UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MARTIN OZINGA III, MARTIN OZINGA IV, KARL OZINGA, JUSTIN OZINGA, AARON OZINGA, PAUL OZINGA, TIMOTHY OZINGA, JEFFREY OZINGA, and OZINGA BROS., INC, an Illinois corporation,	)	
Plaintiffs,	)	
vs.	)	**No. 1:13-cv-03292**
UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health & Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as the Secretary of the U.S. Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and SETH D. HARRIS, Deputy Secretary of Labor, in his official capacity as Acting Secretary of the U.S. Department of Labor,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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A. Summary of Argument

Ozinga Bros., Inc. is one of the largest ready mix companies in the country. Established in the late 1920's, the company is now owned, controlled and being managed by plaintiffs, eight members of the Ozinga family. The Ozingas all are devout Christians, whose faith now does and always has informed and directed their management of the company.

Plaintiffs all are pro-life and believe sincerely that abortion and abortifacient forms of birth control are wrong and sinful. Alerted by media coverage of other lawsuits defending the rights of the owners of closely held business like their own to manage their businesses consistent with their religious beliefs, the Ozingas examined the coverage they were then providing to their own employees. To their shock and chagrin they discovered that despite what they had been told by their insurance carriers their business too was already providing coverage for abortifacient contraception. Worse, they discovered that as of May 1, 2013 the extent of the coverage was not just going to be maintained but expanded, due to the ever-expanding coverage mandates of the Patient Protection and Affordable Care Act ("ACA").

Having determined that coverage without such abortifacient contraception was no longer going to be available to them under the new health care law, Plaintiffs sued to defend among other things, their First Amendment free exercise rights, as codified by the Religious Freedom Restoration Act ("RFRA").

Individual plaintiffs Martin Ozinga III, Martin Ozinga IV, Karl Ozinga, Justin Ozinga, Aaron Ozinga, Paul Ozinga, Timothy Ozinga, Jeffrey Ozinga, and their company, Ozinga Bros., Inc, an Illinois corporation ("Ozinga Bros.," and with the individual plaintiffs collectively "Plaintiffs"), move for a preliminary injunction against the enforcement of provisions of ACA and related regulations requiring that Ozinga Bros. purchase an employee

health-insurance plan that includes no-cost-sharing coverage for abortion and abortifacient contraception, among other things. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012).

B. Factual Background

1. The facts relevant to this motion cannot reasonably be controverted. Plaintiffs are the owners and senior managers of Ozinga Bros., a Mokena based Illinois close corporation with approximately 450 unionized employees and 200 non-unionized employees. Plaintiffs' Joint Declaration (**Exhibit A**, attached), ¶¶1, 5-7, 10, 22. The unionized employees of Ozinga Bros. obtain their insurance through a collectively bargained for health-insurance plan. Ozinga Bros. provides a group health-insurance plan for the company's nonunion employees. Plaintiffs' Joint Declaration, ¶¶7-8, 36.

2. Plaintiffs all are devout Christians. Plaintiffs' Joint Declaration, ¶¶11-12. The individual plaintiffs each belong to non-denominational Christian churches in and around the region. Plaintiffs seek to manage their company in a manner consistent with their Biblically – based Christian faith, including Scriptures teachings regarding the sanctity of human life. Plaintiffs' Joint Declaration, ¶¶11-19. Plaintiffs' commitment to their Christian faith has meant that Ozinga Bros. pays its employees well above the minimum wage, provide employee health insurance, routinely open and close business meetings at the company with prayer; prominently reflect the importance of their religious beliefs throughout the Company's website, engage in tithing, and advocate for a faith based stewardship of the environment. Plaintiffs' Joint Declaration, ¶¶20-32. As a result of their Christian beliefs, the Plaintiffs also consider themselves Pro-Life and consider it wrong and sinful to involve themselves in any way in the providing of abortion or abortifacient contraception to their employees. *Id*, ¶¶33-35, 43-45.

3. In August 2012, and as a result of media coverage of lawsuits challenging such coverage on First Amendment free exercise grounds, Plaintiffs discovered that the company's current health-insurance plan includes coverage for abortifacient contraception. The plan renewal date is May 1, 2013. Plaintiffs want to terminate this coverage and substitute a health plan (or a plan of self-insurance) that conforms to the requirements of their Christian faith. To date they have been unsuccessful in obtaining such a plan. Plaintiffs' Joint Declaration, ¶¶36-42.

4. The ACA's preventive-care provision and implementing regulations prohibit them from doing so. More specifically, as relevant here, the ACA requires non-grandfathered and non-exempt group health-insurance plans to cover certain preventive health services without cost-sharing, see 42 U.S.C. § 300gg-13(a)(4), and regulations promulgated by the United States Department of Health and Human Services ("HHS") specify that the required coverage must include all FDA-approved contraceptive methods and sterilization procedures, see 77 Fed. Reg. 8725 (Feb. 15, 2012) ("the contraception mandate" or "the Mandate"). Complaint, ¶¶4, 8-12; Plaintiffs' Joint Declaration, ¶¶43—45.

5. The Mandate includes oral contraceptives with abortifacient effect (such as the "morning-after pill") and intrauterine devices. *See* OFFICE OF WOMEN'S HEALTH, FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE 10-12, 16-20 (2012), at http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf. Complaint, ¶¶12; Plaintiffs' Joint Declaration, ¶¶45.

6. The offending Mandate takes effect starting in the first plan year after August 1, 2012. 77 Fed. Reg. 8725-26. For the Ozingas and their company, that date is May 1, 2013. Complaint, ¶¶123; Plaintiffs' Joint Declaration, ¶68.

7. Employers who do not comply are subject to enforcement actions and substantial financial penalties. *See* 29 U.S.C. § 1132(a); 26 U.S.C. § 4980 D(a), (b) ($100 per day per employee for noncompliance with coverage provisions); 26 U.S.C. § 4980H (approximately $2,000 per employee annual tax assessment for noncompliance). The Ozinga's estimate that for Ozinga Bros. any such penalty would be financially ruinous for their company and as a result also for them personally. Complaint, ¶122; Plaintiffs' Joint Declaration, ¶¶67, 75.

8. By this motion, Plaintiffs are seeking declaratory and injunctive relief against the enforcement of the contraception mandate, alleging that it violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1; the First Amendment's Free Exercise, Establishment, and Speech Clauses; the Fifth Amendment's Due Process Clause; and the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 706(2)(A),(D). Complaint, ¶¶192-281.

C. Argument

9. This motion is governed by the "sliding scale" approach. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007). Movants are entitled to the injunction requested here. Plaintiffs have established that they have "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). *See also Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012), cert. denied, No. 12-318, 2012 WL 4050487 (U.S. Nov. 26, 2012).

10. The balance of the applicable equities also favors Plaintiffs here. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992). That the balance of harms

here tips so overwhelmingly in favor of the Plaintiffs renders all the lighter their burden to demonstrate that they will ultimately prevail. *Abbott Labs.*, 971 F.2d at 12. In other words, the sliding-scale approach requires us "simply to weigh [the] harm to a party by the merit of his case." *Cavel*, 500 F.3d at 547.

1. Plaintiffs have established both reasonable likelihood of success and irreparable harm if the government is not enjoined from forcing them to violate, through their control and management of Ozinga Bros., their most deeply held and profound religious beliefs.

11. Plaintiffs have established both a reasonable likelihood of success on the merits and irreparable harm, and that the balance of harms tips in their favor. RFRA prohibits the federal government from imposing a "substantial[] burden [on] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

12. This is the strict-scrutiny test established in *Sherbert v. Verner*, 374 U.S. 398 (1963), for evaluating claims under the Free Exercise Clause. This test was displace momentarily by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), but Congress revived and codified it in RFRA. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006); *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 379 (7th Cir. 2010) (Sykes, J., dissenting).

13. *Sherbert v. Verner*'s test is an exacting standard, and the Government bears the burden of satisfying it. Plaintiffs here contend that the contraception mandate substantially burdens their exercise of religion by requiring them, on pain of substantial financial penalties, to

provide and pay for an employee health plan that includes no-cost-sharing coverage for contraception, sterilization, and related medical services that their Christian faith teaches are gravely immoral and sinful. .

14. The Mandate complained of fails RFRA's strict-scrutiny requirement because the Government's interest in making abortion and abortifacient contraception accessible to those who, it contends, would not otherwise have access to such drugs and procedures, on a cost-free basis, is not sufficiently strong to qualify as compelling. Indeed, coercing the nine religious objectors appearing here as plaintiffs to provide this coverage is not the least restrictive means of achieving the government's objective.

15. The Government's own conduct proves as much, as the government must readily concede that some health plans are either grandfathered or exempt from the Mandate, illustrating that the interest served by the mandate is far from compelling. And just as obviously, the Government has other methods of furthering its interest in free access to contraception without imposing this burden on their religious liberty—for example, by offering tax deductions or credits for the purchase of contraception or incentives to pharmaceutical companies or medical providers to offer the services. *See, e.g.*, 75 Fed. Reg. 41732, wherein the Government estimates that in 2013, 98 million individuals will be enrolled in grandfathered health plans in 2013" which are not subject to the Mandate.

16. Non-profit "religions employers," as defined at 45 C.F.R. §147.130(a)(1)(iv)(B), are also exempt from the Mandate. In addition, employers with fewer than fifty full-time employees have no obligation to provide an employee health plan under the ACA and can bypass the Mandate by not providing a plan. 26 U.S.C. §4980H(c)(A).

17. Typically, the Government responds that because plaintiffs are like those here, a secular, for-profit enterprise, no rights under RFRA are implicated at all. It is now well settled, however, that such a contention necessarily ignores that the individual plaintiffs also are plaintiffs, and that together they own and or/manage and control Ozinga Bros. Ozinga Bros is a family-run business, and the Ozingas manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce.

18. That the Ozingas operate their business in the corporate form is not dispositive of their claims. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342-43, 130 S. Ct. 876 (2010). As the Tenth Circuit Court of Appeals recently and correctly noted:

> It is beyond question that associations—not just individuals—have Free Exercise rights: "An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort towards those ends were also not guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Therefore, courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petitions for redress of grievances, and the *exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensible means of preserving other individual liberties." *Id.* at 618 (emphasis added); *see also Citizens United*, 558 U.S. 310, 342-43 (2010) ("First Amendment protections extend to corporations . . .[, and the Court] has thus rejected the argument that . . . corporations or other associations should be treated differently under the First Amendment simple because such associations are not natural persons." (internal quotation marks omitted)).

Hobby Lobby v. Sebelius , Appeal No. 12-6294, at p. 36-37 (June 27, 2013) (attached hereto as **Exhibit D**)

19. The offending Mandate applies to Ozinga Bros., as an employer of more than 50 employees, and therefore to its owners and managers who, the Government contends, must