those cases. Lind cannot satisfy his religious obligation to provide health insurance without transgressing his beliefs against cooperation with contraceptives and abortifacient drugs. The Mandate "affirmatively compels" Lind to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Yoder*, 406 U.S. at 216; *see also Ali*, 682 F.3d at 710 (substantial burden exists if law provides "no consistent and dependable way" to observe religious practices).

Yoder, *Sherbert*, and *Thomas* demonstrate what constitutes as substantial burden; they cannot be disregarded simply because the laws in question did not target businesses. In fact, *Lee* shows that even where a law targets a business it can substantially burden the owner's religious beliefs. 455 U.S. at 257 ("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

[9] Lind began to experience the burdens of being unable to offer group health insurance several weeks ago when a female employee, citing the company's lack of group health coverage, terminated her employment with Annex Medical. Though Appellees claim to be safeguarding the public health, they would prefer Lind's employees go without insurance than grant Lind an exemption.

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exercise rights.”). Contrary to Appellees’ suggestion, *Lee* turned on the government’s compelling interest in uniform application of the social security tax system, *id*. at 260, not on the burden’s magnitude. Indeed, the Supreme Court has recognized that the burden imposed by the social security tax on the Amish beliefs in *Lee* was “substantial.” *Hernandez v. Comm’r*, 490 U.S. 680, 699-700 (1989) (explaining that “Lee establishes that *even a substantial burden* would be justified by the ‘broad public interest in maintaining a sound tax system.’”) (emphasis added).

Appellees also suggest that the Mandate should be upheld because providing insurance is no different than paying employees’ salaries, which they may use to purchase contraception. (Opp. at 28.) Appellees’ attempt to minimize the burdens imposed by the Mandate by pointing to other regulations to which Lind has not objected has been rejected by *Thomas*, which cautioned that “[c]ourts should not undertake to dissect religious beliefs…,” 450 U.S. at 716. (Br. at 34.) Fundamentally, the government may not determine for Lind what his beliefs should be or where to draw the line with respect to his religious beliefs. *Id*. at 715 (“Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one”); *Smith*, 494 U.S. at 887; *Lee*, 455 U.S. at 256-57; *see also* Amicus Brief of Frerking *et al.*, Doc. 28 at 11-14, 29-31 (explaining the nature of

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the Catholic doctrines at issue); Amicus Brief of Minnesota Catholic Conference, Doc. 30 at 18-20 (same).

Appellees' argument is also inconsistent with their decision to "accommodat[e] [the] religious liberty interests" of certain non-profit entities by "protect[ing]" them from "having to contract, arrange, or pay for contraceptive coverage." 77 Fed. Reg. 16501, 16503 (March 21, 2012); 78 Fed. Reg. at 8458-59. This accommodation recognizes that providing insurance implicates companies in a way that paying wages does not. *See also* Amicus Brief of Frerking *et al*., Doc. 28 at 24 (explaining that complying with the Mandate is especially problematic for Catholics because "the employer-provided health plan must include funding that is specifically designated in advance for objectionable services.").

Appellees' reliance on Establishment Clause jurisprudence (Opp. at 29-32), fails for the same reasons the comparison to paying wages fails—it requires this Court to dissect and evaluate Lind's religious beliefs. What the Establishment Clause permits in terms of funding of religiously-affiliated schools has no bearing on what the Catholic faith permits in terms of cooperation with contraception and abortifacient drugs. The court may opine on the former because it is a secular matter; however, "[i]t is not within the judicial function and judicial competence

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to inquire" whether Lind correctly understands his religious doctrine as "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716.

E. The Mandate Fails Strict Scrutiny.

1. Appellees Have Not Proven Their Interests Are Compelling.

The burden is on Appellees to satisfy strict scrutiny. Yet Appellees make nearly no attempt to rebut Lind's extensive critique (Br. at 38-48) of the report issued by the Institute of Medicine ("IOM")—*Clinical Preventive Services for Women: Closing the Gaps*[10] (the "Report")—the document which provides nearly the sole basis for the Mandate. What Appellees do offer is either irrelevant or has already been shown by Lind to fall well short of the demanding evidentiary standard under strict scrutiny.

Appellees claim generally that "[e]ven small increments in cost sharing have been shown to reduce the use of recommended preventive health services." (Opp. at 34) (quoting Report at 109). Yet the Trivedi study on which this claim is based focused on *mammograms*, not contraception. Report at 109 (citing Trivedi et al. *Effect of Cost Sharing on Screening Mammography in Medicare Health Plans*, 358 New England Journal of Medicine 375 (2008), *available at* http://www.nej m.org/doi/pdf/10.1056/NEJMsa070929). Even more troubling is that the Trivedi

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[10] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://cnsnews.com/sites/default/files/documents/INSTITUTE %20OF%20MEDICINE-PREVENTIVE%20SERVICES%20REPORT.pdf (last visited April 22, 2013).

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study focused only on "women between the ages of 65 and 69" with "Medicare managed-care plans." *See id*. This type of evidence is woefully inadequate under strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2738 (2011) (strict scrutiny requires evidence of an "actual problem in need of solving").

Appellees' claim that the Mandate's prohibition on "cost sharing" will further an interest in "gender equality" because women's health needs "often generate additional costs" fairs no better. Appellees do not explain which of the "wide array of recommended [preventive] services" (Opp. at 5) generate these additional costs. This is important because Lind does not challenge *all* the preventive services requirements,[11] but seeks an exemption only from the requirement to provide contraception, sterilization, abortifacient drugs. With respect to access to this narrow subset of products and services, research indicates that cost is a prohibitive factor for only "2.3% of women." *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 April 22, 2013). 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

[11] *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines.

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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.[12]

Appellees rattle off various harms they claim "can occur" as a result of unintended pregnancies. (Opp. at 35.) Yet as Lind has already demonstrated, the Report does not prove any of the causal links necessary to demonstrate a compelling interest in forcing Lind to violate his beliefs: (1) that elimination of cost sharing will increase access among those affected by the Mandate, or more importantly, the women covered by Lind's group health plan (Br. at 46); (2) that increased "*access*" (which is all the Mandate claims to accomplish (Opp. at 34)) leads to increased *use* (Br. at 43-44); (3) that increased use will result in fewer unintended pregnancies among those affected by the Mandate, or more importantly, the women covered by Lind's group health plan[13] (*id*. at 47-48); and (4) that unintended pregnancy causes poor health outcomes for women (*id*. at 47). In fact, the evidence demonstrates that those with the highest access to free

[12] That women have the right to use contraception and make private medical decisions is irrelevant here. (Opp. at 34-35.) The constitutional right to use contraception and related services free from "state interference," (*id*. at 34) does not include the right to force a private party to subsidize that use. Lind's employees are and will remain free to make their own medical decisions. Lind merely asserts his RFRA rights to be free from coercion to subsidize those decisions.

[13] Appellees' argument that "courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption" (Opp. at 37 n.10) is foreclosed by *O Centro*, 546 U.S. at 430-31 ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.").

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contraception experience the highest rate of unintended pregnancy. (Br. at 43-44.) Appellees grapple with none of these shortcomings.

Even if Appellees' evidence sufficed, their interests are doomed solely by their voluntary decision to exempt grandfathered plans (and the millions of people covered by them) from the requirement to provide any of the recommended preventive services. 76 Fed. Reg. at 46623. 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." *Lukumi*, 508 U.S. at 547 (quotations and citations omitted).

It makes no difference if many grandfathered plans already provide contraceptive services (Opp. at 37), or whether the number of grandfathered plans is "declining," (*id*. at 38 n.11). An exemption does not cease to exist because some people may choose to forego it. In *O Centro*, it was the *existence* of the peyote exemption alone that "fatally undermine[d]" the government's interest in enforcing important drug laws, not the popularity of that exemption. 546 U.S. at 433-435. Besides, by the government's own estimates, tens of millions will remain in grandfathered health plans *at the end of 2013*, 75 Fed. Reg. 34538, 34553 (June 17, 2010), dwarfing the number of Native Americans ("hundreds of thousands") eligible for the Peyote exemption in *O Centro*, 546 U.S. at 433-35.

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The grandfathering exemption is not "transitional in effect" (Opp. at 38), but is permanent if certain coverage requirements are maintained. Appellees' claim contradicts the law's text, with no expiration date for grandfathered plans, and the government's informational website, which confirms that "insurers and employers [may] make routine changes without losing grandfather status."[14] *See also* 42 U.S.C. § 18011.

To find the government's interests less than compelling would not "require immediate and draconian enforcement of all provisions of similar laws." (Opp. at 39.) Lind is not asking to enjoin the ACA; he requests only a narrow exemption similar to those already provided to grandfathered plans and religious employers that collectively insure millions of individuals.

2. Appellees Have Not Rebutted Lind's Less Restrictive Alternatives.

Lind provided several viable alternatives that would permit the government to advance its interests (assuming they are compelling) without forcing Lind to violate his religious beliefs. (Br. at 56-57.) "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*

[14] HealthReform.gov, "Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html (last visited April 22, 2013).

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Grp., Inc., 529 U.S. 803, 816 (2000) (emphasis added). Yet Appellees cite no evidence as to why *any* of Lind's alternatives would be "ineffective"; instead, they merely claim that for the government to provide contraception services would "require federal taxpayers to pay the cost of [them]." (Opp. at 41.) However, the government must believe such a system is workable and effective, given that it already spends billions on family planning services to achieve its stated interests. (Br. at 56.) Appellees' view that an injunction in Lind's favor would equate to government "subsidiz[ing] religious practice" (Opp. at 41), is remarkable. Free exercise is the rule in this country and coercion is the rare exception where strict scrutiny is satisfied. Appellees' stance turns this founding principle on its head.

Conclusion

For the foregoing reasons, this Court should reverse the district court.

Respectfully submitted this 24th day of April, 2013.

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