IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

SIOUX CHIEF MFG. CO, INC., *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 13-CV-00036-ODS
	)	
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	
	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS'

MOTION FOR PRELIMINARY INJUNCTION.

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INTRODUCTION

This case challenges regulations promulgated by the Department of Health and Human Service (HHS) and others requiring that employers provide "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education counseling for all women with reproductive capacity." 77 Fed. Reg. 8725 (Feb. 15, 2012) ("Mandate"). These regulations were part of the Patient Protection and Affordable Care Act of 2010, and have been subject to much litigation by companies and their shareholders who have religious objections to some or all of the HHS requirements concerning abortifacients[1], contraception, and sterilization. Thus, this Court is not writing on a blank slate.

Indeed, the Eighth Circuit has twice considered similar claims against the HHS regulations brought by similar plaintiffs—religious objectors to the HHS abortifacient, contraception, and sterilization mandate—and has issued preliminary injunctive relief in both instances. *Annex Medical, Inc. v. Kathleen Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *O'Brien v. U.S. Dep't of Health and Human Services*, No. 12-3357 (8th Cir. Nov. 28, 2012). This Court, based in part on *O'Brien*, also issued preliminary injunctive relief against enforcement of the regulations against another company that had religious objections to providing contraception and sterilization coverage for employees. *American Pulverizer Co., v. U.S. Dep't of Health and Human Services*, Case No. 12-CV-3459-RED (W.D.Mo. Dec. 20, 2012).

Although those cases, like this one, raised several claims, the courts needed only to look at the claim brought under the Religious Freedom Restoration Act (RFRA) to issue preliminary injunctive relief. Likewise, Plaintiffs' RFRA claim is dispositive here because the HHS

[1] Abortifacient is defined as a "substance or device used to induce abortion." The American Heritage Dictionary (2009).

regulations impose a substantial burden on Plaintiffs' exercise of religion without furthering a compelling interest by the least restrictive means.

Indeed, pursuant to discussions with Defendants, the Defendants do not oppose entry of a preliminary injunction in this matter, pending the resolution of *O'Brien* and/or *Annex Medical, Inc.* For the reasons explained below, this Court should likewise issue preliminary injunctive relief against enforcement of the Mandate against Plaintiffs.

. FACTS

Plaintiffs Joseph P. Ismert, Dominic Ismert, and Joseph N. Ismert own Sioux Chief Mfg. Co., Inc., a maker of plumbing parts. Verified Complaint, attached as Exhibit A hereto, at ¶ 12. The Ismerts are Catholic. Ex. A at ¶ 2. The Ismerts believe that actions taken by the Company must be consistent with Catholic ethics and morals. Ex. A at ¶ 2. Thus, the Ismerts believe that it would be immoral for them to pay for or facilitate use of abortifacient drugs, contraception, and elective sterilization. Ex. A at ¶ 3.

Sioux Chief has long offered generous health benefits to its workers through a self-insured healthcare plan. Ex. A at ¶ 3. Thus, in the normal course of events, Sioux Chief sets aside funds for the plan, and that money is used to pay for healthcare services.

Consistent with its understanding of its religious, moral and ethical duties as a business enterprise, Sioux Chief has for more than a decade excluded birth control, abortifacient drugs, and elective sterilization from its employee health plan. Ex. A at ¶ 43. This arrangement has well served Sioux Chief and its employees. The company has approximately 370 employees, mostly at its Peculiar, Missouri, facility. Ex. A at ¶ 40.

Defendants, however, have issued regulations that deny Plaintiffs the ability to continue the *status quo*. The regulations force "group health plan[s]" to provide coverage for all FDA-approved contraceptive methods and sterilization procedures as well as patient education and

counseling about those services. 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130 (2011); *see* also 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012) (rule made final).

Thus, Plaintiffs must now choose between (a) complying with the regulations and violating their religious beliefs and (b) being fined or penalized in order to conduct business consistent with their religious beliefs. Covered employers, like Sioux Chief, that fail to provide an employee health insurance plan face annual fines of roughly $2,000 per full-time employee, *see* 26 U.S.C. §§ 4980H(a), (c)(1), and those that fail to provide certain required coverage, such as coverage for abortifacients, contraception, and sterilization, may be subject to an assessment of $100 a day per employee. *See* 26 U.S.C. § 4980D(b)(1).

Many other employers have been granted exemptions to these regulations. Small businesses with fewer than 50 employees are exempt. 26 U.S.C. § 4980H(c)(2)(A). Plans covering approximately 85 million employees have been granted a limited "grandfather" exemption, *see* 75 Fed. Reg. 41726, 41731 (July 19, 2010); however Sioux Chief's plan does not meet these requirements. Ex. A at ¶¶ 78 - 81. Also, certain tax-exempt religious organizations have been exempted, 45 C.F.R. § 147.130(a)(iv)(B), but Sioux Chief is not tax-exempt and does not meet the Government's definition of "religious employer." Ex. A at ¶ 87.

Sioux Chief's current health plan renews on April 1, 2013, at which time the Mandate requires that the Company provide abortifacients, contraception, and sterilization coverage or face the Mandate's crippling sanctions. Ex. A at ¶ 89. However, Sioux Chief's owners must make choices concerning this renewal prior to April 1, 2013, and they wish to communicate openly with employees. If healthcare coverage cannot be provided to employees, Plaintiffs seek to give those employees opportunity to seek new coverage, which may be necessary without an injunction. *Id*.

ARGUMENT

Whether a court should issue a preliminary injunction rests on "a flexible consideration of 1) the threat of irreparable harm to the moving party; 2) balancing this harm with any injury an injunction would inflict on other interested parties; 3) the probability that the moving party would succeed on the merits; and 3) the effect on the public interest." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012). "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. *Dataphase Sys., Inc. v. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "In balancing the equities no single factor is determinative." *Id.*

Sioux Chief meets this standard. The Eighth Circuit has twice-found for plaintiffs under similar facts, as has this Court. *See Annex Medical, Inc.*, Slip Op. at *5. The Eight Circuit recently re-affirmed that plaintiffs presenting a RFRA claim like Sioux Chief's "satisfied the prerequisites for an injunction pending appeal, including a sufficient likelihood of success on the merits and irreparable harm." *Annex Medical, Inc.*, Slip Op. at *5; *see also American Pulverizer Co.*, Slip Op. at * 1 (noting that the Eighth Circuit's decision in *O'Brien v. Dep't of Health and Human Services* "established precedent that on facts similar to those presented in *O'Brien*, Plaintiffs are likely to succeed on the merits").

I. Plaintiffs Face Irreparable Harm Without a Preliminary Injunction Staying Enforcement of the HHS Mandate.

As this Court noted in *American Pulverizer*, Plaintiffs seeking a preliminary injunction "must 'demonstrate that irreparable injury is *likely* in the absence of an injunction.'" *American Pulverizer Co*, Slip Op. at 4 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). Sioux Chief seeks to continue offering employees generous insurance benefits from its self-

insured plan, which renews April 1, 2013. But because the HHS Mandate requires that Sioux Chief's plan, upon reneweal, cover contraception, sterilization, abortifacients, and counseling for the same, it will either have to violate its beliefs and comply or face the Mandate's crippling penalties. Thus, "Plaintiffs have adequately established that they will suffer imminent irreparable harm absent injunctive relief." *Id.* at * 5; *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"). "Accordingly, this factor favors the Court's entry of injunctive relief." *American Pulverizer*, Slip Op at *4.

II. An Injunction Will Not Inflict Harm To Interested Parties.

In other cases, Defendants have argued that because Congress found that the HHS mandate is in the public interest, this factor should weigh in the government's favor. But as this Court noted when it rejected that argument, "[t]his injury hardly compares to the injury that Plaintiffs will sustain if this Court does not enter Plaintiffs' Motion for Preliminary Injunction." *American Pulverizer*, Slip Op. at * 5; *see also Newland v. Sebelius*, No. 1:12-CV-1123-JLK (D. Colo. July 27, 2012) ("This harm [in preventing enforcement of regulations] pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights.").

Sioux Chief thus easily satisfies this prong as well.

A. Protecting Sioux Chief's Constitutional and Statutory Rights Is In the Public Interest.

Protecting the rights at issue in this case is plainly in the public interest. The importance of First Amendment freedoms and laws protecting religious liberty are paramount. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) (Noting that our Country was "founded by religious refugees and dedicated to religious freedom"). Thus, "it

is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).

Any argument by Defendants that it is in the public interest for the government to require Sioux Chief to provide contraception to its employees is "undermined by the fact that the [Affordable Care Act] contains numerous exemptions." *American Pulverizer*, Slip Op. at *5.

This factor therefore also supports the Court's entry of a preliminary injunction.

III. Sioux Chief's Claims Have a High Probability of Success on the Merits.

As the Eighth Circuit has already found, plaintiffs presenting similar facts and similar claims to those in *O'Brien* can show a high probability of success on the merits and should be granted a preliminary injunction. *Annex Medical Co.*, Slip Op. at *5-6; *accord American Pulverizer Co.*, Slip Op. at *1 (*O'Brien* "established precedent that on facts similar to those presented in *O'Brien*, Plaintiffs are likely to succeed on merits.")

Here, the facts are in all relevant respects the same as *O'Brien*, and therefore Sioux Chief should be granted a preliminary injunction. "The plaintiffs in *O'Brien*, a for-profit corporation with more than 50 employees and its managing member, complained that the [ACA] statute and [HHS] regulations violated their rights under RFRA. The plaintiffs argued that the law forced them to choose between violating their religious beliefs by purchasing a group health plan and paying large fines for failure to comply with the statute." *Annex Medical Co.*, Slip Op. at *3. The *O'Brien* appellants argued, and the Eighth Circuit necessarily found, that each of the factors for success on the merits of their RFRA claim was met. *Id.* at 4-5.

The elements of Sioux Chief's RFRA claim are likewise necessarily met. RFRA provides:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(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.[2] In short, RFRA adopts a strict scrutiny standard against the federal government's substantial burden of religious exercise that Congress found to have been curtailed in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006); *Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011). Thus, to trigger RFRA's protections, Sioux Chief must show that a federal policy or action substantially burdens their sincerely held religious beliefs. *United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012).

A. The Mandate Imposes A Substantial Burden On Plaintiffs' Exercise of Religion.

The government's action "imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in religious belief of the party asserting the claim." *Ali*, 682 F.3d at 710. (citation and quotation omitted). For example, in *Sherbert v. Verner*, the Court held that a state's denial of unemployment benefits to a Seventh-

[2] Sioux Chief is a legal "person" that can assert the rights of its owners. *See Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (Corporation enjoys first amendment rights); *U.S. v. Lee*, 455 U.S. 252 (1982) (addressing free exercise claim of for-profit corporation); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (owners assert free-exercise rights through corporation). Nonetheless, Sioux Chief's shareholders are also plaintiffs in this case asserting their own rights.

Day Adventist, whose religious beliefs prohibited her from working on Saturday, substantially burdened her exercise of religion. The regulation

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

374 U.S. 398, 404 (1963). Also, in *Wisconsin v. Yoder*, the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. For their violation the parents "were fined the sum of $5 each." 406 U.S. 205, 208 (1972). The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

Plaintiffs here face a direct and inescapable burden. Under the Mandate, they must either provide coverage for abortion-inducing drugs, contraception, and sterilization, which is contrary to their faith, or suffer severe penalties. This is an archetypal burden: to "make unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Mandate is a "fine imposed against [Plaintiffs] for" their religious practice, *Sherbert*, 374 U.S. at 404, and requires Plaintiffs "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Thus, the Mandate bears "direct responsibility" for placing "substantial pressure" on Plaintiffs to offer a health plan that violates their religious and ethical beliefs, rendering their sincerely-held and deeply-rooted religious exercise—refraining from immoral acts and operating Sioux Chief Industries in a manner consistent with their faith—effectively impracticable.

Defendants themselves have expressly acknowledged the burden that the Mandate imposes upon religious exercise. Recognizing that providing insurance coverage of contraceptive and sterilization services would conflict with "the religious beliefs of certain religious employers," Defendants have granted a wholesale exemption for a class of employers (*e.g.*, churches and their auxiliaries) from complying with the Mandate. 76 Fed. Reg. 46621, 46623; 77 Fed. Reg. 8725. In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and is sponsored by a *non-profit* organization that meets certain criteria.[3] During the time of this temporary safe harbor, Defendants will refrain from enforcing the Mandate against qualifying entities, thereby providing such entities with the basic equivalent of the injunction that Sioux Chief seeks here. Defendants were also entertaining "for-profit religious employers with [religious] objections should be considered as well," *id.* at 16504, thus underscoring the government's acknowledgment that the Mandate even burdens the religious exercise of some for-profit corporations and their owners.

B. Because the Mandate Imposes a Substantial Burden, RFRA imposes strict scrutiny.

RFRA, with "the strict scrutiny test it adopted," *Gonzales*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Quaring v. Peterson*, 728

[3] Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Jan. 9, 2013).

F.2d 1121, 1126 (8th Cir. 1984), and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945). And under RFRA, "the compelling interest of a challenged law must be evaluated with respect to the particular claimant whose religious exercise is substantially burdened." *Olsen v. Mukasey*, 541 F.3d 827, 831 (8th Cir. 2008).

i) The government lacks a compelling interest as to Plaintiffs.

Defendants have proffered two compelling governmental interests for the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8729. What radically undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests is the massive number of employees and participants, tens of millions in fact, for whom the government has voluntarily decided to omit what they call a compelling need to protect health and equality. *See Newland*, 2012 WL 3069154 at *23; *Tyndale House Publishers v. Kathleen Sebelius, et al.*, 2012 WL 5817323 at *17 (D.D.C. Nov. 16, 2012). "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Defendants cannot explain how their interests can be compelling against Sioux Chief when, by the government's own choice in not applying this Mandate to grandfathered plans, nearly 200 million Americans will not receive the Mandate's benefits, including most large health plans of comparable size or bigger than Sioux Chief's. The Mandate also does not apply to plans meeting the religious exemption.

The government itself has granted the equivalent of a preliminary injunction to additional non-profit companies satisfying the one-year non-enforcement "safe harbor," so that their employees too are omitted from the Mandate's allegedly compelling benefits. And small

employers are not faced with a Mandate penalty if they are able to avoid the Mandate by dropping insurance coverage entirely. Because there is little that is uniform about the Mandate, as demonstrated by the massive number of employees that are untouched by it, this is not an instance where there is "a need for uniformity [that] precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436.

Notably, the Affordable Care Act does impose multiple requirements on grandfathered health plans, but the government has decided that this Mandate is not of a high enough order to be imposed. The preventive services Mandate, listed at § 2713 of PPACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. *See* list at 75 Fed. Reg. 34538, 34542. These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions and annual or lifetime limits. Thus Congress itself has deemed that many interests are of the "highest order" to impose on 2/3 of the nation covered in grandfathered plans, but not this Mandate. (The statutory text of § 2713 does not even mention contraception.) It is therefore necessarily true that Congress deemed the Mandate to be of a lower order, which fails the compelling interest standard. The government cannot demonstrate a compelling need to require Plaintiffs to comply with a Mandate that it has chosen not to apply to millions of employees nationwide. As in *O Centro*, where government exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception for the [hundreds] or so" implicated by plaintiffs here. 546 U.S. at 433.

Finally, the government cannot satisfy the compelling interest prong by asserting its interests generically ("health" and "equality"). *O Centro*, 546 U.S. at 431 (in analyzing asserted compelling interests, courts "look[] beyond broadly formulated interests justifying the general

applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants"). Nor can it fail to offer compelling *evidence* that grave harm will be caused by exempting Plaintiffs. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–39 (2011) (the government must "specifically identify an 'actual problem' in need of solving," show that coercing the plaintiff is "actually necessary to the solution," show a "caus[al]" nexus, "bear[] the risk of uncertainty" and avoid "ambiguous proof"). Generic evidence that contraception benefits women does not prove that this particular Mandate is needed against religious objectors. Indeed, despite 28 similar state mandates, the government has cited zero evidence—not one study—showing that even a single state mandate yielded health and equality benefits, much less that one did so more than "marginal[ly]." *See id.* at 2741.

ii) The Mandate is not the least restrictive means of achieving any interest.

The Mandate is also not the least restrictive means of furthering the cited interests. If Defendants wish to further the interests of health and equality by means of free access to contraceptive services, Defendants could do so in a myriad of ways without coercing Plaintiffs in violation of their religious exercise. For example, the government could offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, provide these services to citizens itself, or provide incentives for pharmaceutical companies to provide such products free of charge. The government *already* subsidizes contraception extensively.[4] In *Riley v. National Federation of the Blind*, 487 U.S. 781, 799–800 (1988), the

[4] *See, e.g.,* 42 U.S.C. § 300, *et seq*. (Family Planning grants); the Teenage Pregnancy Prevention Program, Pub. Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. §

Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective to achieve the goal.

Each of these options would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. Indeed, of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Plaintiffs. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

Thus, Plaintiffs have shown a likelihood of success on the merits on their RFRA claim, and the Court should grant the motion for a preliminary injunction, in accord with the Eight Circuit's decisions. *Annex Medical, Inc.*, Slip Op. at *5.

No bond is necessary, as Defendants will not sustain any costs or damages if they are enjoined or restrained. No bond has been required in similar cases, *see Am. Pulverizer Co. v. HHS*, 12-cv-03459-RED, Doc. 38 (granting preliminary injunction) and there is no reason that this injunction would impose concrete economic damages on Defendants. *See e.g., In re*

711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, *et seq*.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

President Casinos, 360 B.R. 262 (8th. Cir. BAP 2007) ("A court is not required to order a bond to protect a party from economic damages that are speculative.").

CONCLUSION

Because the Plaintiffs have shown that they are currently suffering irreparable harm, that they are likely to succeed on the merits of their claims, that the balance of harms favors the Plaintiffs, and that no harm to the public interest would result from the issuance of the relief requested, this Court should grant Plaintiffs' motion for a Preliminary Injunction against Defendants' requirement that Plaintiffs comply with the mandates at issue in this suit.

Respectfully submitted,

s/ Jonathan R. Whitehead

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