IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 3:12-cv-459 JD
ALEX M. AZAR II, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION AND DECLARATORY RELIEF

In this case, Plaintiffs Grace Schools and Biola University challenge a federal mandate that requires them to choose between violating their religious beliefs about the sanctity of human life and paying millions of dollars in annual fines. Defendants have admitted that imposing the mandate on religious objectors to this mandate violates the Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb *et seq.* Therefore, this Court should issue a permanent injunction and declaratory judgment in the Plaintiffs' favor pursuant to Fed. R. Civ. P. 65 and 28 U.S.C. § 2201.

BACKGROUND

A. The Affordable Care Act and the HHS Mandate

The Affordable Care Act requires some[1] group health plans to provide coverage to women for "preventive care and screenings," among other things. 42 U.S.C. § 300gg-13(a). The U.S. Department of Health and Human Services (HHS) interpreted this to include all FDA-approved

[1] The mandate does not apply to "grandfathered" health plans. 42 U.S.C. § 18011 (2010).

contraceptive methods, including those that sometimes work by causing the demise of very young human beings. *See* http://www.hrsa.gov/womensguidelines (Aug. 1, 2011); *see also* 77 Fed. Reg. 8725 (Feb. 15, 2012).

Although HHS and the other Defendant agencies acknowledged that forcing plan sponsors to cover abortifacients could violate their consciences, they exempted only a relatively small subset of conscientious objectors: churches, conventions or associations of churches, religious orders, and their integrated auxiliaries. 45 C.F.R. § 147.131(a).[2] The government gave other religious objectors (including Grace Schools and Biola University) an alternate means of complying with the mandate, speculating that it might satisfy their concerns. Under the so-called "accommodation," plan sponsors communicate their objection to their insurers or third-party administrators, who consequently provide the objectionable items to beneficiaries through employer's plan. 26 C.F.R. § 54.9815-2713A (Department of the Treasury); 29 C.F.R. § 2590.715-2713A (Department of Labor); 45 C.F.R. § 147.131(b) (Department of Health and Human Services).[3]

With respect to scores of religious objectors, including Grace Schools and Biola University, the government's speculation about the moral acceptability of the accommodation was incorrect. Plaintiffs concluded that obeying the mandate via the accommodation's alternative compliance mechanism would constitute morally culpable cooperation with immoral acts,

[2] The category of plan sponsors exempt from the Mandate was drawn in part, oddly enough, from an Internal Revenue Code provision exempting some non-profits from the obligation to file informational tax returns (Form 990s). *See* 26 U.S.C. § 6033(a)(1) and (a)(3)(i) or (iii). The Defendant Departments have subsequently conceded the insufficiency of the rationale underlying this choice. 82 Fed. Reg. 47792, 47802.

[3] The citations are to regulations that were superseded by the October 2017 Interim Final Rules (IFRs) discussed *infra*. When the IFRs were preliminarily enjoined, the cited versions of the rules became operative again.

something forbidden by their religious convictions. *See* Pls. Comp., Dkt. No. 1, ¶¶ 2-3, 109-11, 120-23. They thus faced a choice. They could either follow their religious beliefs and incur unsustainable financial penalties,[4] or violate their religious beliefs by providing access to life-destroying drugs and devices. Confronted by this untenable situation, Plaintiffs sought judicial relief.

B. This Lawsuit

Plaintiffs filed this challenge to the mandate in August 2012, seeking injunctive and declaratory relief. Dkt. No. 1. This Court preliminarily enjoined application of the mandate to the Plaintiffs' employee and student health plans, concluding that such application likely violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and that preliminary relief was otherwise warranted. Dkt. No. 90. The government appealed, Dkt. No. 91, and the Seventh Circuit reversed, reasoning that the mandate did not "substantially burden" the Plaintiffs' religious exercise under RFRA. *Grace Sch. v. Burwell*, 801 F.3d 788 (7th Cir. 2015), *cert. granted, judgment vacated sub nom. Diocese of Fort Wayne-S. Bend, Inc. v. Burwell*, 136 S. Ct. 2010 (2016), *and cert. granted, judgment vacated Grace Schs. v. Burwell*, 136 S. Ct. 2011 (2016).

The Supreme Court granted six certiorari petitions in related cases. 136 S. Ct. 445 (2015). After the parties submitted briefs, presented oral argument, and filed two rounds of supplemental briefs, the Supreme Court declined to decide the consolidated cases. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Instead, it vacated the underlying appellate decisions and remanded to the Courts of Appeals so that the parties could be "afforded an opportunity to arrive at an approach going

[4] If Plaintiffs excluded the objectionable drugs and devices from their health plans, they would incur fines of $100 per affected beneficiary per day. 26 U.S.C. § 4980D(b)(1). If they dropped their employee health plan to avoid violating their religious beliefs about the sanctity of life, they would incur fines of $2000 per employee per year. 26 U.S.C. § 4980H(c)(1).

forward" that would satisfy their respective concerns. *Id*. at 1560. The Court declared that "the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice" that initiates the accommodation process. *Id*. at 1561.

The Court subsequently granted the federal government's petition for a writ of certiorari in this case, vacated the Seventh Circuit's decision, and remanded the case back to the Court of Appeals in light of the Court's decision in *Zubik*. *Grace Sch. v. Burwell*, 136 S. Ct. 2011 (2016).

C. The October 2017 Interim Final Rules

Following the 2016 election, the government revisited its approach to objecting plan sponsors. On May 4, 2017, President Trump issued an Executive Order entitled "Promoting Free Speech and Religious Liberty." Section 3 of that order, entitled "Conscience Protections with Respect to Preventive-Care Mandate," instructed the Departments to "consider issuing amended regulations . . . to address conscience-based objections" to the challenged mandate. Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

On October 6, 2017, the Defendant Departments issued Interim Final Rules (IFRs) expanding protections for objecting organizations. 82 Fed. Reg. 47792 (Oct. 13, 2017). The Departments concluded that requiring objecting religious organizations to comply with the mandate through the accommodation's alternate mechanism "constituted a substantial burden on the religious exercise of many" religious organizations. *Id*. at 47806. The Departments determined that requiring compliance—with or without the accommodation—"did not serve a compelling interest and was not the least restrictive means of serving a compelling interest." *Id*. They thus concluded that "requiring such compliance led to the violation of RFRA in many instances." *Id*. In order to genuinely accommodate religious organizations' objections, the Departments expanded

the "religious employer" exemption from the mandate to include "all bona fide religious objectors." *Id*.

At least eight lawsuits have been filed challenging the IFRs, claiming that the new regulations violate the Administrative Procedure Act (APA) and the Constitution. On December 15, 2017, the United States District Court for the Eastern District of Pennsylvania preliminarily enjoined the expanded religious exemption on the ground that the Departments likely violated the APA by issuing the rules and making them immediately effective without prior notice and comment. *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017). The Northern District of California did likewise. *California v. HHS*, 281 F. Supp. 3d 806 (N.D. Cal. 2017).[5]

Both courts indicated that their rulings should not impact existing litigation challenging the mandate, leaving this Court the freedom to rule in this case. *Pennsylvania*, at 585; *California* at 832; *see also* Opinion denying motion to intervene, *Pennsylvania v. Trump*, No. 2:17-cv-4540, 2017 WL 6206133 (E.D. Pa. Dec. 8, 2017) (denying intervention to religious objector in challenge to IFR in part because intervenor "has the option of seeking recourse through its own lawsuit . . . which, while currently stayed, remains open").

ARGUMENT

In deciding whether to grant a permanent injunction, a court must consider: (1) whether the plaintiff has "*in fact* succeeded on the merits," "(2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the

[5] The U.S. District Court for the District of Massachusetts dismissed a substantially identical challenge to the IFRs on the ground that the plaintiff lacked standing to sue. *Massachusetts v. United States Dep't of Health & Human Servs.*, No. CV 17-11930-NMG, 2018 WL 1257762, at *1 (D. Mass. Mar. 12, 2018).

defendant; and (4) whether the granting of the injunction will harm the public interest." *Plummer v. Am. Inst. of Certified Pub. Accountants*, 97 F.3d 220, 229 (7th Cir. 1996) (emphasis in original) (internal citations omitted).

Declaratory relief "does not share injunctive relief's requirement of irreparable harm" and may be issued in order to "clarify the relations between the parties and eliminate the legal uncertainties that gave rise to this litigation." *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992); *see also* Wright, Miller & Cooper, 13C *Federal Prac. & Proc. Juris.* § 3533.5 (3d ed.).

Plaintiffs are entitled to a permanent injunction and declaratory judgment because there is no longer any doubt that they have succeeded on the merits of their RFRA claim. Defendants have conceded in the preamble to the IFR discussed above and in similar litigation that challengers like Plaintiffs have succeeded on the merits of their RFRA claims. 82 Fed. Reg. 47792, 47806; *Wheaton Coll. v. Hargan*, No. 1:13-cv-8910, Dkt. No. 117, at 1 (N.D. Ill. Feb. 1, 2018) (Defs.' Resp. to Pl.'s Mot. for Permanent Inj. and Decl. Relief) ("The Government has concluded that requiring employers with sincerely held religious objections to comply with the Mandate or the accommodation process would violate RFRA."); *Reaching Souls Int'l v. Azar*, No. 5:13-cv-1092-D, Dkt. No. 93, at 1-2 (W.D. Okla. Mar. 5, 2018) *Geneva Col. v. Azar*, No. 2:12-cv-207-JFC, Dkt. No. 146, at 1 (W.D. Pa. April 10, 2018) .

In granting the Plaintiffs' preliminary injunction motion, this Court has already concluded that they will suffer irreparable harm without an injunction and that an injunction is not inconsistent with the public interest. Dkt. No. 46, at 6-7. The relevant circumstances have not changed, and there is thus no warrant to revisit these conclusions. Defendants have conceded that exempting plans sponsors like Plaintiffs will not inflict significant injury on them or other parties. 82 Fed. Reg. 47792, 47802 ("the Government's interest in ensuring contraceptive coverage for

employees of particular objecting employers is undermined by the characteristics of many of those employers, especially nonprofit employers"), 47803-47806 (available evidence undermines previous conclusion that Mandate advances the government's stated interests).

Other federal district courts have awarded permanent injunctions and declaratory relief in substantively identical cases. *See Wheaton Coll. v. Azar*, No. 1:13-cv-8910, Dkt. No. 119 (N.D. Ill. Feb. 22, 2018); *Catholic Benefits Ass'n v. Hargan*, Nos. Civ-14-240-R and Civ-14-684-R, Dkt. No. 184 (W.D. Okla. Mar. 7, 2018); *Reaching Souls Int'l v. Azar*, No. CIV-13-1092-D, Dkt. No. 95 (W.D. Okla. Mar. 15, 2018); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092-DDN, Dkt. No. 160 (E.D. Mo. Mar. 28, 2018).

CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that this Court grant their motion, enter a permanent injunction, and issue declaratory judgment. Through counsel, Plaintiffs have contemporaneously filed a proposed order.

Respectfully submitted this 19th day of April, 2018.

s/ Gregory S. Baylor
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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2018, I electronically filed a copy of the foregoing Motion for Permanent Injunction and Declaratory Relief. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ Gregory S. Baylor
Gregory S. Baylor