IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-02105-REB-MJW

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary, U.S. Dep't of Health and Human Services, *et al.*,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO EXPEDITE SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

Considering the crippling fines that Colorado Christian University (CCU) faces beginning July 1, 2014, the government appropriately consents to expediting the summary judgment proceedings. But its opposition to preliminary injunctive relief is inconsistent with the positions it has taken in other cases and is legally unfounded. Thus, unless a ruling on the cross-motions for summary judgment is immediately forthcoming, CCU respectfully requests that this Court grant it preliminary relief.

ARGUMENT

I. The Court should grant CCU prompt relief on the merits.

As the government acknowledges, the simplest way to dispose of this case is to rule on CCU's motion for partial summary judgment. Defs.' Opp. [Dkt. 65] at 1-2. Briefing on CCU's motion is complete, and the parties agree that there are no disputed fact issues

that would prevent an expeditious ruling. Nevertheless, because the summary judgment motions have been referred to the magistrate judge, a ruling unfavorable to CCU would have to be appealed both within the district court and potentially to the Tenth Circuit. The uncertainty of having a definitive ruling before July 1 significantly hinders CCU's ability to efficiently administer its healthcare plan. *See* Armstrong Decl. [Dkt. 64-1] ¶¶ 33-36, 40, 43-48. Thus, CCU requests that this Court grant its motion for partial summary judgment well before July 1, 2014, when CCU would otherwise begin to accrue massive fines for exercising its religion.

II. Alternatively, the Court should grant CCU preliminary relief.

After CCU filed its motion for preliminary relief, but before the government responded, this Court granted the very relief that CCU seeks in a parallel case by another plaintiff challenging the same mandate for the same reasons. *See* Order granting preliminary injunction [Dkt. 37], *Dobson v. Sebelius*, No. 13-cv-03326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014) (Blackburn, J.). The government's subsequent opposition to identical relief here provides no basis for distinguishing the two cases. It simply states that "*Dobson* was wrongly decided." Defs.' Opp. [Dkt. 65] at 2 n.1. Moreover, in *Fellowship of Catholic University Students (FOCUS) v. Sebelius*—another parallel case pending in this district—the government allowed the plaintiff's motion for preliminary injunction to be granted without opposition. *See* Order Granting Preliminary Injunction [Dkt. 39], No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) ("No response in opposition was timely filed. Treating the motion as unopposed, it is granted."). These factors fatally undermine the government's legal arguments opposing preliminary relief in CCU's case.

CCU is entitled to a preliminary injunction because it has shown that (1) it is substantially likely to prevail on the merits, (2) it will suffer irreparable harm if an injunction is not issued, (3) this threat of harm outweighs any injury to the government, and (4) an injunction would be in the public interest. *Dobson*, 2014 WL 1571967, at *5 (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001)). There can be no doubt that the last three factors weigh overwhelmingly in CCU's favor. Indeed, the government has essentially conceded as much by consenting to preliminary injunctions in numerous cases involving similar claims. CCU's Supp. Mem. [Dkt. 64] at 14; Order [Dkt. 39], *FOCUS*, No. 1:13-cv-03263. The government admits that, at least in some of these cases, its behavior was driven by litigation convenience, Defs.' Opp. at 5 n.3, but it fails to explain why its repeated concessions do not, at the very least, fatally undermine the balance of harms and public interest arguments it has made in this case. For these reasons, and for the additional reasons explained below, CCU is entitled to a preliminary injunction.

A. CCU is likely to succeed on the merits.

1. The overwhelming majority of courts—including this one—have granted preliminary relief.

In its opening brief—filed on March 31—CCU noted that courts had granted preliminary injunctive relief in twenty out of twenty-one "essentially identical" cases. CCU's Mot. [Dkt. 64] at 7 & n.3. Since that time, courts have granted preliminary or permanent injunctions in three additional cases, including two in this District and one in this Court. *Dobson*, 2014 WL 1571967, at *11; Order [Dkt. 39], *FOCUS*, No. 1:13-cv-3263; *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489, 2014 WL

1256373, at *18, *33-34 (N.D. Ga. Mar. 26, 2014) (granting summary judgment for plaintiffs on their RFRA and Free Speech claims and entering a permanent injunction). Like the plaintiffs in *Dobson*, *FOCUS*, *Archdiocese of Atlanta*, and twenty out of the twenty-one previously-decided cases, CCU is entitled to an injunction.

2. The Mandate violates RFRA and the First Amendment.

CCU has demonstrated that it is substantially likely to prevail on the merits of both its RFRA and First Amendment claims.

RFRA. In its Preliminary Injunction and Summary Judgment briefs, CCU has established a substantial likelihood of success. The government admits that its arguments to the contrary are foreclosed by *Dobson*. Defs.' Opp. [Dkt. 65] at 2 n.1. It is correct. For purposes of this motion, CCU's case and *Dobson* are virtually indistinguishable.

Here, as in *Dobson*, "[t]he only issue in dispute concerning the RFRA claim . . . is whether the ACA and the regulations . . . constitute a substantial burden on the religious beliefs of the plaintiffs." *Dobson,* 2014 WL 1571967, at *10. Also as in *Dobson*, CCU has only three options: (1) provide the four religiously-objectionable contraceptive methods itself; (2) execute and deliver EBSA Form 700, the government form that designates CCU's third-party administrator to provide the four contraceptive methods; or (3) drop its health benefits altogether. *Id.* at *8.

Each of these options substantially burdens CCU's sincere religious beliefs. CCU cannot provide these contraceptive methods itself, because that would violate its commitment to protect the sanctity of life. Armstrong Decl. [Dkt. 64-1] ¶¶ 13, 14, 21, 22. CCU cannot designate its third-party administrator to provide these contraceptive methods, because that would make CCU morally complicit in providing the four

contraceptive methods, and CCU cannot outsource its conscience in this way. *Id*. ¶¶ 23, 26. And CCU cannot simply drop all health benefits, because—in addition to incurring substantial fines and competitive harm—dropping health benefits would cause CCU to violate its religious commitment to promoting the spiritual and physical well-being of its employees. *Id*. ¶¶ 12, 35, 45, 46, 48 (religious commitment to employees' well-being and harm to employees); *id.* ¶ 29 (fines of $1.3 million per year for dropping all health benefits); *id.* at ¶ 30-33 (severe competitive disadvantage). In short, "execution of any these three options would violate *per force* the sincerely held religious beliefs of the plaintiffs; yet the ACA essentially requires plaintiffs to choose among them." *Dobson*, 2014 WL 1571967, at *8. As a result, CCU is substantially likely to show that "the ACA and the regulations constitute a substantial burden on [CCU's] exercise of religion." *Id.* at *9.

Because the government does not dispute the religiosity or sincerity of CCU's claims, and because the Tenth Circuit has already held that the Mandate does not meet strict scrutiny, see Defs.' Mot. to Dismiss and for Summ. J. [Dkt. 40] at 14; *Dobson*, 2014 WL 1571967, at *9-10, CCU has established that it is substantially likely to prevail on its RFRA claim. *Id.* at *9; *see also* 42 U.S.C. § 2000bb–1(b).

First Amendment. Likewise, for the reasons set forth in its summary judgment briefs, CCU is also likely to prevail on its First Amendment claims. *See* CCU's Mot. for Summ. J. [Dkt. 27] and Reply in Supp. [Dkt. 45]; *see also* CCU's Notices of Suppl. Auth. [Dkts. 60-61].

B. The remaining preliminary injunction factors weigh in CCU's favor.

CCU has likewise established that the three remaining preliminary injunction factors—irreparable injury, balance of harms, and the public interest—weigh heavily in its favor.

See Dobson, 2014 WL 1571967, at *5 (citing *Prairie Band of Potawatomi Indians*, 253 F.3d at 1246)).

Irreparable Injury. Because CCU is likely to succeed on its RFRA and First Amendment claims, it has "*ipso facto*" established irreparable injury. *Dobson*, 2014 WL 1571967, at *10 (citing *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354)).

Balance of Harms. The government cites out-of-circuit cases for the proposition that "granting an injunction against the enforcement of a likely *constitutional* statute would harm the government." Defs.' Opp. [Dkt. 65] at 3 (citing, *inter alia*, *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998)) (emphasis added). But where a law is "likely unconstitutional," the interests of those the government represents . . . "do not outweigh [a plaintiff's interest] in having [its] constitutional rights protected."[1] *Awad v. Ziriax*, 670 F.3d 1111, 1131–32 (10th Cir. 2012). And the same principle applies to laws that likely violate RFRA, which was enacted to protect the constitutional value of free exercise. *See Dobson*, 2014 WL 1571967, at *10 (citing *Hobby Lobby*, 723 F.3d at 1146) (applying this principle to the Mandate and holding that the balance of harms factor was satisfied).

Even if this were not so, the balance of harms would still favor CCU, because all but a tiny fraction of the government's interest in the ACA—and, indeed, the Mandate itself—will still be fully realized if this Court enters an injunction. *See id.* The government asserts that enjoining the Mandate would undermine "Congress's goals," Defs.' Opp. [Dkt. 65] at

[1] This principle is basic to the American justice system. As it says over the door to the Attorney General's office in Washington, D.C.: "[T]he United States wins its case whenever justice is done one of its citizens in the courts." U.S. Dep't of Justice, Letter re DOJ Seal – History and Motto, Feb. 14, 1992, at n.25, *available at* http://www.justice.gov/jmd/ls/dojseal.htm (last visited May 5, 2014).

3-4, but Congress did not adopt the Mandate; HHS did. The government has made no showing that Congress required or even contemplated that HHS would adopt a rule requiring religious institutions like CCU to cover the narrow class of contraceptives with potentially life-ending properties, and the sources the government cites do not support this assertion.[2] Because an injunction would affect only a small portion of the Mandate's required preventive services, and because enforcing the law is substantially likely to violate CCU's rights, the balance of harms favors CCU.

Public Interest. As with the balance of harms, the conclusion regarding public interest flows directly from CCU's likely success on the merits. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132; *Chamber of Commerce of U.S. v. Edmondson,* 594 F.3d 742, 771 (10th Cir. 2010) (same). "Although a violation of the RFRA is not, on its face, a violation of the constitution, 'Congress has given RFRA similar importance by subjecting all subsequent

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[2] The only Congressional sources the government cites are two floor statements made during the debate over the women's preventive services amendment. *See* Defs.' Opp. [Dkt. 65] at 3-4 (citing 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009)). But these statements mention only "family planning," not "emergency contraceptives."

The government also cites the IOM Report, a non-Congressional document. But even that does not support its point: the IOM Report mentioned "emergency contraceptives" only in passing, excluded the "ethical, legal and social issues" relevant to coverage for emergency contraceptives from its analysis, and considered the contours of actual "insurance coverage requirements"—such as the Mandate—to be "beyond the scope" of its review. *Compare* Defs.' Opp. [Dkt. 65] at 3-4 (citing Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps (2011) ("IOM Rep."), *with* IOM Rep. at 76 (stating that "a methodology to fully address insurance coverage was beyond its scope" and noting that insurance coverage requirements "may consider a host of other issues, such as . . . ethical, legal, and social issues" and "cost," which were beyond the scope of the IOM's review); *id.* at 105 (mentioning "emergency contraception" as one among many FDA-approved contraceptive methods).

congressional enactments to strict scrutiny unless those enactments explicitly exclude themselves from RFRA.'" *Dobson*, 2014 WL 1571967, at *10 (citing *Hobby Lobby*, 723 F.3d at 1146-47). Thus, the public interest is served by enjoining the Mandate, which likely violates RFRA. *See id.*

The government nevertheless argues that an injunction would "inflict a very real harm" on "a readily identifiable group of individuals"—CCU's students and employees. Defs.' Opp. [Dkt. 65] at 4-5. But all of CCU's employees agree with CCU's religious beliefs, all of CCU's students agree to abide by CCU's Lifestyle Covenant, and both students and employees have voluntarily associated themselves with an institution that has adopted, as one of its Strategic Objectives, the goal of promoting the sanctity of life. Armstrong Decl. [Dkt. 64-1] ¶¶ 10, 11, 14. Indeed, the real harm to CCU's students and employees would come from *not* entering an injunction, which would subject their school and employer to the untenable choice between complying with the Mandate, paying massive fines, and dropping health benefits altogether. For these reasons as well, the public interest weighs heavily in favor of CCU.

CONCLUSION

This Court should expedite summary judgment or, alternatively, prohibit Defendants from enforcing the Mandate against CCU and its third-party administrator and insurer until the summary judgment motions have been resolved and any time for appeal has expired.

Dated: May 5, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, the foregoing *Reply in Support of Motion to Expedite Summary Judgment or, in the Alternative, for a Preliminary Injunction* was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ Eric S. Baxter
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