IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PRIESTS FOR LIFE,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

HILDA SOLIS, in her official capacity as Secretary, United States Department of Labor;

UNITED STATES DEPARTMENT OF LABOR;

TIMOTHY GEITHNER, in his official capacity as Secretary, United States Department of the Treasury; and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 1:12-cv-00753-FB-RER

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

Hon. Frederic Block

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INTRODUCTION

Plaintiff Priests for Life ("Plaintiff"), through counsel, hereby replies in support of its motion for a temporary restraining order / preliminary injunction, which seeks to preliminarily enjoin (*and thus maintain the status quo between the parties*) the federal government's unlawful mandate, which compels Plaintiff to provide access to contraceptive coverage to its employees in direct violation of Plaintiff's sincerely held religious beliefs. This mandate becomes effective for Plaintiff in January 2013, (Jones Decl. at ¶ 14 [Doc. No. 20-1]), not January 2014, as Defendants erroneously claim, (Defs.' Opp'n at 14 [incorrectly stating that Plaintiff's claim of irreparable harm "rest[s] entirely on plaintiff's speculation that the regulations will apply to them in their current form come January 2014"]).

Defendants object to Plaintiff's motion by advancing what is plainly a duplicitous and contradictory argument. On one hand, Defendants argue that Plaintiff lacks standing because the government has adopted its own, non-binding stay of enforcement of the mandate (*i.e.*, "temporary enforcement safe harbor") for some qualifying religious organizations, which, according to Defendants, includes Plaintiff, based on the government's alleged concern for religious freedom that will be addressed by some future and yet unknown rule.[1] (*See* Defs.' Opp'n at 12-13 & 11, n.5 [claiming that "defendants have initiated a rulemaking process to

[1] The government's claim that it will adopt a new rule in the future to protect religious freedom is rank speculation, at best (at worse, it is a transparent tactic to sideline this litigation and the negative publicity surrounding the mandate during the election cycle). Indeed, the government's claim that it is concerned about religious freedom is belied by its own stated objectives and the goals of the mandate. (*See* 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (objecting to expanding the exemption to include other religious employers or employers who oppose contraception based on their sincerely held religious beliefs and stating that this "would subject their employees to the religious views of the employer, limiting access to contraceptives, thereby inhibiting the use of contraceptive services and the benefits of preventive care"). Moreover, the government had *every* opportunity to provide a meaningful religious exemption when it first promulgated the mandate, and yet it refused to do so. To say that Plaintiff is skeptical of the government's concern for its religious freedom in the context of this mandate is an understatement. As demonstrated in Plaintiff's memorandum in support of its motion and further here, the harm to Plaintiff by the government's mandate is real and imminent, while Defendants' promise of a new rule is entirely speculative (and, when viewed objectively and reasonably, quite unbelievable).

amend the challenged regulations to accommodate the precise religious liberty concerns plaintiff raises here," but also stating that "[t]he accommodations defendants are considering are not constitutionally or statutorily required" (emphasis added)]). And on the other hand, Defendants strenuously object to Plaintiff's request for a preliminary injunction (which would, in effect, be a binding stay of the enforcement of the contraception mandate, thereby protecting Plaintiff's fundamental rights pending the government *fulfilling* its promise to adopt a new rule that *actually* respects religious freedom, and thus maintaining the *status quo*), arguing that the mandate imposes no burden on Plaintiff's religious beliefs and that, nonetheless, the government has a compelling interest for the burden. (*See* Defs.' Opp'n at 13-25). In short, Defendants' concern for Plaintiff's "religious liberty" is the same today as it was the day the mandate was created, which is to say, there is none.

Defendants also claim that every court to have considered their jurisdictional arguments has ruled in its favor. (Defs.' Opp'n at 1 [citing cases]). However, that assertion assumes that the cases cited by Defendants are factually similar to this one—an incorrect assumption. Moreover, not only have federal courts exercised their jurisdiction to decide cases challenging the contraception mandate where the plaintiff does not qualify for the safe harbor provision, two federal courts (Michigan and Colorado) have already granted preliminary injunctions—the very same relief requested in this case. *Legatus v. Sebelius*, No. 12-cv-12061, 2012 U.S. Dist. LEXIS 156144, at *44 (E.D. Mich. Oct. 31, 2012) (granting a preliminary injunction enjoining the enforcement of the contraception mandate); *Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012) (same).

In the final analysis, Defendants' arguments are factually and legally without merit. Plaintiff has standing to challenge the contraception mandate, which imposes a substantial

burden on Plaintiff's religious beliefs. Plaintiff's challenge is ripe in that it will be subject to the mandate in less than two months. Plaintiff has demonstrated a likelihood of succeeding on its claims under the Religious Freedom Restoration Act and the Free Exercise Clause. And Plaintiff satisfies the remaining factors,[2] compelling this court to *immediately* and preliminarily enjoin the contraception mandate, thereby maintaining the *status quo* until either (1) a ruling on the merits or (2) Defendants fulfill their promise to provide a meaningful exemption from the mandate that protects Plaintiff's right to the free exercise of religion—a right that is protected by federal law and enshrined in the First Amendment.

ARGUMENT

I. Plaintiff Has Standing to Challenge the Contraception Mandate, and this Challenge Is Ripe for Review.

Defendants' entire standing and ripeness argument is premised on their *disbelief* that Plaintiff does not qualify for the temporary enforcement safe harbor provision. (*See* Defs.' Opp'n at 1, 12-13). However, Defendants' *lack of faith* does not mean that there is a *lack of facts* to support Plaintiff's claim. As Defendants concede, in order to qualify for the government's non-binding, self-imposed stay of the contraception mandate pending the promulgation of some promised rule in the future,[3] a party must "meet[] all of the following criteria":

(1) The organization is organized and operates as a non-profit entity.

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[2] Defendants make the erroneous claim that "Plaintiff incorrectly suggests that the four requirements for a preliminary injunction are not prerequisites to be satisfied but rather factors to be weighed in the exercise of the Court's discretion." (Defs.' Opp'n at 12, n.6). Indeed, a simple reading of Plaintiff's memorandum reveals that Plaintiff *first* cites the standard for a temporary restraining order / preliminary injunction set forth in a case decided by *this* court *in March 2012*, *see Landers v. Samuelson*, No. 12-CV-703 (DLI) (LB), 2012 U.S. Dist. LEXIS 30922, at *5 (E.D.N.Y. Mar. 8, 2012), and then cites the standard set forth in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), stating that "Plaintiff will use [the *Winter*] standard in its analysis." Plaintiff then proceeds to apply all four requirements. (Pl.'s Mem. at 10-22). Consequently, Defendants' argument is, once again, incorrect.

[3] Nowhere do Defendants argue—let alone present evidence—that this new rule will be completed and enforced in time for Plaintiff to make a meaningful decision regarding its healthcare coverage well prior to January 1, 2013, the start of its new plan year. (*See* Jones Decl. at ¶¶ 14-20 [Doc. No. 20-1]).

> (2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable state law, because of the religious beliefs of the organization.
>
> (3) The group health plan sponsored by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
>
> (4) The organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribed procedures.

(Defs.' Opp'n at 9). If a party does not meet all of the requirements and demands of this government regulation, then it does not qualify for the temporary enforcement safe harbor provision and must therefore comply with the contraception mandate the first plan year that begins after August 12, 2012. (*See* Defs.' Opp'n at 9). For Plaintiff, that is January 2013. (Jones Decl. at ¶ 14 [Doc. No. 20-1]).

As the *evidence* before this court demonstrates, Plaintiff does not qualify for this provision and will not self-certify that it does. To do so, would violate federal law. *See, e.g.*, 18 U.S.C. § 1001 (making false statement to a government agency). Defendants can complain all they want about "invit[ing]" Plaintiff "to explain what happened prior to February 10, 2012," (*see* Defs.' Opp'n at 1), but that explanation was provided in a declaration submitted in this case, (*see* Jones Decl. at ¶¶ 9-14 [Doc. No. 20-1]). Moreover, Plaintiff has stated quite clearly that it will not provide any notice to its employees regarding contraception coverage nor will it self-certify that it meets the requirements of this provision.[4] (Jones Decl. at ¶ 12 [Doc. No. 20-1]).

[4] Plaintiff further contends that this "temporary enforcement safe harbor" provision and the requirements it imposes is itself an improper intrusion by the government into the affairs of a religious organization.

There is nothing more to be said.[5] Plaintiff does not meet the government's requirements or demands to qualify for the temporary enforcement safe harbor.[6] Period.

Consequently, Plaintiff has standing because it has alleged a "personal injury" that is "fairly traceable" to the contraception mandate and is "likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984)*; see also Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (stating that there was "no question that petitioners have sufficient standing" to challenge a regulation that would require "changes in their everyday business practices").

Moreover, this case is ripe for review. *Abbott Labs.*, 387 U.S. at 149 ("The [ripeness] problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."). It presents a pure legal question. *Id.* at 149 (finding the issues appropriate for judicial resolution because "the issue tendered is a purely legal one"). And withholding review would cause a hardship to Plaintiff in that it is faced with the dilemma of complying with a government mandate that violates its sincerely held religious beliefs or dropping its healthcare coverage and suffering the consequences. *Marchi v. Bd. of Coop Educ. Servs.*, 173 F.3d 469, 478 (2d Cir. 1999) ("In assessing the possible hardship to the parties resulting from withholding judicial resolution, we ask whether the challenged action creates a direct and immediate dilemma for the parties.").

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[5] In fact, Defendants can check their own files to see that they do not have a copy of a self-certification form from Plaintiff, nor will they receive one. Moreover, the certification form itself states quite explicitly, "*Failure to provide the requisite notice to plan participants renders a group health plan* ***ineligible*** *for the temporary enforcement safe harbor*." http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Nov. 9, 2012) (emphasis added). As stated here and in the declaration of Ms. Jones, Plaintiff has not provided such notice, nor will it. (Jones Decl. at ¶ 12 [Doc. No. 20-1]). Indeed, this is Defendants' rule; they should be required to follow it and accept its consequences.

[6] Defendants' unwillingness to enter into a stipulated injunction (*i.e.*, *binding* order from this court and not some temporary stay made up by the government that subjects a party to the government's demands) is strong evidence that Defendants are not sincere about providing a meaningful "safe harbor" for those who have religious objections to the government's unlawful mandate.

Finally, it is worth noting that Defendants claim that "[t]he accommodations defendants are considering are not constitutionally or statutorily required." (Defs.' Opp'n at 11, n. 5). This is a tacit admission that there is *nothing*, aside from a court order, that would prohibit Defendants from returning to its old ways after this long-anticipated new rule is promulgated. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (holding that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case"); *Tiffany Inc. v. eBay, Inc*., 576 F. Supp. 2d 463, 499 (S.D.N.Y. 2008) (same); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (same). As the Supreme Court noted, not only is a defendant "free to return to his old ways," *but also the public has an interest "in having the legality of the practices settled*." *W. T. Grant Co.*, 345 U.S. at 632 (emphasis added).

In sum, the constitutionality of the contraception mandate needs to be decided, and it needs to be decided now, regardless of any future rule that Defendants admit is not binding.

II. Plaintiff Has Satisfied the Requirements for Injunctive Relief.

In the First Amendment context, the often dispositive factor in determining whether a party is entitled to a TRO / preliminary injunction is whether the party requesting the injunction has established a likelihood of succeeding on the merits. (*See* Defs.' Opp'n at 23, n. 9 [stating that the *Legatus* "court appropriately recognized that, with respect to First Amendment and RFRA claims, the likelihood of success on the merits and irreparable harm prongs of the preliminary injunction analysis merge"]). Indeed, once the party has established a likelihood of succeeding on the merits, irreparable harm follows as a matter of law. *See, Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (finding irreparable harm based on the plaintiff's substantial likelihood of demonstrating a violation of his right to the free exercise of religion under RFRA); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury."). Consequently, Defendants' claim that Plaintiff has failed to establish irreparable harm in this case is factually and legally incorrect. (*See* Defs.' Opp'n at 13). Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Thus, Defendants' anemic public interest argument must be rejected as well. (*See* Defs.' Opp'n at 14).

III. Plaintiff Has Established a Likelihood of Succeeding on the Merits.

Plaintiff's claims arising under the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA") are obviously related, and they were more fully addressed in Plaintiff's memorandum filed in support of its motion. (*See* Pl.'s Mem. at 11-20). Suffice it to say, demonstrating a likelihood of success on either claim is sufficient for this court to grant the requested injunction. Consequently, since RFRA applies to all federal laws that burden religion, even those that are neutral and of general applicability,[7] Plaintiff will focus its reply on this claim. *See* 42 U.S.C. § 2000bb-1(a) (stating that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability").

As an initial matter, it is unclear whether Defendants question the fact that Plaintiff's objection to the contraception mandate is grounded in its sincerely held religious beliefs, which prohibit providing access to contraception, sterilization, and abortifacients. Based on Defendants' arguments regarding the "substantial burden" factor and their lengthy quotations from the decision in *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476 (CEJ), 2012 U.S. Dist. LEXIS 140097, (E.D. Mo. Sept. 28, 21012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012), which was incorrectly decided and, at a minimum, distinguishable from this

[7] As demonstrated in Plaintiff's memorandum in support of its motion, the contraception mandate is not a neutral law of general applicability. (Pl.'s Mem. at 14-17). Consequently, Plaintiff's free exercise claim is not foreclosed by *Emp't Div. v. Smith*, 494 U.S. 872 (1990). (*See* Pl.'s Mem. at 14-17).

case, (*see* Defs.' Opp'n at 14-16), it appears that Defendants do not accept the sincerity of Plaintiff's beliefs and urge this court to do the same. However, to do so would be incorrect as a matter of law. *Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs.") (internal quotations and citation omitted); *Jolly*, 76 F.3d at 476 ("Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature."). As the Second Circuit warned in *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985), courts must be vigilant to "avoid any test that might turn on the factfinder's own idea of what a religion should resemble."

A close reading of the *O'Brien* decision makes clear that despite the judge's claim that she did not question the sincerity of the plaintiffs' religious beliefs, *O'Brien*, 2012 U.S. Dist. LEXIS 140097, at *14, she clearly had little regard for these beliefs and thus failed to see (and, indeed, appeared incapable of seeing) that by *forcing* plaintiffs to provide access to practices that are immoral and in direct contravention to their beliefs, the government is imposing a "substantial burden" on their religion. Indeed, why should a person *receive* unemployment benefits who does not want to work at a roll foundry that produced armaments, *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), or on Saturdays, *Sherbert v. Verner*, 374 U.S. 398 (1963)? The government is not "demand[ing] that [these individuals] alter their behavior in a manner that will directly and inevitably prevent [them] from acting in accordance with their religious beliefs." *O'Brien*, 2012 U.S. Dist. LEXIS 140097, at *18. By not *receiving* unemployment benefits, the plaintiffs in *Thomas* and *Sherbert* are "not prevented from keeping the Sabbath," nor are they being forced to work at a place that produces armaments. *See id*. at *19. In short, the standard applied by the court in *O'Brien* is wrong. And it is wrong precisely

because the judge substituted her view as to what a religion should and should not proscribe with the plaintiffs' view of their own religious beliefs and what they require. As the U.S. Supreme Court acknowledged in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), "[*I*]*indirect* coercion or penalties on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment." (emphasis added). Consequently, under RFRA, Plaintiff need not show that the government is forcing it "to alter [its] behavior in a manner that will directly and inevitably prevent [it] from acting in accordance with [its] religious beliefs," as the *O'Brien* court incorrectly held. Rather, "indirect coercion" is enough.

As the facts in this case demonstrate, by *compelling* (*i.e.*, mandating) Plaintiff to provide a healthcare plan that provides access to (and, indeed, subsidizes and affirmatively promotes) immoral practices—a burden upon a belief that is central to Plaintiff's religious doctrine—the government's coercion is "direct." As such, it is a "substantial burden" under RFRA. *Alameen v. Coughlin*, 892 F. Supp. 440, 448 (E.D.N.Y. 1995) (stating that "to impose a substantial burden, government interference . . . must burden a belief central to a plaintiff's religious doctrine"); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) ("[W]e will assume that undoing May's dreadlocks imposes a substantial burden on his exercise of Rastafarianism.").

Because Plaintiff has shown that the contraception mandate imposes a "substantial burden" upon its religious beliefs, Defendants must now justify the burden with affirmative evidence that the contraception mandate "(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(b). In other words, the mandate must survive strict scrutiny.

Defendants' broad and sweeping claims regarding "public health and gender equality" (*see* Defs.' Opp'n at 16-22), however, do not satisfy the "rigorous scrutiny" required here. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (stating that a law that impermissibly burdens a religious practice "must undergo the most rigorous scrutiny"). Moreover, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006).

Defendants insist that they won't impose the mandate against Plaintiff if Plaintiff is simply willing to certify falsely that it qualifies for the "safe harbor" provision. This plainly undermines any argument that Defendants have a compelling interest to impose the mandate *against Plaintiff*. Also, Defendants claim that Plaintiff's employees are "significantly disadvantaged" if they have to purchase contraceptives themselves such that this satisfies the "rigorous" standard of review. (Defs.' Opp'n at 18). Yet, previously Defendants argued that the mandate does not impose a substantial burden because the regulation has "no more of an impact on [Plaintiff's] religious beliefs than the employer's payment of salaries to its employees, which those employees can also use to purchase contraceptives." (Defs.' Opp'n at 16) (emphasis added). Once again, Defendants demonstrate that the government's interests *in forcing Plaintiff to provide contraception coverage* are not compelling.

CONCLUSION

Plaintiff hereby requests that the court grant its motion and issue the requested temporary restraining order / preliminary injunction, enjoining the enforcement of the contraception mandate pending resolution of the merits of this case and thereby maintaining the *status quo*.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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