IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MEDIA RESEARCH CENTER,	)	
Plaintiff,	)	
v.	)	
	)	Civil Action No. 1:14-cv-379 (GBL/IDD)
KATHLEEN SEBELIUS, et al.,	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

The Government's refusal to take a position on what the "eligible organization" exemption to the Contraception Mandate means, and whether the Media Research Center ("MRC") qualifies for the exemption, highlights MRC's dilemma. Potential fines of $12,500 per day, which are of a magnitude that threaten the continued existence of MRC, loom over the question of whether MRC's decision to self-certify for the eligible organization exemption based on its sincerely-held religious beliefs, was correct. These facts illustrate a clear case and controversy wherein MRC's continued existence and its freedom to exercise constitutionally protected religious liberties lie in the balance.

INTRODUCTION

The Government spends 95% of its Opposition Brief arguing that MRC's motion should be denied due to "serious jurisdictional defects" and it chose not to even address the merits of MRC's claims in light of those alleged defects. Defs.' Opp'n at 18 n.10. The Government's essential argument is that because *MRC believes it is qualified for the eligible organization exemption, and has self-*

certified as required by the law, there is no justiciable case or controversy.[1] The Government, however, takes no position as to the correctness of MRC's interpretation. But, it is the Government, not MRC, who is charged with enforcement of the ACA. Therein lies the danger.

MRC is ensnared in a trap, created by the Government, that requires MRC either to violate its sincerely-held religious beliefs or risk devastating fines. Such facts illustrate an unconstitutional state of affairs and present a clear case or controversy.

ARGUMENT

I. MRC HAS STANDING TO BRING THIS ACTION AND IT IS RIPE FOR JUDICIAL REVIEW

The Government argues that this Court lacks subject matter jurisdiction because (1) MRC has not alleged "actual or imminent" injury; (2) the case is not sufficiently "ripe" for judicial review; and (3) MRC has not yet been injured. Defs.' Opp'n at 8-18. The Government is wrong.

There was a time when there was a question about the compatibility of declaratory judgment actions with the Constitution's "case-or-controversy" requirement. *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289 (1928). Those doubts were removed, however, when the Declaratory Judgment Act was signed into law in 1934 and the Supreme Court declared it to be constitutional in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

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[1] The Government's position is that MRC is compliant with the law, thus no case or controversy. If that is the case, the Government should be willing to stipulate that no fines would be imposed against MRC until such time that there is an actual adjudication that it does not qualify for the eligible organization exemption and that such fines will only accrue prospectively after such adjudication, and that under no circumstance shall any fines against MRC be applied retroactively to the date of self-certification.

While the Supreme Court has not drawn "the brightest of lines between those declaratory judgment actions that satisfy the case-or-controversy requirement and those that do not," *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

The cases decided since 1937 make clear that plaintiffs are not required to expose themselves to the threat of criminal or civil sanctions before seeking declaratory relief; that situations where the plaintiff is forced to choose between disadvantageous compliance with a regulation and the possibility of strong sanctions are "ripe" for federal judicial review; and that these principles are particularly applicable where the disadvantageous compliance involves the compromise of First Amendment freedoms.

A. Potentially Severe Governmental Sanctions Loom over the Exercise of MRC's First Amendment Freedoms

Where threatened governmental action is concerned, plaintiffs are not required to expose themselves to liability "before bringing suit to challenge the basis for the threat." *Medimmune*, 549 U.S. at 128-29. In *Terrace v. Thompson*, 263 U.S. 197 (1923), for example, a state threatened a plaintiff with forfeiture of his farm, as well as fines and penalties, if he leased his farm in violation of the state's anti-alien land law. The court did not require the

plaintiff to "bet the farm" as a prerequisite to testing the law. *Id.* at 216-17. Similarly, in *Steffel v. Thompson*, 415 U.S. 452 (1974), the court did not require that the plaintiff actually distribute handbills, and risk prosecution, before he could proceed to court to test the constitutionality of a statute prohibiting such distribution. *Id.* at 458-60. Thus, a court will not require a plaintiff to engage in behavior that could risk criminal sanctions, or great personal or business loss, before challenging the constitutionality of a statute or the legality of certain actions. *Medimmune*, 549 U.S. at 134 ("The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III").

An aptly named case illustrating the application of these principles in a somewhat analogous context is *MRC II Distribution Co., L.P. v. Coelho*, No. 2:12-cv-03539-ODW (JCGx), 2012 WL 3810257 (C.D. Cal. Sept. 4, 2012). *MRC II* arose from a contract concerning a license to a short story, which included an option to acquire the film rights. *Id.* at *1. The plaintiff paid a substantial sum to exercise the option, and made a popular motion picture starring Matt Damon based on the short story. *Id.* The plaintiffs then learned that the story may have fallen into the public domain prior to the contract. *Id.* They filed a declaratory judgment action to determine whether the story had, indeed, entered the public domain. *Id.*

The defendants argued, just as the Government does here, that the plaintiffs lacked standing to bring such an action because there was no case or

controversy due to the fact that the defendants had never threatened to sue for copyright infringement. *Id.* The *MRC II* court disagreed, observing that the parties' dispute over the validity of the copyright was "not a hypothetical set of facts," it remained an issue between the parties, and the plaintiff had no guarantee that the defendants would not sue in the future. *Id.* at *2-3. The fact that the federal copyright issue continued to "loom over the parties' relationship" was enough to confer standing. *Id.* at *3.

Here the Government makes arguments very similar to those rejected in *MRC II*. The potential that the Government might one day seek to impose ruinous fines of $12,500 per day on MRC "looms over the parties' relationship" at least as much as the license at issue in *MRC II* did in that case. The Supreme Court has made clear that organizations like MRC are not required to "bet the farm" and that the federal courts are available for them to vindicate their rights in exactly these kinds of situations.

B. This Case Is "Ripe" for Review Because the Harm to MRC Is Immediate and Hardly Conjectural

Whether a claim is ripe for review is determined under a two-part test. Part 1 evaluates the fitness of the issues for judicial decision and Part 2 analyzes the hardship to the parties of withholding consideration. *Sigram Schindler BGMBH v. Kappos*, 675 F. Supp. 2d 629, 636 (E.D. Va. 2009).[2]

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[2] It is ironic that the Government argues that the case is not ripe while simultaneously chastising MRC for waiting until the day the regulations went into effect to file suit. The fact that MRC is now actually facing the possibility of fines based on its self-certification decision more than makes this case ripe.

The issue of whether MRC is an "eligible organization" is fit for judicial decision. The issue presents a pure question of law and the relevant regulation is now final and in force. This fact distinguishes this case from others where the case was deemed not ripe due to the lack of finality of the regulation or the pending amendment of one. *See, e.g.*, *Conlon v. Sebelius*, 923 F. Supp. 2d 1126, 1132 (N.D. Ill. 2013).

Moreover, unlike other cases where standing was problematic due to lack of action by the plaintiffs to initiate the controversy, here MRC affirmatively availed itself, prior to filing suit, of the self-certification process for not-for-profit "religious" organizations to escape the Contraception Mandate and has put itself in harm's way. Compl., Ex. 10. However, by choosing to avoid the Scylla of paying for the abortion and contraceptive services that it finds religiously intolerable, MRC put itself squarely in the cross-hairs for a potentially ruinous dispute with a governmental Charybdis about whether such self-certification was appropriate. That is an action creating sufficient immediacy to create standing. The threat to MRC's continued existence is real and growing larger every day.

The hardship faced by MRC is palpable. If this Court were to dismiss this case as "unripe," MRC's board of directors face an extremely difficult decision. The board members can either violate their sincerely-held religious convictions and vote to pay for the abortion services and contraceptive care they find religiously abhorrent, or they can gamble MRC's future on the hope that this or some future administration will not seek to enforce ruinous fines if

it disagrees with MRC's interpretation and resultant self-certification. That forced choice between violating its religious beliefs or violating the law is actual and immediate hardship and injury to MRC. Such undeniably immediate hardship and injury makes this case ripe. *520 S. Michigan Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006) ("Courts frequently engage in pre-enforcement review based on the potential cost that compliance (or bearing a penalty) creates"). The Constitution does not permit governmental imposition of such a dilemma on the free exercise of religion.

Such dilemmas are not uncommon in the case law and the harm of being forced to modify one's behavior to avoid the possibility of serious future adverse consequences has routinely been found sufficient to overcome any ripeness objections. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-53 (1967) (relying on the dilemma created by forcing manufacturers to choose between complying with a regulation and incurring the associated compliance costs, or continuing to act in a manner that "they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation" and potentially facing more costly criminal and civil penalties); *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) ("If Texas cannot challenge the Procedures in this lawsuit, the State is forced to choose one of two undesirable options: participate in an allegedly invalid process that eliminates a procedural safeguard promised by Congress, or eschew the process with the hope of invalidating it in the future, which risks the approval of gaming procedures in which the state had no input."). These cases, and many others like them,

teach that where the plaintiff is forced to choose between disadvantageous compliance with a regulation and the possibility of strong sanctions, the case is ripe for review. *Abbott*, 387 U.S. at 152-54. The dilemma faced by MRC here is indistinguishable from the dilemmas faced by the plaintiffs in *Abbott Labs* and *Texas*.

C. Courts Apply a More Relaxed Standing Analysis When First Amendment Freedoms Are at Stake

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Thus, the First Amendment establishes a number of equally important "first freedoms" in its various clauses. These are the fundamental freedoms that define Americans. They were established in the wake of religious civil war in England and continental Europe and at a time when hereditary kings believed that all rights emanated only from them. Americans believe that all people are endowed by their creator with these "self-evident" and "unalienable" rights. The Declaration of Independence para. 2. These freedoms were enshrined in the First Amendment to protect, among other things, the rights of religious minorities.

The importance of these freedoms is why courts employ a "First Amendment standing framework" that relaxes standing requirements when First Amendment freedoms are at stake. *Cooksey v. Futrell*, 721 F.3d 226, 229

(4th Cir. 2013) (former Supreme Court Justice Sandra Day O'Connor on panel) states:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

"The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact." *Cooksey*, 721 F.3d at 235; *see also Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) ("First Amendment cases raise unique standing considerations that tilt[ ] dramatically toward a finding of standing") (internal quotation marks and citation omitted).

In *Cooksey*, the plaintiff (who was not a physician or dietician) launched a website called the Diabetes Warrior where he advocated certain lifestyle and diet changes to combat diabetes, in particular the "Paleolithic diet." *Id.* at 230. Someone reported the plaintiff to the State Board and claimed that he was engaged in the unlicensed practice of dietetics. The State initiated an investigation into the complaint. *Id.* Cooksey altered his website based on his fear of civil and criminal action against him by the State. *Id.* at 231-32. He then filed suit alleging that the investigation and North Carolina law violated his First Amendment rights. *Id.* at 232-33. The State moved to dismiss,

arguing that Cooksey lacked standing because the State had never enforced North Carolina law against him or even threatened to. *Id.* at 233. The district court granted the motion, but it was reversed by the Fourth Circuit. *Id.* at 241.

The Fourth Circuit held that its earlier decision in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) controlled this case. There the court stated that:

> When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. A non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary. This presumption is particularly appropriate when the presence of the statute tends to chill the exercise of First Amendment rights.

Id. at 710 (internal quotation marks and citations omitted).

Cooksey belonged to the class implicated by the North Carolina law; no one alleged that that Act was moribund; so the only issue was whether it facially restricted Cooksey's expressive activity. *Cooksey*, 721 F.3d at 237-38. The court held that it did. *Id.* at 238. Violation of the law was a crime. *Id.* Cooksey's complaint described speech that could violate the law. *Id.* Therefore, his speech subjected him to a credible threat of criminal penalties and he was deemed to have standing, notwithstanding the fact that he had never been prosecuted or overtly threatened with prosecution. *Id.* Other cases teach that the potential action need not be criminal in nature to confer standing. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 473-75 (1987) (senator had

standing to challenge governmental labeling of films as "political propaganda" due to the risk of injury to his reputation); *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (plaintiffs faced "credible threat of real consequences" from potential enforcement of ballot initiative).

The consequences facing MRC if its interpretation of the ACA regulations is wrong are not only severe, they are existential. MRC will cease to exist if, months or years down the road, the Government seeks to impose fines totalling $12,500 per day (indeed, if MRC is wrong, as of the date of the hearing on this motion, MRC would be liable for $450,000 in fines). An organization forced either to violate its sincerely-held religious beliefs or face the possibility of extinction has standing to obtain either a stay of enforcement or a ruling as to whether it falls within an exemption to the vague statutory and regulatory regime that has ensnared it.

II. THE GOVERNMENT'S ARGUMENT THAT MRC'S CLAIM IS NOT YET RIPE, BUT THAT MRC WAITED TOO LONG TO FILE SUIT, IS BOTH SCHIZOPHRENIC AND WITHOUT BASIS IN THE LAW

MRC's filing of the Complaint the day before the regulations went into effect was appropriate. "A motion seeking to enjoin a statute's enforcement before the statute may legally be enforced is timely—or at least not late—by definition." *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011) (holding that filing the day before the statute applied was timely). The fact that MRC could not be liable for fines until the day the regulations went into effect is also relevant to the actual injury or "ripeness" prong of the standing analysis.

The Government's conclusion that "delay alone" eliminates irreparable harm lacks any legal basis. The cases relied upon by the Government, arising out of construction[3], trademark[4] and antitrust disputes[5], stand for the proposition that delay in filing is a factor that may be considered by the court in balancing the harms in determining whether to issue an injunction. *See Quince Orchard Valley*, 872 F.2d at 80 (balancing the harms against an injunction because timing of filing could result in costly disruptions of ongoing public planning and construction which would not have occurred had suit been filed earlier); *see also Ty*, 237 F.3d at 903 (mere delay alone, without any explanation by defendant of why such a delay negatively affected them, would not lessen the claim of irreparable injury). Here, the Government did not argue or offer evidence that the timing of MRC's filing would cause any harm to the Government or the public should an injunction be issued. On the other hand, as acknowledged by the Government (Defs.' Opp'n at 20), "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The

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[3] *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75 (4th Cir. 1989) (construction of four-lane road through state park).

[4] *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 894 (7th Cir. 2001)(Beanie Babies); *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598 (8th Cir. 1999) (half-barrel container for animal block-feed product); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 966 (2d Cir. 1995) (backpacks and child carriers).

[5] *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374 (9th Cir. 1985) (monopolization of newspaper market).

balancing of harms associated with the timing of MRC's filing unquestionably weighs in favor of granting the injunction.

III. MRC PLEADED AND "IDENTIFIED" A FEDERAL CAUSE OF ACTION

The Government contends that MRC "has not identified a federal cause of action" and, therefore, this Court lacks subject matter jurisdiction. Defs.' Opp'n at 18-19. This argument conflates two issues: (1) whether the Court has subject matter jurisdiction (which it clearly does); with (2) whether there is some kind of pleading defect in MRC's declaratory judgment claim.

The Court has subject matter jurisdiction. MRC alleged subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2). Compl. at ¶ 22. A court has jurisdiction under § 1331 when the action "aris[es] under the Constitution, laws, or treaties of the United States." Count II alleges that the Contraception Mandate violates the Establishment Clause of the United States Constitution. Compl. at ¶¶ 87-97. That is plainly a claim arising under the Constitution. Count II, alone, is enough to confer subject matter jurisdiction on this Court for all other claims because 28 U.S.C. § 1367 provides the authority to hear all additional claims that are substantially related to the constitutional claim.

MRC's declaratory judgment claim is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. That is a cause of action arising under the laws of the United States. Moreover, MRC seeks a declaration concerning the scope of a newly promulgated final federal regulation. That count falls within 28 U.S.C. § 1346(a)(2), which provides

jurisdiction over challenges to governmental actions under federal regulations. The case is, thus, replete with subject matter jurisdiction.

The Government argues that a declaratory judgment count is not an independent cause of action, but merely a claim for relief. Defs.' Opp'n at 18-19. That is a slogan, not an argument. MRC interprets the Government's actual argument as contending that nothing alleged by MRC provides a private cause of action to challenge the assessment of fines under the ACA or an advanced determination of that issue. Indeed, the cases cited by the Government, such as *Ormet Corporation v. Ohio Power Company*, 98 F.3d 799, 805 (4th Cir. 1996), address such arguments. The Government's argument, however, is baseless.

The Declaratory Judgment Act provides, in relevant part, that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . ." 28 U.S.C. § 2201(a). The central purpose of a declaratory judgment action is to remove uncertainty and prevent potential injury to the plaintiff unless legal relations are clarified. *Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 398 n.8 (5th Cir. 2003). This is the proper invocation of the Declaratory Judgment Act present in this case.

Judge Ellis provides an excellent discussion of the two leading Supreme Court ripeness cases in *Sigram*, 675 F. Supp. 2d at 636-37. Both of those cases, *Abbott* and *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967), which

were decided the same day, involved actions filed to clarify the scope of different FDA regulations. *Abbott* notes that the Administrative Procedure Act, in particular 5 U.S.C. § 704, authorizes judicial review of agency action reviewable by statute, but also for agency action for which there is no other adequate remedy in court. *Abbott*, 387 U.S. at 140. In neither case did the lack of a private right of action in the applicable regulations prevent consideration of declaratory relief. Rather, the two cases illustrate the distinction between ripe and unripe matters. In *Abbott*, the case was ripe, but in *Gardner* it was not.

Abbott was ripe because the plaintiffs risked serious penalties if the regulation was not clarified. *Id.* at 152-53. This case is indistinguishable from *Abbott*. The ACA regulations impose fines of $100 per day, per plan participant, against organizations who do not comply with the Contraception Mandate. MRC's declaratory judgment claim is a federally-sanctioned means by which this Court is authorized to interpret the scope of a federal regulation, clarify the parties' rights and obligations thereunder, and thereby avoid having to rule on the difficult constitutional question raised in MRC's complaint. It is an especially appropriate procedure here considering that the issue of whether the Contraception Mandate is constitutional as applied against a "for-profit" organization with sincerely-held religious beliefs is currently pending before the Supreme Court. *See Sebelius v. Hobby Lobby Stores, Inc.*, Docket No. 13-354 (argued March 25, 2014).

CONCLUSION

WHEREFORE, for the foregoing reasons, MRC requests that its motion for preliminary injunction be granted.

Dated: May 30, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2014, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to electronic filing to the following:

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