IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.,*

Plaintiffs,

Case No. 12-cv-01096
Hon. ROBERT J. JONKER

v.

KATHLEEN SEBELIUS, *et al.,*

Defendants

PLAINTIFFS' SUPPLEMENTAL BRIEF ON HARM SUPPORTING MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

At the preliminary injunction hearing on December 17, 2012, the Court asked a series of questions related to whether the Plaintiffs will experience harm on January 1, 2013, that can be alleviated by a preliminary injunction. Specifically, the Court drew counsel's attention to the possibility that a preliminary injunction could later be dissolved, which would leave the Plaintiffs subject to the same penalty, regardless of what the Court does. The Court invited further briefing by the parties on the issue of harm and the Court's concern that preliminary relief might prove ineffective or counterproductive in the event the Court was obliged to rule against plaintiffs at the culmination of these proceedings.

If the HHS Mandate is not enjoined, the Plaintiffs will suffer immediate consequences on January 1, 2013. By enjoining the HHS Mandate, the Court will protect the Plaintiffs from harm in the following ways:

- Reducing non-compliance period for calculating penalties. The penalty is calculated on a per-day basis. For every day the injunction is in place, the Plaintiffs are spared tens of thousands of dollars in fines—even if the injunction is ultimately vacated. As explained below, the Plaintiffs believe this Court has the power to protect them from any effort to sanction the Plaintiffs for the period in which their noncompliance can be justified with reference to this Court's decision to grant preliminary relief pending its decision, and consequently ask this Court to so provide in its order.
- Establishing reasonable cause for penalty reduction. The penalty is eliminated or reduced dramatically if the Plaintiffs have reasonable cause for failure to comply. Reliance on a court order, even if only during the temporary application of that order, will show reasonable cause and thus eliminate or reduce the penalty accrued during the upcoming plan year.
- Preserving financing and ability to continue business. The Plaintiffs cannot operate their business subject to a $19 million liability. Having this liability hanging over their head will immediately impact their credit, reputation, and ability to conduct business.
- Avoiding other lawsuits, expenses, and fee awards. The Plaintiffs will be protected against ERISA suits based on the HHS Mandate during the pendency of the injunction, with all the attendant costs and consequences.
- Avoiding massive fine. The Plaintiffs will avoid being subjected, as a matter of law, to a tremendous fine that, although collected later, is legally imposed immediately for the reasons explained below.

It is important to evaluate these harms, though, within the context of the Religious Freedom Restoration Act ("RFRA"), under which any violation constitutes irreparable harm.

ARGUMENT

I. The RFRA standard for harm.

A violation of the RFRA is itself irreparable harm. *See, e.g., Jolly v. Coughlin,* 76 F.3d 468, 482 (2d Cir. 1996) ("Courts have persuasively found that irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA."); *Taubman Co. v. Webfeats,* 319 F.3d 770, 778 (6th Cir. 2003) (violation of constitutional rights for even a minimal amount of time constitutes irreparable harm). For the reasons set forth in earlier briefing, the Government cannot survive an RFRA challenge. The question posed by the Court thus appears to be whether the injuries the Plaintiffs face as of January 1, 2013, constitutes a substantial burden under 42 USC § 2000bb–1 which would warrant an immediate and preliminary injunction.

The RFRA will be violated by January 1, 2013. Where the Government places "substantial pressure on an adherent to modify his behavior and to violate his beliefs substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas v. Review Bd. Of Ind. Empt' Sec Div.,* 450 U.S. 707, 719 (1981). The pressure faced by the Plaintiffs is substantial, and it starts immediately. But the Court can take that pressure off.

II. The penalty is calculated on a per-day basis, which means temporary relief will reduce the penalty that accrues even if the injunction is later vacated.

The most crippling mechanism for enforcing the HHS Mandate is the penalty in 26 U.S.C. § 4980D. A penalty of $100 for each day of noncompliance is imposed "with respect to

each individual to whom such failure relates." *Id.* at (b)(1). Depending on how the number of individuals is calculated, this generates a penalty of $19-24 million per year or approximately $50,000-65,000 per day. (*See* Verif. Compl. at ¶ 8; Supp. Kennedy Dec.) This penalty is calculated on a daily basis for the noncompliance period. 26 U.S.C. § 4980D(b)(1). The noncompliance period begins at the date noncompliance first occurs and ends when the failure is corrected. *Id.* at (b)(2). This is not an all-or-nothing annualized penalty, but a penalty where each day matters. Even one day's penalty is a substantial burden for RFRA purposes. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (finding $5 fine substantially burdened religious exercise).

If the Court issues an injunction on January 1, only to later lift the injunction, the Plaintiffs would benefit from that injunction because their period of noncompliance would not start until the injunction were lifted. To the extent the Court is unsure of whether the statute itself would provide immunity from penalty during the injunction period, the Court has the power to make such relief explicit in its preliminary injunction order. In a unanimous opinion by Justice Brandeis a century ago, the Supreme Court stated that if a preliminary injunction against enforcement were held erroneous on final hearing, ''a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite [pending litigation], provided that it also be found that the plaintiff had reasonable ground to contest'' the challenged law. *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1920). To counsel's knowledge, the Supreme Court has not decided the issue since.[1]

[1] This issue did come up in *Edgar v. Mite Corp*., 457 U.S. 624 (1982), where the majority passed on the issue of whether a "preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties," *id.* at 630. *Edgar* involved an injunction against a state statute, however, and no "federalism concerns would prevent an immunizing effect in the present case," where the question concerns only branches of the federal government. *See Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) (discussing *Edgar*).

Since then, other federal courts have found that an injunction, although later vacated, provides a defense to enforcement for acts committed during the injunction. *See*, *e.g.*, *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) ("a federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect") (collecting cases); *Am. Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473, 498 n.1 (E.D. Pa. 1999) (after concluding that a federal court could craft injunctive relief that would protect acts taken in reliance on the injunction even if the injunction is reversed on appeal, enjoining "the defendant from enforcing [the statute] against acts which occur during the pendency of this Order"); *International Paper Co. v. Jay*, 672 F. Supp. 29, 35 (D. Me. 1987) (following *Oklahoma Operating* and enjoining "enforcement of the ordinance pendente lite"). The limited number of cases exactly on point is not surprising. As a matter of habit and practice, governments likely do not seek to prosecute or fine those who act in reliance on federal court orders. There is no reason to think here that the Government would even seek to impose penalties for conduct during the pendency of the preliminary injunction.

In the criminal context, the ability to rely on a court ruling is well settled. *See* Model Penal Code § 2.04(3), 10A Unif. L. Ann. 106 (2001) (creating a defense of ''belief that conduct does not legally constitute an offense . . . when . . . [defendant] acts in reasonable reliance upon . . . a judicial decision, opinion or judgment''). Federal courts have anchored this ability to rely on a judicial decision in the constitutional guarantees of due process: "It would be an act of intolerable injustice to hold criminally liable a person who had engaged in certain conduct in reasonable reliance upon a judicial opinion instructing that such conduct is legal. Indeed, the reliance defense is required by the constitutional guarantee of due process." *Kratz v. Kratz*, 477 F. Supp. 463, 481 (E.D. Pa. 1979) (footnotes omitted); *United States v. Albertini*, 830 F.2d 985,

989 (9th Cir. 1987) (same), *overturned on other grounds by* 469 U.S. 1071; *United States v. Brady*, 710 F. Supp. 290, 295 (D. Colo. 1989) (same); *Ostrosky v. State*, 704 P.2d 786, 791; (Alaska Ct. App. 1985) (same); *see also United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992) ("'fundamental notions of fairness embodied in the Due Process Clause of the Constitution' provide a defense where the government announces that an act as legal and the defendant relied on the announcement"); *Cox v. State of Louisiana*, 379 U.S. 559, 571 (1965) (due process clause does not permit conviction where government told demonstrators conduct was lawful). Indeed, "[t]he case for allowing the due process defense when the advice is given by a judge is even more compelling . . . [b]ecause of the unique role of the judiciary in interpreting the law." *United States v. Brady*, 710 F. Supp. 290, 295 (D. Colo. 1989). This case involves a tremendous and crippling penalty.[2] The guarantees of due process would thus protect the Plaintiffs rights to act in reliance on a preliminary injunction instructing them that their conduct is legal.

The Plaintiffs respectfully submit that the Supreme Court's decision in *Love*, *supra*, represents the only resolution of this question consistent with the constitutional separation of powers and the role of the federal judiciary in ensuring the rule of law.[3] Article III vests the judicial power in the federal courts and the courts have certain inherent power, including the power to take measures in aid of their jurisdiction. *Chambers v. NASCO*, 501 U.S. 32 (1991) (recognizing federal courts have inherent power to take steps that protect the integrity of the judicial process, including power to investigate and punish fraud on the court); *see also Bessette*

[2] As set forth in Plaintiffs' Supplemental Brief Concerning the Anti-Injunction Act, which is incorporated here by reference, the enforcement mechanism in 26 U.S.C. § 4980D is a penalty and not a tax.

[3] The Plaintiffs address here only the specific situation presented by the application of Section 4980D to collect fines for a period of noncompliance justified by a judicial order providing preliminary relief in connection with a pending action, believing that in this case the executive branch's effort to collect fines for that period would directly undermine the exercise of judicial power. The Plaintiffs acknowledge that other cases involving private parties or fixed damages may present different considerations.

v. W.B. Conkey Co., 194 U.S. 324, 333 (1904) (noting contempt power "has been uniformly held to be necessary to the protection of the court…and to enable it to enforce its judgments and order necessary to the due administration of law and the protection of the rights of suitors."). In this case that power is augmented by the legislative authorization contained in the Rules Enabling Act which expressly grants to the judiciary the power to make rules governing the judicial process pursuant to which the Supreme Court has promulgated Rule 65, which authorizes the preliminary relief. *See* 28 U.S.C. §2072; *see also Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) (noting rules governing equity proceedings were derived from statute and courts "inherent power to regulate by rules the modes of proceeding in suits in equity."). The Court has recognized that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34 (1812).

The Supreme Court has recognized that the separation of powers prevents the other branches from acting in a way that threatens to effectively undermine its decision. *See*, *e.g*., *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211 (1995) (law requiring federal courts to reopen final judgments violated the separation of powers). It has also recognized that the separation of powers prevents the other branches from taking actions that impair the ability of the federal courts to perform their constitutionally assigned function. *See*, *e.g*., *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545 (2001) (holding that Congress could not prohibit recipients of federal funding for representation from advancing challenges to validity of existing welfare laws because "the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."). These cases converge with the Supreme Court's decision in *Love*, which reflects the commonsense notion that the federal courts have the

power necessary to preserve the judiciary's constitutional role by protecting parties from sanctions levied for the period during which the party sought the protection of the federal courts.

Here the Plaintiffs have sought protection from the federal judiciary alleging unlawful, indeed unconstitutional, conduct by the Defendants. The Court has taken jurisdiction over the case and confronts a request for preliminary relief, a form of relief that is justified by the pressing need to make recourse to the federal courts effective by allowing the court to protect parties who come to it for a decision. It is true that the Court's initial decision is not final, but that cannot matter. If the Court cannot protect a party from fines levied for the period needed to complete the process of judicial review, the very possibility of judicial review and ability to render a final decision will be eviscerated by the fear of fines incurred while a proceeding were pending. Similarly, it is true that an executive branch enforcement would not literally prevent the Plaintiffs from recourse to the Courts. But if the executive branch could sanction a party for a period of noncompliance justified by reliance on a grant of preliminary relief, recourse to the federal courts would be effectively thwarted. The net result would be to undermine the role of the judiciary as a guardian of statutory and constitutional rights according to the tripartite scheme of government created by the federal constitution and to effectively eviscerate the rights to due process of law. The Plaintiffs respectfully submit that the separation of powers does not allow either the legislative or executive branches to take actions that effectively thwart recourse to the judiciary. The constitution prevents these branches from making recourse to the federal judiciary for a determination of rights no better than a double-edged sword.

III. Even were the Plaintiffs penalized retroactively, a preliminary injunction would still reduce the penalty under the terms of the statute itself.

The penalty assessed under 26 U.S.C. § 4980D is subject to certain limitations. The Plaintiffs would not be liable if they "did not know, and exercising reasonable diligence would

not have known" that they were failing to meet their obligation to comply with the HHS Mandate. *Id.* at (c)(1). If the failure to comply with the HHS Mandate was "due to reasonable cause and not to willful neglect," the penalty would be capped at $500,000. *Id.* at (c)(3). The Government also has authority to "waive part or all of the" penalty if it "would be excessive relative to the failure involved." *Id.* at (c)(4).

At the preliminary injunction hearing, the Government made its position clear: if the Plaintiffs refuse to comply with the HHS Mandate, this constitutes willful conduct not subject to this immunity or limit on liability. Without an injunction, the Plaintiffs will be subject to the full penalty, approximately $19 million. But if the Plaintiffs are granted a preliminary injunction, they would certainly be able to claim that they exercised reasonable diligence and had reasonable cause for failure to comply with the HHS Mandate.[4] They should not be subject to any penalty in such circumstances and, at the very least, the penalty would be capped at $500,000—which, although still a substantial burden, is an approximately 98% reduction in the penalty. At the very least, the Plaintiffs would be able to seek a partial waiver of the penalty for the period covered by the injunction because a penalty imposed in the face of a court ruling would be excessive relative to the failure to comply.

IV. Plaintiffs' business will be damaged immediately once the fine accrues.

The Government has taken the position that the Plaintiffs' failure to comply is willful, which will subject it to a crippling fine reaching $19 million or more over the next year.

[4] Although the statute does not appear to define these terms, the general definitions would appear to cover reliance on a court order. Black's Law Dictionary (8th ed. 2009) (defining "reasonable diligence" as "[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue."); *In re Slater Corp*., 190 B.R. 695, 699 (Bankr. S.D. Fla. 1995) ("Willful neglect is defined by case law as a 'conscious, intentional failure or reckless indifference.'"); *Law Offices of Robert A. Cushman v. Comm'r*, T.C. Summary Opinion 2011-37 (T.C. 2011) (reasonable cause is exercise of ordinary care and prudence). The cases indicating that Due Process would bar prosecution for conduct undertaken in reliance on a judicial determination likewise indicate that reliance on a grant of preliminary relief would excuse noncompliance for the period the order was in effect by constituting

Whether or not the fine is paid immediately, its impact is felt now. Autocam faces the potential loss of its financing and credit, an injury to its reputation, and a tremendous strain on its ability to simply operate the business. (*See* Ex. A, Kennedy Dec. Concerning Harm.) These injuries all constitute irreparable harm.

In other situations, the courts have found that injury to credit constitutes irreparable harm. *United States v. Brum*, 2005 U.S. Dist. LEXIS 21208, 7 (E.D. Tex. July 1, 2005) (threat irreparable injury where government officers must "set aside time from their official jobs to try and clear their credit history"); *United States v. Castle*, 2011 U.S. Dist. LEXIS 43889, 25 (E.D. Cal. 2011) ("damaging their credit ratings" constitutes irreparable injury for government officers). In the business context, the "impairment of intangible values" such as injury to reputation constitutes irreparable harm. *Hair Assocs. v. National Hair Replacement Servs*., 987 F. Supp. 569, 591 (W.D. Mich. 1997) (citing *Wynn Oil Co. v. American Way Serv. Corp.*, 943 F.2d 595, 608 (6th Cir. 1991)); *Circuit City Stores, Inc. v. CarMax, Inc*., 165 F.3d 1047, 1056 (6th Cir. 1999) (irreparable harm for possible risk to reputation). In the absence of an injunction, the consequences to the Plaintiffs after January 1 will be dramatic. These injuries are a direct result of the fine imposed for failure to comply with the HHS Mandate. The HHS Mandate does, and was designed to, apply substantial pressure on the Plaintiffs to modify their behavior and violate their beliefs. This is a substantial burden under the RFRA, and it constitutes irreparable harm.

V. ERISA will make the HHS Mandate immediately enforceable against the Plaintiffs as of January 1.

If the HHS Mandate is not enjoined, plan participants, beneficiaries, or, perhaps more importantly, the Secretary of Labor will be allowed to immediately bring an ERISA action to

---

"reasonable cause" within the meaning of Section 4980D if that term is given its plain meaning under well

enforce the benefits of the HHS Mandate. *See* 29 U.S.C. § 1132. A preliminary injunction holding that the Plaintiffs are not subject to the HHS Mandate would have the effect of immunizing them from ERISA litigation—at least while the preliminary injunction is in effect. This immunity, even if only temporary, would avoid the immediate and substantial cost of litigation. A plan participant or beneficiary who sues can be awarded *reasonable* attorneys fees, and a court would certainly be expected to reduce or refuse to award fees incurred in litigation to enforce a benefit that had been preliminarily enjoined. 29 U.S.C. § 1132(g).

VI. The imposition of a fine, even if not collected immediately, is itself a burden.

As of January 1, the Plaintiffs are being fined $100 per individual per day. 26 U.S.C. § 4980D. Even if this fine is not collected on January 1, the Plaintiffs are still irreparably harmed. The purpose and effect of the fine is to place pressure on the Plaintiffs to modify their behavior. *Thomas*, 405 U.S. at 709. This is a substantial burden. *Id.* And because that burden violates the RFRA, it is itself irreparable harm, even before the check is cut. *See Jolly,* 76 F.3d at 482.

CONCLUSION

For these reasons, the Court should grant the relief sought by the Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

Dated: December 21, 2012

Patrick T. Gillen (P47456)
Fidelis Center for Law and Policy
CatholicVote Legal Defense Fund
Attorney for Plaintiffs
1025 Commons Circle
Naples, FL 34119
(734) 355-4728
ptgillen@avemarialaw.edu

/s/ Jason C. Miller
Jason C. Miller (P76236)
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
(616) 831-1700
millerj@millerjohnson.com

Attorneys for Plaintiffs

established canons of statutory interpretation.

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*

Plaintiffs,

Case No. 1:12-cv-01096-RJJ

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants.
_____/

DECLARATION OF JOHN KENNEDY CONCERNING HARM

Pursuant to 28 U.S.C. § 1746, John Kennedy declares:

1. This Declaration is submitted in support of Plaintiffs' motion for preliminary injunction.

2. I am above the age of 18, of sound mind, and have personal knowledge as to the matters set forth herein.

3. I am the President and Chief Executive Officer of the Autocam corporations that are plaintiffs in this suit (referred to herein collectively as "Autocam").

4. I submit this supplemental declaration to provide the court with additional information relating to the harm that the Plaintiffs will suffer as a result of the HHS Mandate and why we have requested protection from the Court.

5. The total projected cost of medical benefits (excluding dental) for my employees for 2013 is $6,500,000. In addition, I will pay an additional $381,000 for stop-loss insurance to cover employee claims over the plan limit so individual employees with serious medical needs can

be taken care of without undermining the viability of our benefits plan. The maximum cost of complying with the HHS mandate would be $100.000.

6. In contrast, the penalty for dropping insurance coverage altogether is just $2,000 per employee, a fine that would total between $1,036,000 (if it applies only to employees taking advantage of our plan) and $1,182,000 per year (if the fine is calculated based on the total number of our employees, including employees who have opted out of the plan). The penalty for failing to comply with the mandate is between $19,000,000 (if the fine applies only to employees taking advantage of our plan) or $24,000,000 (if the fine is calculated based the total number of my employees).

7. If I (and the members of my family who own Autocam) had no religious objection to the mandate, we could cover the additional $100,000 in costs. But we cannot do that consistent with our sincerely held religious conviction.

8. Another way that I (and the members of my family who own Autocam) could avoid the moral dilemma we confront is to simply drop medical benefits. This would save us about $5,600,000. But we cannot do that consistent with our religious conviction for the reasons given below.

9. If we cut benefits, our employees would be in a terrible position. Even if we were to increase wages for the full or partial amount of money saved by not offering insurance, our employees would be unable to purchase a similar health insurance plan because they would not be afforded the tax advantages of employer-sponsored plans. They will be unable to purchase comparable health insurance as the market exists today if we drop coverage. Moreover, as I have informed the Court in my earlier affidavit, it appears that a large portion of our employees would continue to suffer drastic adverse consequences even when the state exchanges begin operating.

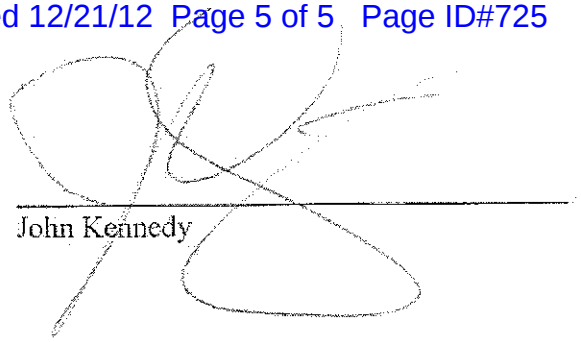
10. For these reasons, we cannot cut benefits consistent with our religious conviction that we have a duty to offer good wages and benefits to our workers in keeping with the Catholic Church's teachings on the dignity of worker and the importance of fair treatment of employees as an essential element of social justice.

11. In sum, either of the two options we have described would actually save us money. So if this were just a matter of avoiding our problem in the easiest way, we could take those "outs." But we cannot do so for the reasons I have explained. For us, the operation of our business and the treatment of our employees is not simply a matter of dollars-and-cents, it is a matter of living our faith.

12. That leaves the last option, which caused us to seek relief from this Court. If we continue to the offer benefits, but do not include the drugs and services mandated by the HHS to which we object by reason of our sincerely held, religious conviction, we would be a subjects to the risk of a potential fine between $19,000,000 (if the fine is calculated only for employees who are currently enrolled in the plan) and $24,000,000 (if the fine is calculated for all employees) per year. This would quickly ruin Autocam by destroying our ability to finance the business. I have talked to my bank, and they have indicated that faced with a $20 million penalty even if we believe the probability of loss is low they would be unwilling to finance the equipment necessary for us to fulfill our contractual agreements. Accordingly, we would quickly, lose customers, face lawsuits from customers where we are contractually committed and go out of business. Without a preliminary injunction, which prevents the penalty from being assessed during the period of the litigation we will not get the financing necessary to meet our obligations in 2013.

13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2012



John Kennedy