UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEGATUS; WEINGARTZ SUPPLY COMPANY; and DANIEL WEINGARTZ, President of Weingartz Supply Company,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.
_____/

Case No. 2:12-cv-12061
Honorable Robert Cleland
United States District Judge
Magistrate Judge Michael Hluchaniuk
United States Magistrate Judge

ATTORNEY GENERAL BILL SCHUETTE'S AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF INTEREST OF AMICUS CURIAE ATTORNEY GENERAL

The Michigan Constitution provides for the protection of religious worship, and also protects the religious liberty of Michigan citizens by guaranteeing that "[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." Mich. Const. art I, § 4.

The claim here was filed by Michigan residents Legatus, Weingartz Supply Company, and Daniel Weingartz, who claim that the HHS Mandate violates their religious liberty under the Religious Freedom Restoration Act and the First Amendment by requiring them to provide certain products and services in their insurance plans over their religious objections. Although the claims are not based on Michigan law, the principle of religious freedom is one of the central values in Michigan law and it implicates the role of the Attorney General, who is the chief legal officer for the State. Consistent with this role, the Attorney General is authorized by Michigan law, Mich. Comp. Law § 14.28, to safeguard the interests of the people of the State when in his judgment this is necessary.

In the view of the Attorney General, the HHS Mandate is a substantial burden as applied against the religious practice of these plaintiffs and others like them under RFRA, and there is no compelling interest that justifies this violation. There also are other less restrictive means by which this may be achieved.

The Amicus Curiae Brief of the State of Michigan prepared by the Attorney General is being filed pursuant to Fed. R. Civ. Pro. 7.

INTRODUCTION

> "Nothing is more dreaded than the national government meddling with religion."
>
> John Adams (letter to Benjamin Rush, June 12, 1812)

Congress enacted the Religious Freedom Restoration Act (RFRA) in response to *Employment Division v. Smith,* 494 U.S. 872 (1990), which effectively immunized virtually any statute of general applicability from constitutional challenge. RFRA's purpose was to restore a system of legal analysis to the First Amendment that would provide closer scrutiny to government's actions that substantially burden Americans' religious liberty. RFRA's reinvigorated understanding of religious liberty is directly relevant here.

Plaintiffs have religious objections to the HHS Mandate's requirement that plaintiffs provide certain reproductive products and services, including early abortion-inducing drugs, in the insurance plans to their employees, contrary to the unambiguous teachings of the Catholic Church. Legatus is a Catholic organization composed of Catholic business persons and seeks to educate its members about the Catholic faith. Weingartz Supply Company (with Daniel Weingartz as its president) is a family-owned business that is run consistent with Catholic principles. Each corporation has designed its health insurance policies with Blue Cross/Blue Shield to exclude contraceptives and other services that violate Plaintiffs' religious principles. The HHS Mandate requiring Plaintiffs to provide reproductive products and services substantially burdens these principles under RFRA.

The United States Government lacks a compelling interest justifying this burden on Plaintiffs or on other businesses that have equally-held religious objections to the HHS Mandate. The Act includes several significant exceptions, the most significant of which is the one that exempts health-insurance plans formed before March 23, 2012. The United States cannot contend that the mandate must be applied to all businesses without exception, and to Plaintiffs in particular, when more than 190 million plan participants are already exempted by the grandfathering provision. The only court that has examined this issue has preliminarily rejected the claim of the United States that its interest is compelling.

Given the considerable merits of the plaintiffs' RFRA claim, the United States is forced to reach for an alternative argument: that RFRA applies only to businesses that are religious in nature and does not apply to secular ones. But this is not so. There is nothing in RFRA that limits its application to businesses that sell religious goods or are operated by a church. A business may be (and often is) animated by religious principles, even if the tasks it performs are secular in nature. This is true whether it is the Weingartz Supply Company selling outdoor power equipment, a Jewish-owned deli that does not sell non-Kosher foods, a Muslim-owned financial brokerage that will not lend money for interest, or a hotel chain owned by religious persons that will not carry pornographic broadcasting.

The insidious effect of the United States Government's argument is to push religious beliefs expressed by the ordinary person or business out of the public square. Religious liberty cannot be confined to the sanctuary and sacristy. Such a

truncated view of religion threatens to create a barren public culture, denuded of the religious beliefs of ordinary American citizens. This is an important principle, and it applies to all Americans and to all faiths. Plaintiffs' motion for preliminary injunction should be granted.

ARGUMENT

I. The HHS mandate requiring Legatus and Weingartz Supply Company to cover contraception and related services violates their religious liberty under RFRA.

Under RFRA, Congress has provided for the protection of a person's free exercise of religion even from laws of "general applicability":

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]

42 U.S.C. § 2000bb-1(a). The only exception to this rule is when the government can prove that the burden (1) "is in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling interest." *Id.*

RFRA's purpose was to return to the constitutional standards governing the First Amendment before the decision in *Smith,* 494 U.S. 872 (1990), which "virtually eliminated the requirement that the government justify burdens on religious exercise without compelling justification." 42 U.S.C. § 2000bb(a). Accord *Cutter v. Wilkinson,* 423 F.3d 579, 582 (6th Cir. 2005). RFRA codified the "compelling interest" standard for laws of general application that substantially burdened the free exercise of religion. As RFRA itself explains, its purposes are:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205

> (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

There are three points the Attorney General wishes to advance in this *amicus*: (1) that the HHS Mandate imposes a substantial burden on Plaintiffs' free exercise of religion; (2) there are no compelling reasons to apply the mandate to Plaintiffs and other similarly-situated persons, particularly where there are less restrictive means by which the United States could accomplish the objective of guaranteeing access to reproductive services; and (3) the argument that limits the application of RFRA and the First Amendment to religious businesses – as opposed to secular businesses – violates RFRA's terms. This third argument is the one the Attorney General wishes to emphasize given its importance to all Michigan citizens, regardless of religious faith.

A. The HHS mandate to provide contraception imposes a substantial burden on Plaintiffs' free exercise of religion.

There is no dispute that the plaintiff businesses, Legatus and Weingartz Supply Company, and the individual plaintiff, Daniel Weingartz as president of Weingart Supply Company, have built their employees' health-insurance plans on Catholic principles. In specific, both Legatus and Weingartz Supply have designed a health insurance plan with Blue Cross/Blue Shield of Michigan that specifically excludes contraception, abortion, and other services because these things would conflict with the teachings of the Catholic Church. (Compl., ¶¶ 65, 82.)

The teachings of the Catholic Church against contraception and abortion are clear. See "Married Love and the Gift of Life," approved November 2006 by the United States Conference of Catholic Bishops.[1] See also *Humanae Vitae,* encyclical of Pope Paul VI, released on July 25, 1968.[2] And the courts generally defer to the official statements of religious organizations regarding their doctrines and disciplines. See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 113 (1952) ("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them") (internal quotes omitted). This is because "[r]eligion . . . must be left to the conviction and conscience" of the person. *People v. DeJonge,* 442 Mich 266, 282; 501 N.W.2d 127 (1993).

The fact that the federal mandate at issue – requiring employers to provide contraception and other services in their insurance plans – is a rule of general applicability does not shield it from strict scrutiny under RFRA. That is the entire reason why Congress passed RFRA in the first instance. "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2).

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[1] This document may be found online on the website of the USCCB at http://usccb.org/beliefs-and-teachings/what-we-believe/love-and-sexuality/married-love-and-the-gift-of-life.cfm (last visited on September 25, 2012).

[2] The encyclical is available on the Vatican's website at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (last visited September 25, 2012).

The two cases that RFRA cites in its text, *Sherbert*, 374 U.S. 398 (1963) and *Yoder*, 406 U.S. 205 (1972), each examined state laws of general applicability. In *Sherbert,* the Supreme Court determined that the South Carolina law that disqualified a Seventh Day Adventist, who refused to work on Saturdays, from unemployment benefits had to yield to her free exercise of her religion. *Sherbert,* 374 U.S. at 410. Even though this was an "incidental burden" i.e., an unintended effect, the State was still required to come forward with a compelling interest to justify it. *Id.* at 403. The same was true in *Yoder*, where the obligation of Wisconsin law was for children to have compulsory education through age 16. *Yoder,* 406 U.S. at 207. The Court determined that this statute proved to be an unconstitutional burden on Amish children, and therefore was "beyond the power of the State to control, even under regulations of general applicability." *Id.* at 220.

RFRA's general standards for determining whether there is a "substantial burden" on a person's exercise of religion also come from *Sherbert* and *Yoder*. The "disqualification for benefits" in *Sherbert* was a substantial burden on the plaintiff's exercise of her religion because she was forced to choose between work and following the precepts of her religion:

> The ruling forces 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.

Sherbert, 374 U.S. at 404. The same is true here. The HHS Mandate requires Legatus and Weingartz Supply Company either to abandon their commitment to

Catholic principles or otherwise face a yearly fine of $2,000 *per employee* for failing to provide health insurance for contraceptive (including early abortion-inducing drugs) and other services.

Likewise in *Yoder,* the Supreme Court determined that the requirement for Amish children to attend compulsory second education would substantially interfere with their religious development by exposing them to "worldly influences." *Yoder,* 406 U.S. at 218. In short, it would "contravene[] the basic religious tenets and practices of the Amish faith." *Id.* Again, the same is true here. The provision of contraception contravenes the basic religious tenets and practices of the Catholic Church.

Although there are distinctions between the businesses here and the individuals that were at issue in *Sherbert* and *Yoder,* the only court to have examined this RFRA claim for a private business and its family owners granted the preliminary injunction. See *Newland v. Sebelius,* ___ F. Supp. 2d ___, 2012 WL 3069154 (D. Colo. July 27, 2012). The district court did not resolve the legal issue on whether there was a substantial burden, but concluded that the issue required "more deliberate investigation":

> These arguments pose difficult questions of first impression. Can a corporation exercise religion? Should a closely-held subchapter-s corporation owned and operated by a small group of individuals professing adherence to uniform religious beliefs be treated differently than a publicly held corporation owned and operated by a group of stakeholders with diverse religious beliefs? Is it possible to "pierce the veil" and disregard the corporate form in this context? What is the significance of the pass-through taxation applicable to subchapter-s corporations as it pertains to this analysis? These questions merit more deliberate investigation.

Newland, 2012 WL 3069154, *6. The court then went ahead and granted the preliminary injunction. The same can be said for the small businesses here, each of which professes to operate according to the parameters as established by the faith of their owners.

The United States Government argues that Weingartz Supply Company cannot complain about the burden imposed on it because it "elected to organize itself as a secular, for-profit entity and to enter commercial activity[.]" (United States, Opposition to Motion, p. 20.) This argument misunderstands the proper inquiry for whether there is a substantial burden on a person's right to free exercise under RFRA. A person does not lose his right to free exercise of religion by engaging in action in the public sphere. In specific, the case on which the United States cites to support its claim, *United States v. Lee,* 455 U.S. 252, 257 (1982), only confirms Plaintiffs' argument.

In *Lee,* the Supreme Court examined whether the Social Security tax imposed an unconstitutional burden on the Amish, and the Court concluded that because "the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* at 257.[3] The Court ultimately determined that the Government's interest were compelling. *Id.* at 260. Although the right to the free exercise of religion had to yield, there was nevertheless a substantial burden imposed on the Amish community.

[3] Plaintiffs persuasively identify the United States Government's error on this point. (Plaintiffs' Reply, p. 6.)

The danger of the United States' error here is that it suggests that protections for religious liberty only apply as a category to the private realm and never the public one. The case in point to demonstrate this mistake is Adell Sherbert. She was fired because she would not work on Saturday and refused unemployment benefits for the same reason. *Sherbert,* 374 U.S. at 401. In contrast to the Amish community in *Lee,* the State in *Sherbert* had to yield because it could not demonstrate a compelling interest in enforcing this law against her. This was so even though Ms. Sherbert was not engaged in a religious occupation. The Supreme Court's holding in *Sherbert* illustrates that an individual citizen need not leave her religious convictions at the corporate door.

B. The United States does not have a compelling interest in applying this mandate to Plaintiffs, particularly where there are less restrictive means by which it may achieve this end.

In *O Centro*, the Supreme Court outlined the proper analytical framework for determining whether there is a compelling governmental interest that justifies a substantial burden on a person's religious liberty. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006). The Court was careful to note that this examination requires an inquiry into whether there is a compelling interest to apply the government mandate to the "particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro,* 546 U.S. at 431. This narrowing of the inquiry damages the United States Government's claim here where there is no dispute that the HHS Mandate already contains multiple exemptions: (1) a narrow exemption for religious organizations, (2) an exception for

employers with fewer than 50 employees, and (3) a grandfathering provision that exempts more than 190 million health plan participants. See *Newland,* 2012 WL 3069154, *7 ("this massive exemption [for grandfathered plans] completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs").

The United States's position–that the HHS Mandate requires national uniformity–cannot withstand strict scrutiny. Even excluding the grandfathering exemption on which the *Newland* court relied, the other exceptions demonstrate the lack of compelling nature in the Government's claim.

The exception for religious organizations governs "religious employers" that primarily inculcate the religious belief of the religious organization, employ primarily persons who share the tenets of the religious group, and serve persons who share that religious faith. 45 C.F.R. § 147.130(A), (B). Just within the Catholic Church, this exception applies to more than 15,000 parishes. Center for Applied Research (CARA) of Georgetown University, "Frequently Requested Church Statistics."[4]

As for the exemption regarding plans with fewer than 50 employees, the 2007 economic census (compiled every five years) indicates that there were more than 20 million paid employees at firms nationwide with fewer than 20 employees. See Table 2b "Employment Size of Employer and Nonemployer Firms, 2007."[5] In other

[4] This report may be found at the CARA website: http://cara.georgetown.edu/CARAServices/requestedchurchstats.html (last visited September 25, 2012).
[5] This United States Census Bureau document may be found at: http://www.census.gov/econ/smallbus.html (last visited on September 25, 2012).

words, there are tens of millions of U.S. employees who are specifically exempted from this federal mandate, not even counting the 190 million plan participants subject to the "grandfather" exemption.

These exemptions defeat the Government's claim that the federal mandate must be imposed on all other businesses, including Plaintiffs. In *O Centro,* the Court examined whether the United States violated RFRA by applying the federal Controlled Substances Act to a religious sect that used a plant that contains a hallucinogen in its communion as a sacramental tea. *O Centro,* 546 U.S. at 423. The compelling interest that the United States Government put forward was "the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id.* (emphasis in original). The Court rejected this argument, concluding that the Act itself contemplated exceptions, since the Attorney General was authorized to grant "waiv[ers]" where consistent with the public health and safety. *Id.* at 432.

The same reasoning applies here. The number of employees affected by exempting Plaintiffs and other similarly-situated businesses would be small in comparison to the exemptions already provided to employers with fewer than 50 employees. The claim that there can be no exceptions to this rule – even where it burdens the free exercise of religion – rings hollow. This is particularly true if this Court limited its examination to merely these Plaintiffs, as the Supreme Court in *O Centro* indicated should be done.

Equally important, there are other less restrictive means that the United States Government could have chosen. As Plaintiffs noted on page 18 of their opening brief, the United States itself could provide access to these contraceptive and other services. The district court in *Newland* delineated this same point about the various ways in which the Government could directly provide this benefit: "creation of a contraception insurance plan with free enrollment, direct compensation of contraception and sterilization providers, creation of a tax credit or deduction for contraceptive purchases, or imposition of a mandate on the contraception manufacturing industry to give its items away for free." *Newland,* 2012 WL 3069154, *7.

The United States argues that such an approach would "impose considerable new costs and other burdens" on the government and therefore was "impractical." (United States, Opposition to Motion, pp. 32-33.) But the district court in *Newland* rejected this same argument for reasons that are equally applicable here:

> Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women. Once again, the current existence of analogous programs heavily weighs against such an argument.

Newland, 2012 WL 3069154, *8. At a bare minimum, any "impracticality" of such a government program is outweighed heavily by the violation of Plaintiffs' religious liberty.

C. RFRA applies to businesses that operate according to religious principles even if they are not operated by a religious organization.

Given RFRA's plain application to the HHS Mandate and the United States' inability to satisfy RFRA's stringent test, the United States is left to argue that RFRA protects only *religious* organizations, not secular, for-profit corporations. (United States, Motion in Opposition, p. 18.) This is a significant claim, one the law does not support.

There is no dispute that First Amendment protection for speech and association applies equally to religious and secular organizations. This point was confirmed recently by the Supreme Court's decision in *Citizens United v. Federal Election Commission,* 558 U.S. 310; 130 S. Ct. 876, 900 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). Indeed, the analysis on which the Supreme Court based its decision in *Citizens United* excludes the Government's claim that secular business fall outside the purview of the First Amendment's religious protections:

> Freedom of speech *and the other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 (1978) (citations omitted; emphasis added).

Consistent with *Belloti,* if a corporation is protected as a person under the First Amendment, it follows that a corporation would be a "person" under 42 U.S.C. § 2000bb-1 of RFRA. See 42 U.S.C. § 2000bb(a) (stating that RFRA secures the federal test for protections for the First Amendment before the *Smith* decision). But see *Holy Land Foundation for Relief and Development v. Ashcroft,* 333 F.3d 156, 167 (D.C. Cir. 2003) (reserving the question but casting doubt on whether a non-profit corporation was a "person" within meaning of RFRA). And on this point, the First Amendment does not distinguish between its protection of the free exercise of religion and its protection of free speech between organizations and individuals or between religious corporations and secular ones.

The one case on which the United States relies does not support its contention. It cites *Hosanna-Tabor* for the point that the First Amendment provides "special solicitude" for religious organizations. *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission,* 132 S.Ct. 694, 706 (2012). But the corollary to this point is *not* that non-religious organizations are excluded from the purview of the First Amendment, but rather that such organizations are covered by it, only they are not given the same level of protection, i.e., they are not accorded this "special" solicitude.

And this conclusion that secular businesses, particularly a family-owned one, would have its right to religious liberty protected under RFRA and the First Amendment comports with common sense. On a basic level, a corporation is a group formed to achieve a particular mission and is comprised of natural persons.

As demonstrated by Legatus and the Weingartz Supply Company, these associations may establish religious principles on which to operate their business even if their mission is secular in nature. The example here are businesses rooted in Catholic principles, but the same points would equally apply for a secular organization that adhered to specific doctrines of Judaism, Islam, or a different Christian church. It is easy to envision a family-owned business that would not wish to endorse non-Kosher foods, collect interest on debt, or sell pornography.[6]

This misguided effort to circumscribe religious liberty to only religious organizations is similar to confining religious practice to worship, as if religious principles should not animate a corporation – or a person – in public and commercial life. It is akin to the error that suggests that only priests or ministers should express religious views. But this is a misunderstanding of religion and religious freedom. It is the right of the ordinary person.

Because Legatus and Weingartz Supply Company have demonstrated such a burden on their religious exercise, this Court should grant their preliminary injunction.

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[6] The position of the United States appears motivated by the fear that a rule that allows a non-religious will subject a "host of laws and regulations" to attack. (United States, Motion in Opposition, p. 19.) But while the ability of a secular organization to demonstrate a substantial burden may prove to be more difficult, it is not categorically excluded. As in *Lee,* in contrast to here, where there is a compelling justification for uniform application and no other means to achieve the end, the government's position will prevail.

CONCLUSION AND RELIEF SOUGHT

The Attorney General asks that this Court grant Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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Dated: September 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I electronically filed the foregoing papers with the Clerk of the Court using ECF system which will send notification of such filing to the following:

HONORABLE ROBERT CLELAND
MAGISTRATE JUDGE MICHAEL HLUCHANIUK
ERIN MANCUSO, ATTORNEY FOR PLAINTIFFS
ETHAN DAVIS, ATTORNEY FOR DEFENDANT

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