UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

ANNEX MEDICAL, INC.; **STUART LIND**, and **TOM JANAS** *Plaintiffs*, *v.* **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services; **HILDA SOLIS**, in her official capacity as Secretary of the United States Department of Labor; **TIMOTHY GEITHNER**, in his official capacity as Secretary of the United States Department of the Treasury; **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR;** and **UNITED STATES DEPARTMENT OF THE TREASURY**, *Defendants*.	Civ. No. 12-cv-02804-DSD-SER **MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

Background

On November 2, 2012, Annex Medical, Inc. and Stuart Lind (together, "Lind"), along with plaintiff Tom Janas, filed a Verified Complaint ("VC"), alleging the Mandate violated the Religious Freedom Restoration Act ("RFRA), the First Amendment to the United States Constitution, and the Administrative Procedures Act. (Doc. 1.) On November 21, 2012, Lind moved for a preliminary injunction on his claim that the Mandate violates RFRA. (Doc. 7.) On January 8, 2013, this Court denied Lind's motion for a preliminary injunction. (Doc. 37, hereafter "the Order".) On January 11, 2013, Lind

filed a Notice of Appeal of the January 8th Order. Lind now asks this Court to enjoin the Mandate pending his appeal of the Order.

Argument

Rule 8(a)(1) of the Federal Rules of Appellate Procedure provides that "[a] party must ordinarily move first in the district court for … (C) an order … granting an injunction while an appeal is pending."

The injunction pending appeal standard is identical to the preliminary injunction standard. *Shrink Missouri Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). The "issuance of a preliminary injunction depends upon 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 (4) the effect on the public interest." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) ("*MCCL*") (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1991) (en banc)). "When a Plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *MCCL*, 692 F.3d at 870 (internal citations and quotations omitted). Lind satisfies all four of the injunctive relief factors.

I. Lind is Likely to Succeed on Appeal on His RFRA Claim.

A. Defendants Have Acknowledged that the Eighth Circuit's Order in *O'Brien v. United States HHS* is Tantamount to a Preliminary Injunction.

This Court found that it was "uncertain of how to interpret the Eighth Circuit's treatment of *O'Brien*." (Doc. 37 at 13 n.8.) Because the "*O'Brien* panel did not provide a rationale for its decision," this Court found that it could not "interpret the stay pending appeal as indicating a likelihood of success on the merits." (*Id*. at 9-10.) Therefore, this Court found it necessary to engage in an independent analysis of Lind's claims, ultimately denying his request for injunctive relief based largely on the reasoning of the lower court in *O'Brien*. (*Id*. at 10-11.)

Before this Court, Defendants argued that the Eighth Circuit's order in *O'Brien v. United States HHS*, 2012 U.S. App. LEXIS 26633 (8th Cir. Mo. Nov. 28, 2012) did not mean that the *O'Brien* appellants had been issued a preliminary injunction pending appeal. Defendants contended that the Eighth Circuit "may merely have been staying enforcement of the judgment of the district court pending appeal," (Doc. 37 at 9), an argument this Court accepted.

Yet, on December 19, 2012, at oral argument (held telephonically) in a substantially similar challenge to the Mandate in the Western District of Missouri—*American Pulverizer v. HHS*, No. 12-cv-3459 (W.D. Mo., filed Oct. 12, 2012)—Michelle Bennett, counsel for Defendants in that case, acknowledged that the Eighth Circuit's Order in *O'Brien* means that the *O'Brien* Appellants have been granted a preliminary injunction pending appeal.

THE COURT: Now, I see, you know, plaintiff in that case—let's talk about the O'Brien case for a little bit—you were seeking a preliminary injunction and the Court dismissed your case. [1]

MR. MANION: Right.

THE COURT: Then you filed a motion for preliminary injunction—let me get it right here—but with the Court of Appeals. It seems like you were requesting them to enter a preliminary injunction.

MR. MANION: That's correct.

THE COURT: And then they issue an order for a stay pending appeal. Now, did they—do you all have agreement on that? Did they essentially issue the preliminary injunction or is this kind of an alternative status here?

MR. MANION: Well, the plaintiffs think it's a preliminary injunction, Judge. When you look at the Eighth Circuit docket, it links to what it was they were granting. What it was they were granting was appellant's motion for a preliminary injunction pending appeal. So even though it's styled on the docket as a motion for a stay, what they actually say they are granting is the only thing that was before them which was the motion for preliminary injunction pending appeal.

THE COURT: Well, I'm looking at the order where it just says appellant's motion for stay. So you take it that they just misstated?

MR. MANION: Your Honor, there was no motion for a stay.

THE COURT: Okay. And the motion is granted. What do defendants say about that?

MS. BENNETT: Your Honor, that's our understanding as well. The issue that was briefed was whether to preliminary enjoin the regulations pending the appeal. It might just be that the Eighth Circuit calls those stays. I'm not really sure. But it is our understanding that the effect of that ruling is –

THE COURT: Preliminary injunction.

MS. BENNETT: Yes, pending the appeal.

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[1] Counsel for the plaintiffs in *American Pulverizer*, the American Center for Law and Justice, is also counsel for plaintiffs in *O'Brien*.

Transcript of Teleconference at 2-4, *American Pulverizer v. HHS*, No. 12-cv-3459 (W.D. Mo., Dec. 19, 2012) (Attached as Exhibit A to Declaration of Erick G. Kaardal).

Counsel for Defendants' concession makes sense when one considers the relief sought by the *O'Brien* appellants and the text of the Eighth Circuit's order. After their claims were dismissed by the district court, the *O'Brien* plaintiffs appealed the decision on the merits and filed a "MOTION FOR A PRELIMINARY INJUNCTION PENDING APPEAL" in the Eighth Circuit, in which they argued that they had satisfied the preliminary injunction factors on their RFRA claim alone. *O'Brien v. United States HHS*, No. 12-3357, Doc. 14 (8th Cir., docketed Oct. 4, 2012). While this Court correctly notes that the Eighth Circuit described the appellants' motion as a "stay pending appeal" in its Order, the court was clear that it was granting the "Appellants' motion," which, as explained, requested injunctive relief pending appeal on the grounds that appellants satisfied the preliminary injunction factors on their RFRA claim. Had the Eighth Circuit believed that the *O'Brien* appellants had failed to meet their burden for a preliminary injunction, there would have been no basis to grant the appellants' motion.

By Defendants' admission, the *O'Brien* Order means the appellants in that case were granted an injunction pending appeal.[2] It also means that the *O'Brien* district court's RFRA analysis has been called into question. As the parties are similarly situated, *O'Brien* counsels strongly in favor of an injunction pending appeal in this matter.

[2] As noted, the Seventh Circuit Court of Appeals also interprets the Eighth Circuit's Order in *O'Brien* to mean the Mandate is enjoined pending appeal. *Korte v. Sebelius*, 2012 U.S. App. LEXIS 26734, *10 (7th Cir. Ill. Dec. 28, 2012).

B. Lind Has Satisfied the Requirements for an Injunction Pending Appeal.

Lind is likely to succeed on his RFRA claim because the Mandate substantially burdens his exercise of religion, but fails strict scrutiny. 42 U.S.C. §§ 2000bb-9(a); 2000bb-1(b). The Mandate affirmatively compels Lind to pay for insurance coverage that violates his sincerely-held religious beliefs. (VC ¶¶ 49-50, 55) If Lind does not offer this coverage, he will face substantial monetary penalties and potentially, lawsuits. 26 U.S.C. § 4980D; 29 U.S.C. § 1132(a). Lind's "alternative" is to drop insurance altogether, which will cause him to violate his religiously-held duty to provide for his employees. (VC ¶ 58.) These are direct and substantial burdens on Lind's exercise of religion. *See Thomas v. Review Board*, 450 U.S. 707, 718 (1981) (substantial burden exists where law "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (substantial burden exists where a regulation "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a person's individual religious beliefs").

Lind's religious objections do not depend on someone else's decision to use the contraceptive products and services the Mandate requires Lind's insurance plan to cover. As the Seventh Circuit recognized, "[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Korte*, 2012 U.S. App. LEXIS 26734 at *10. Therefore, it is irrelevant to the substantial burden analysis that Lind remains free to refrain from using contraception himself or discourage his employees to do likewise. Of

course, the Mandate does not force anyone to *use* contraception, but it clearly forces Lind to directly subsidize it in violation if his religious beliefs.

The Mandate imposes these "substantial burdens," but fails strict scrutiny in violation of RFRA. Defendants cannot have a compelling interest in forcing Lind to violate his religious beliefs when they have voluntarily exempted millions of people from providing women's preventive care. *See, e.g.*, *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, *2 (D. Colo. July 27, 2012) (*citing* 75 Fed. Reg. 34538, 34550 (June 17, 2010)) (estimating 191 million people qualify for "grandfathered" health plans that are exempt from the Mandate). Defendants' have also exempted Lind, as an employer with fewer than fifty employees, 26 U.S.C. § 4980H(a), from complying with the Mandate, making it all the more unlikely the government could show a compelling interest in forcing Lind's compliance with the Mandate. Defendants' asserted interests are generic and abstract, and therefore insufficient to carry its burden under strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

Defendants have also failed to show the Mandate is the least restrictive means to further its interests. Notably, Defendants do not explain why the government cannot provide contraception and abortifactients directly to the small number of employees whose employers exclude this coverage for religious reasons. Defendants currently subsidize free contraception through Title X funding and Medicaid. There is no reason Defendants cannot subsidize the same coverage for women working for exempted employers.

The remaining injunctive relief factors weigh in favor of Lind. As this Court noted, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (Doc. 37 at 14-15 (quoting *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008)).) Thus, when First Amendment freedoms are infringed, the Eighth Circuit "view[s] the balance clearly in favor of issuing the injunction" because irreparable harm occurs otherwise. *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999). Defendants will face no harm from being prevented from enforcing the Mandate against Annex Medical, a business the Defendants chose to exempt from the requirement to provide health insurance altogether. On the other hand, absent relief, Lind will be forced to discontinue Annex Medical's health insurance plan, forcing him to neglect his duty to provide for his employees. Lastly, because Lind has demonstrated likely merits success, the public interest favors an injunction. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).

Conclusion

For the foregoing reasons, Annex Medical and Stuart Lind request this court to enter an injunction pending their appeal of this Court's January 8th Order.

Respectfully submitted this 11th day of January, 2013.

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