No. 12-6294

In the United States Court of Appeals for the Tenth Circuit

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,

Appellants-Movants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellees-Respondents.

On Appeal from the United States District Court
for the Western District of Oklahoma

REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Appellants—the Green family and their businesses—seek an injunction pending appeal because, in twenty-nine days, the government's mandate will force them either to violate their faith by covering abortion-causing drugs or incur fines of $1.3 million per day. Four federal courts have now granted interim relief to similarly-situated business owners under the Religious Freedom Restoration Act (RFRA). *O'Brien* v. *HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012) (granting injunction pending appeal); *Tyndale House Pub., Inc.* v. *Sebelius*, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Legatus* v. *Sebelius*, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland* v. *Sebelius*, 2012 WL 3069154 (D. Colo. July 27, 2012). The decision below breaks that consensus by denying business owners any protection for their consciences, contrary to RFRA's plain terms and governing precedent. The district court missed the obvious: ruining a believer's business with fines unless he violates his faith substantially burdens religious exercise. *See Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) ("substantial burden" created by "substantial pressure on an adherent … to engage in conduct contrary to a sincerely held religious belief"). The government cannot possibly justify that burden under strict scrutiny.

The government's response avoids defending the lower court's reasoning. Instead, it claims an injunction would harm Appellants' employees by denying them "the health insurance coverage required by federal law." Opp'n at 2. This is specious. Appellants exclude only a few abortion-causing drugs while covering all other mandated services,

including all other contraceptives. And the government itself allows plans covering over 100 million employees to omit *all* mandated services indefinitely.

The government also asks the Court to bar businesses and business owners from the protection of RFRA by importing the Title VII exemption for "religious organizations." Opp'n at 8-10. The district court ignored this attempt to confuse RFRA with Title VII. RFRA, which broadly protects against substantial burdens on "any exercise of religion," 42 U.S.C. §2000cc-5(7), is not limited by Title VII's exemption for religious corporations or by the government's view that one cannot practice religion and earn a living at the same time. Thus, *all* pertinent authorities agree that businesses and their owners can challenge laws that force them to act contrary to their faith. *See United States* v. *Lee*, 455 U.S. 252, 256-57 (1982); *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961); *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988). Four courts have accordingly granted interim relief to business owners under RFRA—including the Eighth Circuit in *O'Brien*. These cases unanimously reject the government's cramped theory of religious freedom. Appellants are therefore entitled to an injunction pending appeal to save them from imminent and irreparable harm.

ARGUMENT

I. APPELLANTS ARE LIKELY TO SUCCEED UNDER RFRA.

In its RFRA argument, the government avoids defending the district court's reasoning. It fails to mention that, in finding Appellants unlikely to succeed under RFRA, the court adopted a Seventh Circuit "substantial burden" standard that contradicts Tenth

Circuit precedent, that has been rejected by three other circuits, and that resurrects a distinction between "direct" and "indirect" burdens the Supreme Court interred decades ago. *See* Order at 22-23 (relying on *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003)); Mot. at 10-11. Nor does the government mention that the court grafted into RFRA a distinction between "religious non-profit" and "general business" corporations that contradicts both RFRA's plain language and the federal Dictionary Act. Mot. at 13 n.11; Order at 17-18. Nor does the government mention that the district court revolutionized First Amendment law by banishing—for the first time—"general business corporations" from the Free Exercise Clause and RFRA. Mot. at 13 n.11; Order at 10-12, 18. These mistakes obscured the obvious—*i.e.*, that threatening to ruin a believer's business with fines unless he violates his faith substantially burdens his religion. Mot. at 8-9.

Instead of defending the district court's errors, the government offers two arguments the district court barely mentioned or ignored: (1) that the mandate burdens the Greens "indirectly" because it impacts their businesses only (Opp'n at 10-15), and (2) that RFRA silently incorporates Title VII's category of "religious organizations," thus barring religious claims by a "secular" business owner (Opp'n at 8-10, 15-16). These arguments are baseless.

A. The Supreme Court rejects any distinction between "direct" and "indirect" burdens on a business owner's religious exercise.

The government's contention that the "legally separate" identity of Hobby Lobby and Mardel erases any burden on the Greens is a red herring. Opp'n at 10-11. Incorporation

separates a business from its owners for specific purposes. *See, e.g.*, *Puckett* v. *Cornelson*, 897 P.2d 1154, 1155-56 (Okla. Civ. App. 1995) (corporate form "ordinarily shields corporate officers … from personal liability for corporate debt"). But no case the government cites says incorporation divorces an owner's *conscience* from his business activities. This merely re-packages the discredited notion that a person cannot complain about "indirect" coercion of conscience. Mot. at 11 (discussing rejection of distinction); *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981) ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Settled law forecloses the government's argument. The Supreme Court has twice allowed business owners—an Amish carpenter and Jewish merchants—to assert free exercise claims against regulation of their businesses. *Lee*, 455 U.S. at 256-57; *Braunfeld*, 366 U.S. at 605.[1] The government's response—that "neither case addressed the regulation of a corporation," Opp'n at 12—misses the point. Neither case suggested that the *form* of their businesses dictated whether plaintiffs could assert conscience claims. Misreading those cases, the government champions the radical proposition that business owners like the Greens—merely by availing themselves of state incorporation law—have unwittingly forfeited their religious freedom.

[1] Congress also recognizes that businesses and their owners can exercise religion, regardless of whether they make profits or qualify for the Title VII exemption. *See, e.g.*, 42 U.S.C. § 300a-7(b) (prohibiting discrimination against any "entity" that refuses to make facilities available for abortion "on the basis of religious beliefs or moral convictions"); 42 U.S.C. § 18023(b)(4) (Affordable Care Act) (prohibiting discrimination against any "health care facility" due to refusal to "pay for," "provide coverage of," or "refer for" abortion). These provisions complement the long history of federal enactments protecting objecting taxpayers from paying for abortions, even indirectly. *See, e.g.*, 22 U.S.C. § 2151b(f)(1); *Harris* v. *McRae*, 448 U.S. 297, 302 (1980); 75 Fed. Reg. 15,599.

The government's argument would also create a conflict with the Ninth Circuit, which holds that corporations may assert owners' religious claims. *Stormans*, 586 F.3d at 1120; *Townley*, 859 F.2d at 619-20. Those decisions reasoned that the corporations—a pharmacy and a mining company—were "an 'extension of the beliefs' of the owners." *Stormans*, 586 F.3d at 1120 (quoting *Townley*); *see also Townley*, 859 F.2d at 619 (corporation was "the instrument through and by which [plaintiffs] express their religious beliefs"); *see also Tyndale*, 2012 WL 5817323, at *8 (holding "*Townley* and *Stormans* recognize that when 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"). The government apparently agrees that these decisions recognize a corporation can assert the free exercise rights of its owners. Opp'n at 13-14. But it tries to distinguish them on the ground that they found no substantial burden. *Id.* That is both irrelevant and false. *Townley* did find a substantial burden, but held that excusing employees from devotions under Title VII was "essential to accomplish an overriding governmental interest." 859 F.2d at 620-21. And, on remand in *Stormans*, the pharmacy won its claim that Washington could not compel it to stock Plan B against the owners' conscience. *See Stormans, Inc.* v. *Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. 2012).

Thus, both *Stormans* and *Townley* confirm what *Lee* and *Braunfeld* recognized: a business and its owner may challenge laws that burden their religious exercise. And as discussed above, four courts to consider this question in the context of the mandate have reached the same conclusion—including the Eighth Circuit in *O'Brien*, which last week

granted a business owner an injunction pending appeal. *But cf.* Opp'n at 18-19 (arguing *O'Brien* distinguishable because it has fewer employees than Hobby Lobby).

B. RFRA contains no "dichotomy" between "religious" and "secular" organizations.

Alternatively, the government invents law to create a "dichotomy" between "religious" and "secular" organizations. Opp'n at 8-10. Its only textual source for this principle is Title VII's limited exemption for "religious organizations." But Title VII is not at issue here, and the government cites no authority for writing Title VII into RFRA.[2]

RFRA protects "any exercise of religion" by any "person," drawing no distinction between persons engaged in for-profit or non-profit activities, and no distinction between individuals and organizations. *See* 42 U.S.C. § 2000bb-1(b); *id.* § 2000bb-2(4), *as amended by id.* § 2000cc-5(7)(A). Ignoring this, the government insists that Title VII's exemption of "religious organizations" from its ban on religious employment discrimination must be judicially superimposed on RFRA. Opp'n at 8-10. This is extraordinary. It ignores that RFRA contains nothing like Title VII's explicit limitation. *Cf.* 42 U.S.C. § 2000e-1(a). And, contrary to the government's assertion, Opp'n at 10, the fact that RFRA was enacted *after* Title VII *confirms* that it does not silently contain such a limitation. Congress—well aware of Title VII—specified in RFRA that any conflict

[2] The government also suggests that the Free Exercise Clause itself—by showing "special solicitude" for religious organizations—must exclude protection for all others. Opp'n. at 8. Not so. The government's only authority for this idea, *Hosanna-Tabor* v. *EEOC*, simply recognizes that both Religion Clauses limit government meddling with religious organizations' internal governance. *See* 132 S. Ct. 694, 702 (2012). Nothing in *Hosanna-Tabor* suggests this *additional* right of religious organizations impairs the distinct and well-established right of persons and organizations to resist government coercion of their consciences under RFRA and the Free Exercise Clause.

with other federal laws must be resolved in RFRA's favor. *See* 42 U.S.C. §2000bb-3(a) ("This chapter applies to all Federal law … *whether adopted before or after November 16, 1993*.") (emphasis added); *see also, e.g.*, *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (en banc) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (citations omitted).

Lacking authority for its Title VII argument, the government summons a parade of horribles, warning that unless this Court re-writes RFRA to the government's specifications, it will undermine not only Title VII but "*any* federal regulation of a for-profit, secular corporation." Opp'n at 16. This is alarmism, not argument. In decades (indeed, two centuries) of religious liberty litigation, no court has ever adopted the government's bright line rule that religion and profit shall not mix, and yet the horribles have never paraded. Nor will applying RFRA as written undermine Title VII. If a court needs to reconcile the two laws in the future (a concern not presented here), it would simply consider whether Title VII's religious discrimination ban meets strict scrutiny. *Townley* considered that question 24 years ago, and upheld Title VII. 859 F.2d at 621.

C. The government cannot meet strict scrutiny.

The district court did not consider whether the mandate meets strict scrutiny. *See* 42 U.S.C. § 2000bb-1(b). It does not. The government did not identify a compelling interest in applying the mandate specifically to Appellants, but merely argued that women's health and equality were served by increased access to "women's preventive services." Opp'n to Prelim. Inj. at 24-25. But Appellants object only to a few abortion-causing drugs; they cover all other mandated services, *including most contraceptives*. Mot. 2, 16;

see Gonzales v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (government must specify "the asserted harm of granting specific exemptions to particular religious claimants"); *Tyndale*, 2012 WL 5817323, at *16 (noting lack of "*any* proof that mandatory insurance coverage for the specific contraceptives to which the plaintiffs object … furthers the government's compelling interests").

Moreover, by allowing over 100 million grandfathered plans to omit *all* mandated services, the government lacks a compelling interest in refusing a far narrower accommodation for Appellants. *See Gonzales*, 546 U.S. at 433 (supposedly "compelling" interest in uniform narcotics laws undermined by exempting "hundreds of thousands of Native Americans"); *Newland*, 2012 WL 3069154, at *7-8 (noting "government has exempted over 190 million health plan participants and beneficiaries," which "completely undermines any compelling interest"). It is no answer that grandfathering is "transitional" (Opp'n at 17), because the status is indefinite and millions of plans will remain grandfathered next year.[3]

Finally, the government cannot show mandating coverage by Appellants is the least restrictive means of furthering its interests. The government has numerous alternatives—many of which it already employs—for expanding contraceptive coverage. *See* Mot. for Prelim. Inj. at 15-16 (discussing existing government programs); *see also Newland*, 2012 WL 3069154, at *8 (same). The government's response is inaccurate and bizarre.

[3] *See* 45 C.F.R. § 147.140; 75 Fed. Reg. 34,538, 34,552 (June 17, 2010); *see also* Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans, *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Dec. 3, 2012).

Alternatives like the Title X family planning program are not "new" (Opp'n at 17), and expanding them would subsidize access to contraceptives (the government's asserted interest) but would hardly "subsidize private religious practice" (*id.*).

II. AN INJUNCTION WOULD PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE HARM TO APPELLANTS' CONSCIENCES AND THEIR BUSINESSES.

An injunction would simply preserve the status quo pending appeal and avoid exposing Appellants to catastrophic fines in less than a month. Those fines will irreparably harm the Greens' consciences by daily pressuring them to renounce their beliefs to preserve their livelihood. Granting the motion would allow them to continue offering employees the current health plan, with all the mandated preventive services—including most contraceptives—less one small subset of drugs that can cause abortions.

Because it would merely preserve the status quo, the requested injunction is subject to this Circuit's "modified" standard. *See, e.g., RoDa Drilling Co.* v. *Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) (under modified test, movant need only show "serious, substantial, difficult, and doubtful" questions); Mot. 5-6. The government suggests that the heightened standard for disfavored injunctions should apply because Appellants' plan previously covered two of the objectionable drugs and an injunction would thus upset the status quo. Opp'n. at 7. But the district court rejected this argument. It found that the drugs were included in a formulary "due to … a mistake," that they were "immediately excluded" upon discovery, and that "[the government] do[es] not dispute that [Appellants'] policies have otherwise long excluded abortion-inducing drugs." Order at 7.

The court thus agreed that Appellants "are not seeking a disfavored injunction, but rather ask the court to preserve the status quo." *Id*.

Equally flawed is the government's argument that an injunction pending appeal would irreparably harm Appellants' employees and their families by "den[ying] them the health insurance coverage … required by federal law." Opp'n at 7. This argument again ignores that Appellants exclude only a few abortion-causing drugs while covering all other mandated services, including all other contraceptives. It also ignores that the government itself allows over 100 million plans to omit *all* mandated services indefinitely.[4]

The real irreparable harm will occur in twenty-nine days when the mandate's draconian fines hit Appellants. The government disputes neither the magnitude of those fines nor the fact that complying with the mandate will violate Appellants' beliefs. The harm to Appellants' consciences will not be recoverable after January 1. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Nor will Appellants be able to repair the damage to their businesses. Fines of this magnitude are not mere budget line-items. They are catastrophic. And by crippling Appellants' businesses, they will harm the employees for whose welfare the government expresses so much concern. Only an injunction pending appeal will spare Appellants from this irreparable harm.

CONCLUSION

The Court should enter an injunction pending appeal against Appellees.

[4] The government's decision to stay enforcement of the mandate against non-profit organizations for an additional year, *see* Opp'n at 5 n.2, further belies their argument that a temporary injunction pending appeal would cause irreparable harm to employees.

Respectfully submitted,

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Dated: December 3, 2012

CERTIFICATE OF SERVICE

I certify that on December 3, 2012, I caused the foregoing *Reply in Support of Injunction Pending Appeal* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

(1) All required privacy redactions have been made;

(2) No hard copies are required to be filed;

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