

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' EMERGENCY APPLICATION FOR A TEMPORARY RESTRAINING
ORDER PENDING THE COURT'S RULING ON PLAINTIFFS' MOTION FOR
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. Plaintiffs respectfully request **FORTHWITH** consideration of and a ruling on this application.

FACTUAL BACKGROUND

As the Court is aware, on February 25, 2013 this Court denied Plaintiffs' Motion for Temporary Restraining Order (Doc. 25). The Court is already familiar with the factual background set forth in Plaintiffs' Verified Complaint (Doc. 2) and the facts and legal arguments set forth in Plaintiffs' Motion for a Preliminary Injunction (Doc. 15) and Plaintiffs' Brief in Support of Motion for Preliminary Injunction (Doc. 15-1). Thus, Plaintiffs will not restate those facts in this emergency application.

PROCEDURAL HISTORY

On June 27, 2013, the United States Court of Appeals for the Tenth Circuit rendered its decision in *Hobby Lobby Stores Inc. v. Sebelius*, No. 12-6294 (10th Cir. June 27, 2013) (en banc). In brief summary, the Tenth Circuit held that plaintiffs Hobby Lobby and Mardel: (a) were entitled to bring claims under the Religious Freedom Restoration Act ("RFRA"); (b) had established a likelihood of success that their rights under RFRA were substantially burdened by the HHS contraceptive-coverage mandate; and (c) had established irreparable harm. The *Hobby Lobby* case was thereupon remanded to the district court for further evaluation of two preliminary injunction factors, to wit: balance of equities and public interest.

On June 28, 2013, following the filing by the Hobby Lobby plaintiffs of an "Emergency Application for Ruling on Pending Preliminary Injunction Motion or In the Alternative for Temporary Restraining Order" (W.D. OK. Doc. 68), the District Court for the Western District of Oklahoma, during a telephone conference, entered a temporary restraining order in favor of the Hobby Lobby plaintiffs and scheduled a hearing on the Hobby Lobby plaintiffs' motion for preliminary injunction for July 19, 2013 (W.D. OK. Doc. 69).

On July 1, 2013, Plaintiffs filed their Motion for an Order or, In the Alternative, Request to Set Plaintiffs' Preliminary Injunction Motion for Hearing and Request for Forthwith Consideration (Doc. 39). Since that filing, counsel for Plaintiffs have been telephonically advised by the Court's clerk that the Court will take some time to review the *Hobby Lobby* decision and then determine Plaintiffs' Motion for an Order.

Insomuch as the claims by Plaintiffs herein are similar if not identical to those upheld by the Tenth Circuit in *Hobby Lobby* and these Plaintiffs continue to suffer irreparable injury, it is in the interests of justice that the Court reconsider its order denying Plaintiffs' Motion for a Temporary Restraining Order and **FORTHWITH** enter a Temporary Restraining Order pending the Court's determination of Plaintiffs' Motion for an Order or, In the Alternative, Request to Set Plaintiffs' Preliminary Injunction Motion for Hearing and Request for Forthwith Consideration.

ARGUMENT

- 1. The Court should enter a Temporary Restraining Order in favor of Plaintiffs pending its determination of Plaintiffs' "Motion for an Order or, In the Alternative, Request to Set Plaintiffs' Preliminary Injunction Motion for Hearing and Request for Forthwith Consideration."**

In *Hobby Lobby*, the Tenth Circuit reversed the denial of the Hobby Lobby plaintiffs' motion for preliminary injunction. Slip Op. at 9. A majority of the en banc court found both that Plaintiffs had established a likelihood of success on their RFRA claim and that they would suffer irreparable harm absent a preliminary injunction. Slip Op. at 8. The Court remanded the case to the U.S. District Court for the Western District of Oklahoma "with instructions that the district court address the remaining two preliminary injunction factors and then assess whether to grant or deny the plaintiffs' motion." Slip Op. at 9.

The two remaining preliminary injunction factors are “balance of equities and public interest.” Slip Op. at 8. Both parties here have already addressed those factors in briefing to this Court.

Plaintiffs have presented sworn evidence in the form of a verified complaint (Doc. 2) as well as in Plaintiffs’ Motion for a Preliminary Injunction (Doc. 15) and Plaintiffs’ Brief in Support of Motion for Preliminary Injunction (Doc. 15-1). The Verified Complaint and these pleadings set out in significant detail: the harm to the Plaintiffs in terms of both pressure to violate their beliefs and exposure to massive fines; the existence, size, and scope of other exemptions already permitted by the Defendants; and the very limited nature of Plaintiffs’ objection only to abortion-inducing drugs and devices, not the vast majority of other contraceptives described in the federal birth control guide.

While Defendants have had ample opportunity to contest Plaintiffs’ evidence, they have essentially failed to do so and rather have rested on the theory that secular, for profit organizations are not “persons” under RFRA and thus cannot exercise religious liberties – a view thoroughly discredited by the Tenth Circuit in *Hobby Lobby*. See, e.g., Slip Op. at 7.

In light of the fact that all parties have already briefed and submitted these issues to the Court and in light of the on-going irreparable harm to Plaintiffs, the Court should be able to rule on Plaintiffs’ Motion for Preliminary Injunction without any further hearing. In light of the Tenth Circuit’s conclusion that the Hobby Lobby plaintiffs are likely to succeed on the merits and will face irreparable harm if denied a preliminary injunction, the analysis of the two remaining preliminary injunction factors – the equities and the public interest – should be easily decided in favor of Plaintiffs. This is particularly true where, as here, Defendants have exempted

plans covering millions of people from the HHS Mandate and has voluntarily stipulated to injunctions in other cases.

2. Entry of a Temporary Restraining Order in favor of Plaintiffs is justified by the *Hobby Lobby* decision.

The standard for granting a temporary restraining order is largely the same as the preliminary injunction standard. *See Thomas v. Carson*, 30 F. App'x 770, 772 (10th Cir. 2002). A plaintiff must thus demonstrate “(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the [plaintiff’s] favor; and (4) that the injunction is in the public interest.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

Just as in the *Hobby Lobby* case, these Plaintiffs have already shown a likelihood of success on the merits and that they would suffer irreparable harm. Thus, this Court need only address the final two elements. *United States v. West*, 646 F.3d 745, 747-48 (10th Cir. 2011).

a. Entry of a Temporary Restraining Order in favor of Plaintiffs is in the public interest.

Entry of a temporary restraining order here would serve the public interest. Temporarily enjoining the HHS Mandate will not harm the public interest. Defendants have admitted as much by voluntarily dismissing its appeal and leaving the district court’s preliminary injunction intact in *Tyndale House Publishers v. Sebelius*, No. 13-5018 (D.C. Cir. May 3, 2013) (granting

government's voluntary dismissal motion) and failing to oppose or failing to appeal preliminary injunctions in six other HHS Mandate cases.¹

Of even more import is the fact that Defendants have indefinitely exempted plans covering tens of millions of individuals from having to cover any of the mandated preventive services. For example, "grandfathered" plans, which the government estimates cover over 87 million people, at least through 2013 and probably beyond, may stay grandfathered indefinitely. In addition, "small employers" which employ over 34 million people need not offer health insurance at all and can thus avoid the HHS Mandate as well.

Most fundamentally, 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

¹ Order, *Johnson Welded Products Inc. v. Sebelius*, No. 1:13-cv-00609 (D.D.C. May 24, 2013) (granting unopposed motion for preliminary injunction); Order, *Hart Electric LLC v. Sebelius*, No. 1:13-cv-02253 (N.D. Ill. April 18, 2013) (same); Order, *Tonn and Blank Construction, Inc. v. Sebelius*, No. 1:12-cv-325 (N.D. Ind. April 1, 2013) (same); Order, *Bick Holdings Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. April 1, 2013) (same); Order, *Sioux Chief Manufacturing Co. Inc. v. Sebelius*, No. 13-cv-0036 (W.D. Mo. Feb. 28, 2013) (same); Order *Lindsay Rapaport and Postel LLC v. Sebelius*, No. 13-cv-1210 (N.D. Ill. Mar. 20, 2013) (granting preliminary injunction by agreement of the parties).

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.

b. The balance of harms tips strongly in Plaintiffs’ favor.

The balance of harms tips strongly in Plaintiffs favor for the same reasons it tips in their favor with respect to the requested preliminary injunction. Given the Tenth Circuit’s ruling in *Hobby Lobby*, there can be no doubt that the balance of the equities favors Plaintiffs and necessitates emergency relief.

As the Tenth Circuit noted, the harms to the Hobby Lobby plaintiffs are severe and the harms to the government are minimal and temporary. A plurality of the Tenth Circuit balanced the equities and concluded they favored Hobby Lobby:

Nor is there any question about the balance of equities. A preliminary injunction would forestall the government’s ability to extend all twenty approved contraceptive methods to Hobby Lobby and Mardel’s 13,000 employees. But Hobby Lobby and Mardel will continue to provide sixteen of the twenty contraceptive methods, so the government’s interest is largely realized while coexisting with Hobby Lobby and Mardel’s religious objections. And in any event, the government has already exempted health plans covering millions of others. These plans need not provide *any* of the twenty contraceptive methods. By contract, Hobby Lobby and Mardel remain subject to the Hobson’s choice between catastrophic fines or violating its religious beliefs. Accordingly, the balance of equities tips in Hobby Lobby and Mardel’s favor.

Hobby Lobby, Slip Op. at 66 (emphasis added).²

It is clear that the harms to Plaintiffs are severe, while the harms to the government are minimal and unsupported in the record. Exempting Plaintiffs' 730 employees from the HHS Mandate in light of the fact that tens of millions are currently exempted by the government from the HHS Mandate imposes no further harm. The balance of equities strongly favors Plaintiffs and the temporary restraining order should be granted.

CONCLUSION

Defendants' HHS Mandate violates RFRA. Unless this Court issues a temporary restraining order, Plaintiffs face the choice of continuing to violate their beliefs or violate the HHS Mandate and potentially suffering massive financial penalties, lawsuits, and other liabilities.

CERTIFICATE OF COMPLIANCE RE: CONSULTATION

Pursuant to D.C.COLO.LCiv.R. 7.1A, Plaintiffs certify that, through counsel, they have, before the filing of this motion, telephonically consulted and conferred with attorneys for Defendants, to wit: Bradley P. Humphreys, Esq., Trial Attorney, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, NW, Washington, D.C. 200001 (202-514-3367) about this motion and the relief requested herein. Mr. Humphreys advised counsel for the Plaintiffs that the Defendants had not yet determined what position, if any, to take with respect to this motion or the relief requested therein in light of the 10th Circuit's *Hobby Lobby* decision. In addition and following this telephonic communication, counsel for the

² One additional judge concurred, stating that "the equitable balancing should be performed by the district court" in the first instance. Opinion of Bacharach, J., concurring, at 2.

Plaintiffs advised counsel for the Defendants, via email, that, in light of the irreparable injury being suffered by Plaintiffs, Plaintiffs were obliged to file this motion whether or not the Defendants had decided on their position. Thus, as of the filing of this motion, the position of the Defendants, if any, is not known.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order temporarily restraining Defendants from requiring Plaintiffs to provide health insurance coverage for abortion-inducing drugs, abortifacient drugs, and related education and counseling to their employees as required by the HHS Mandate until the Court determines Plaintiff's Motion for Preliminary Injunction. In addition, Plaintiffs respectfully request that this motion be determined **FORTHWITH**.

DATED this 2nd day of July, 2013.

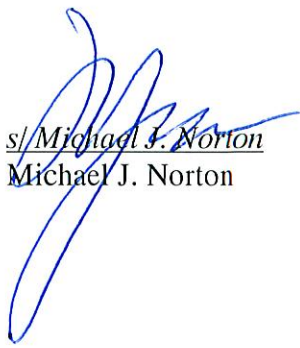
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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on July 2, 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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