

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Wiley Y. Daniel

Civil Action No. 1:13-cv-00285-WYD-BNB

STEPHEN W. BRISCOE, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as
Secretary of the United States Department of Health
and Human Services, et al.,

Defendants.

**PLAINTIFFS' SECOND EMERGENCY APPLICATION FOR A TEMPORARY
RESTRAINING ORDER PENDING THE COURT'S RULING ON PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, A
REQUEST FOR A PRELIMINARY INJUNCTION and REQUEST FOR FORTHWITH
CONSIDERATION**

PLAINTIFFS, by and through their undersigned counsel, respectfully apply to the Court on an emergency basis for an immediate grant of a Temporary Restraining Order in favor of Plaintiffs preventing Defendants from enforcing the HHS Mandate against Plaintiffs until the Court is able to rule on Plaintiff's Motion for Preliminary Injunction or, in the alternative, entry of a Preliminary Injunction and, in support hereof, state as follows:

BACKGROUND

On February 25, 2013 this Court denied the Briscoe Plaintiffs' Motion for Temporary Restraining Order (Doc. 25) but has deferred its consideration of the Briscoe Plaintiffs' Motion for a Preliminary Injunction (Doc. 15), supported by the Briscoe Plaintiffs' Brief in Support of Motion for Preliminary Injunction (Doc. 15-1), until the United States District Court for the Western District of Oklahoma entered its order following remand of *Hobby Lobby Stores Inc. v. Sebelius*, No. CIV-12-1000-HE by the Tenth Circuit Court of Appeals, *Hobby Lobby Stores Inc. v. Sebelius*, __ F.3d __ (10th Cir. June 27, 2013). On July 19, 2013, the United States District Court for the Western District of Oklahoma, after considering the parties' briefs and oral arguments on the two remaining preliminary injunction issues, to wit: equitable balancing and whether issuance of an injunction would be in the public interest, entered its order granting Hobby Lobby's request for a preliminary injunction (see attached Exhibit A).

Except for these two preliminary injunction elements, the Tenth Circuit Court of Appeals' decision in *Hobby Lobby Stores Inc.* controls in *Briscoe v. Sebelius*. The facts and circumstances in support of these two elements in *Briscoe* requires this Court to enter a preliminary injunction in favor of the Briscoe Plaintiffs or, at a minimum and as the United States District Court for the Western District of Oklahoma did during a telephone conference with counsel for the parties in that case (see W.D. OK. Doc. 69), enter a temporary restraining order in favor of the Briscoe Plaintiffs until this Court can schedule a hearing on the Briscoe Plaintiffs' motion for preliminary injunction.

EQUITABLE BALANCE FACTOR

The Briscoe Plaintiffs employ more than 200 full-time employees in the State of Colorado. At present, 108 of these employees are health insurance plan participants, along with 89 of their dependents, resulting in 197 covered lives. The Briscoe Plaintiffs maintain a self-insured group plan for their employees. The plan year for the Briscoe Plaintiffs' self-insured plan begins on April 1 of each year, with the most recent plan year starting on April 1, 2013. Because the Court, on February 25, 2013, denied the Briscoe Plaintiffs' Motion for Temporary Restraining Order, the Briscoe Plaintiffs were unable to secure health insurance for its plan year starting on April 1, 2013 that did not cover objectionable abortion-inducing drugs. Thus, since April 1, 2013, the Briscoe Plaintiffs have been forced into violating their religious beliefs.

Defendants' HHS Mandate imposes penalties of \$100 per employee per day if the Briscoe Plaintiffs omit abortion-inducing drugs from their self-insurance plan and \$2,000 per employee per year if the Briscoe Plaintiffs elect to drop health insurance altogether. Dropping insurance is not a realistic option as it would harm the Briscoe Plaintiffs' employees and place the Briscoe Plaintiffs at a competitive disadvantage. Moreover, following entry of this Court's denial of the Briscoe Plaintiffs' motion for a temporary restraining order, the Briscoe Plaintiffs were unable to obtain insurance that did not include coverage of the objectionable drugs. 26 U.S.C. §§ 4980D & 4980H. The HHS Mandate further authorizes lawsuits by plan participants and the Secretary of Labor to force the Briscoe Plaintiffs to provide coverage in violation of their beliefs. 29 U.S.C. § 1132. The mere fact that the HHS Mandate creates a federal law requirement on the Briscoe Plaintiffs puts them at risk in innumerable arrangements, such as contracts, that may require them to comply with "all federal laws." See Briscoe Brief in Support of Motion for Preliminary Injunction (Doc. 15-1) at 6, 9-10.

It is clear that the harms to Plaintiffs are severe, while the harms to the government are minimal and unsupported in the record. Exempting the Briscoe Plaintiffs' 200 employees from the HHS Mandate (in comparison, Judge Heaton, in *Hobby Lobby*, found that Hobby Lobby's 13,000 employees should be exempted) in light of the fact that tens of millions are currently exempted by the government from the HHS Mandate imposes no further harm to the government. Just as Judge Heaton found in *Hobby Lobby* ("the threatened injury to the corporations if the injunction does not issue outweighs the potential harm to the government"), the equitable balance tips strongly in the Briscoe Plaintiffs' favor and necessitates emergency injunctive relief.

PUBLIC INTEREST FACTOR

Just as Judge Heaton determined in *Hobby Lobby*, entry of injunctive relief by this Court in favor of the Briscoe Plaintiffs would serve the public interest. Indeed, Judge Heaton stated that "the court concludes there is an overriding public interest in the resolution of the legal issues raised by the mandate before Hobby Lobby . . . [as Hobby Lobby is] exposed to the substantial penalties that are potentially applicable. The public interest therefore lies in preserving the status quo until the issues raised by plaintiffs' claims are resolved."

It is always in the public interest to protect First Amendment freedoms. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) ("there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]") (quoting *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004)); *Pac Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). Although RFRA

violations are not constitutional violations, “Congress has given RFRA similar importance by subjecting all subsequent congressional enactments to a strict scrutiny standard of review unless those enactments explicitly exclude themselves from RFRA.” *Hobby Lobby*, Slip Op. at 66-67.

The public interest in enforcing a fundamental right must outweigh the interest in immediate enforcement of a new law that creates a “substantial expansion of employer obligations” and raises “concerns and issues not previously confronted.” *Newland*, 881 F. Supp. 2d at 1295.

CONCLUSION

As the Tenth Circuit Court of Appeals determined in *Hobby Lobby*, Defendants’ HHS Mandate violates RFRA. This 10th Circuit decision, coupled with Judge Heaton’s order on the two remaining preliminary injunction prongs, mandates that this Court issue injunctive relief in favor of the Briscoe Plaintiffs.

CERTIFICATE OF COMPLIANCE RE: CONSULTATION

Pursuant to D.C.COLO.LCiv.R. 7.1A, Plaintiffs certify that, through counsel, they have, previously consulted and conferred with attorneys for Defendants about this and similar motions and the relief requested herein, and the Defendants oppose this motion and the relief requested herein.

WHEREFORE, Plaintiffs respectfully request that this Court enter a Temporary Restraining Order in favor of the Briscoe Plaintiffs preventing Defendants from enforcing the HHS Mandate against Briscoe Plaintiffs until this Court is able to rule on the Briscoe Plaintiff’s Motion for Preliminary Injunction or, in the alternative, entry of a Preliminary Injunction enjoining Defendants from requiring the Briscoe Plaintiffs to provide health insurance coverage

for abortion-inducing drugs as required by the HHS Mandate until further order of this Court.

The Briscoe Plaintiffs respectfully request that this motion be determined **FORTHWITH**.

DATED this 22nd day of July, 2013.

Attorneys for Plaintiffs:



s/ Michael J. Norton

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on July 22, 2013, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

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s/ Michael J. Norton
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