IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE, *Plaintiff*, v. HARGAN, Secretary, United States Department of Health and Human Services, *et al.*, *Defendants*.	 No. 1:13-cv-8910 Honorable Robert M. Dow, Jr.

MOTION FOR PERMANENT INJUNCTION

This case involves a challenge to a federal regulation (the mandate) that requires Plaintiff Wheaton College ("Wheaton"), a Christian liberal arts college, to choose between violating its traditional Christian beliefs about the sanctity of life and paying millions of dollars in yearly fines. Defendants ("the government") have now admitted that this mandate violates the Religious Freedom Restoration Act ("RFRA"). Therefore, this Court should issue a permanent injunction so that Wheaton can dismiss its remaining claims and end this litigation.

BACKGROUND

A. The Affordable Care Act and the mandate

The Affordable Care Act ("ACA") provision at issue here mandates that any "group health plan" must provide for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). The Department of Health and Human Services ("HHS") defined women's preventive services to include all FDA-approved contraceptive methods, including "emergency contraception" such as Plan B and ella, which—according to the FDA's Birth Control Guide—work by preventing implantation "of a fertilized egg in the uterus."

The government offered exemptions from this rule to many health plans, including grandfathered plans, *see* 42 U.S.C. § 18011 (2010), employers with fewer than fifty employees, *see* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d), and "religious employers" defined by the government to narrowly include institutional churches and their dependent organizations, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); 45 C.F.R. § 147.131(a) (currently reserved pending the outcome of the new Interim Final Rule, *see infra*).

Instead of offering Wheaton the same exemption available to churches, the government created what it called an "accommodation," which required Wheaton to sign authority of its health plans over to its insurer and third-party administrator ("TPA"), allowing them to provide the objectionable contraceptives to Wheaton's students and employees through Wheaton's existing health plans. 77 Fed. Reg. 16,501, 16,503 (March 21, 2012). Wheaton College could not in good conscience facilitate or purchase insurance for emergency contraceptives. Nor could it leave its employees without health insurance and pay the requisite fines. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ($100/day per person); 26 U.S.C. § 4980H(c)(1) ($2000 per employee, per year). It had no choice but to file suit.

B. This lawsuit

Wheaton's complaint includes sixteen claims. Dkt. 1. Beyond its RFRA claim, Wheaton has claims under the Free Exercise Clause, (Counts II-VI, XI, and XV) the Establishment Clause (Counts IV-VII), the Free Speech Clause (Counts IX-XI), the First and Fifth Amendments (Counts VII-VIII), and the Administrative Procedure Act (Counts XII-XVI). On April 1, 2014, the government filed a motion to dismiss Wheaton's complaint or for summary judgment. Dkt. 25. Wheaton filed its own motion for summary judgment in response. Dkt. 44. The mandate was set to take effect when Wheaton's new plan started on July 1, 2014, so on June 10, without a ruling on the motions for summary judgment, Wheaton filed a motion for a preliminary injunction

pursuant to this Court's order. Dkt. 57, Dkt. 58. Wheaton's memoranda in support of its motion for summary judgment and its motion for a preliminary injunction explain how the mandate and the accommodation work, as well as the impact on Wheaton and its health plans. Dkt. 41, 58. Wheaton incorporates those motions by reference here. This Court denied the motion for preliminary injunction on June 23, 2014. Dkt. 62. Wheaton asked for an emergency injunction from the Seventh Circuit, Emergency Motion, *Wheaton College v. Burwell*, 791 F.3d 792 (2015) (No. 14-2396), ECF No. 2, and when that was denied, *Wheaton College v. Burwell*, ECF No. 12, Wheaton submitted an application for an emergency injunction from Justice Kagan under the All Writs Act. Application for Injunction Pending Appellate Review, *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284). Justice Kagan granted a temporary injunction, and on July 3, 2014, the Supreme Court granted an injunction. *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

Wheaton's appeal of the order denying the preliminary injunction continued at the Seventh Circuit, which held that the accommodation did not violate RFRA because it did not constitute an "effort[ ] by the government to take over Wheaton's health plans." *Wheaton College v. Burwell*, 791 F.3d 792, 794 (7th Cir. 2015) (Posner, J.). The Seventh Circuit panel agreed that Wheaton exercised its sincere religious beliefs "by excluding coverage of [abortifacient contraceptives] from its health plans." *Id.* at 793. But it held that when a religious objector invokes the accommodation, "[t]he college and its health plans are . . . bypassed." *Id.* at 795. The Seventh Circuit also held that Wheaton's actions in implementing the accommodation did not constitute a "trigger" for abortifacient coverage because "it is the *law*, not any action on the part of the college" that requires Wheaton's insurers to provide the drugs and devices. *Id.* at 796. The Seventh Circuit summarized that "[a]lmost the entire weight of [Wheaton's] case falls on attempting to show that

the government is trying to 'use' the college's health plans, and it is this alleged use that it primarily asks us to enjoin. But the government isn't using the college's health plans[.]" *Id.* at 801.

Wheaton's case was then stayed pending the Supreme Court's consideration of *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Dkt. 96.

C. The Supreme Court litigation

At the Supreme Court, the government about-faced and contradicted the factual findings on which the Seventh Circuit relied.

First, the government admitted that the accommodation required contraceptive coverage to be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (quotations omitted). Thus, it removed any basis for the Seventh Circuit's prior holding that the accommodation did not impose a substantial burden on the religious exercise of objecting employers. *See also* Tr. of Oral Arg. at 60-61, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided, I think as you as it said, seamlessly. You want it to be in the one insurance package. . . . Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case."); *id*. at 61 (government "would be content" if Court would "assume a substantial burden" and rule only on the government's strict scrutiny affirmative defense).

Next, the government made further concessions that fatally undermined its strict scrutiny affirmative defense. The Departments admitted to the Supreme Court that it does not matter where the contraceptive coverage comes from and that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." Br. for the Resp'ts at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). Indeed, these are the same alternatives available to women whose

employers are exempted from the mandate for entirely secular reasons. The government also acknowledged that the mandate "could be modified" to avoid forcing religious organizations to carry the coverage themselves, Suppl. Br. for the Resp'ts at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), thereby conceding the "least restrictive means" argument.

As a result of these concessions, the Supreme Court unanimously vacated the decisions of the Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits. *Zubik*, 136 S. Ct. at 1560. It remanded the cases to the Courts of Appeals so that the parties could be "afforded an opportunity to arrive at an approach going forward" that both "accommodates [the religious employers'] religious exercise" and ensures that "women covered by [their] health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.*

D. The interim final rule

Following the election, the government revisited its position on the accommodation. On May 4, 2017, President Trump issued an Executive Order entitled "Promoting Free Speech and Religious Liberty," which instructed the Departments to "consider issuing amended regulations . . . to address conscience-based objections" to the challenged mandate. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

Following the Executive Order, the Departments issued Interim Final Rules (IFR) revising their stance on the accommodation. 82 Fed. Reg. 47,792 (Oct. 13, 2017). The Departments concluded that requiring objecting religious organizations to comply with the Mandate "constituted a substantial burden on the religious exercise of many" religious organizations. *Id.* at 47,806. Since requiring "compliance through the mandate or accommodation . . . did not serve a compelling interest and was not the least restrictive means of serving a compelling interest," the Departments 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 to the Mandate to include "all bona fide religious objectors." *Id.*

At least eight lawsuits have since been filed against the Departments' IFR.[1] These lawsuits argue that the Departments' IFR is unconstitutional and seek injunctions prohibiting the Departments from enforcing their expanded religious exemption.[2] On December 15, 2017, the Eastern District of Pennsylvania issued a preliminary injunction against the expanded religious exemption on the grounds that the Departments likely issued the IFR without following the procedures required by the Administrative Procedure Act (APA). *Pennsylvania v. Trump*, No. 2:17-cv-4540, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017). The Northern District of California issued a second nationwide injunction, also on APA grounds. *California v. HHS*, No. 4:17-cv-5783, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017). Both courts suggested that their rulings should not impact existing litigation, leaving this Court the freedom to rule in Wheaton's specific case. *Pennsylvania*, 2017 WL 6398465, at *21; *California*, 2017 WL 6524627, at *17; *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").

[1] *See, ACLU v. Wright*, No. 4:17-cv-5772 (N.D. Cal. filed Oct. 6, 2017); *California v. HHS*, No. 4:17-cv-5783 (N.D. Cal. filed Oct. 6, 2017); *Massachusetts v. HHS*, No. 1:17-cv-11930 (D. Mass. filed Oct. 6, 2017); *Washington v. Trump*, No. 2:17-cv-01510 (W.D. Wash. filed Oct. 9, 2017); *Medical Students for Choice v. Wright*, No. 1:17-cv-2096 (D.D.C. filed Oct. 10, 2017); *Pennsylvania v. Trump*, No. 2:17- cv-4540 (E.D. Pa. filed Oct. 11, 2017); *Campbell v. Trump*, No. 1:17-cv-2455 (D. Colo. filed Oct. 13, 2017); *Shiraef v. Hargan*, No. 3:17-cv-0817 (N.D. Ind. filed Oct. 31, 2017).

[2] *See, e.g.*, Press Release, American Civil Liberties Union, ACLU Filing Lawsuit Challenging Trump Administration Contraceptive Coverage Rule (Oct. 6, 2017), https://www.aclu.org/news/aclu-filing-lawsuit-challenging-trump-administration-contraceptive-coverage-rule (linking copy of ACLU's complaint against IFR).

ARGUMENT

To obtain a permanent injunction, a plaintiff must answer: (1) whether it "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 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). This is nearly the same inquiry as that of a "traditional" preliminary injunction standard; only "the first of the four traditional factors is slightly modified." *Id.*

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 . . . litigation." *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992); *see also* 13C Wright, Miller & Cooper, *Federal Prac. & Proc. Juris.* § 3533.5 n.15 (3d ed.).

Here, Wheaton is entitled to a permanent injunction and declaratory relief because there is no longer any doubt that it has succeeded on the merits of its RFRA claim, given the government's concessions at the Supreme Court, in the Federal Register, and in court that the accommodation would, in fact, use Wheaton's health plan, and therefore imposes a substantial burden under RFRA that is not the least restrictive means of achieving a compelling government interest.

I. Wheaton meets the standard for obtaining a permanent injunction.

Success on the merits. The government has conceded that the mandate that Wheaton challenged in this lawsuit "constituted a substantial burden on the religious exercise" of religious nonprofits like Wheaton. 82 Fed. Reg. at 47,806; Joint Status Report, Dkt. 114 ("the parties now agree that the mandate in question violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* (RFRA)." It has conceded that the mandate is not the least restrictive means of

serving a compelling government interest. 82 Fed. Reg. 47,792 (Oct. 13, 2017); Joint Status Report, Dkt. 114 at 2. Even before the IFR, the government conceded at the Supreme Court that the mandate "could be modified" to avoid forcing religious organizations to carry the coverage themselves. Suppl. Br. for the Resp'ts at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). Those concessions follow the government's concessions at the Supreme Court that contradicted any prior basis for denying relief to Wheaton. *Compare* 791 F.3d at 801 ("[a]lmost the entire weight of its case falls on attempting to show that the government is trying to 'use' the college's health plans) *with* Br. for the Resp'ts at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (accommodation requires objected-to items to be "part of the same plan as the coverage provided by the employer") (quotations omitted).

With those concessions, Wheaton has succeeded in demonstrating that the mandate "led to the violation of RFRA," 82 Fed. Reg. at 47,806, thereby showing that it has in fact succeeded on the merits of its RFRA claim.

Remaining Factors. In the Seventh Circuit, showing a RFRA violation establishes irreparable harm. *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) ("the 'loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury'"). Wheaton also faces the irreparable harm of being subject to the accommodation in the future. And the IFR shows that the Government will not be harmed at all by a permanent injunction for Wheaton. Finally, upholding RFRA is "always in the public interest." *Korte*, 735 F.3d at 666.

II. A permanent injunction is appropriate here.

With injunctions in place against the IFR, the operative law currently in place mandates that Wheaton choose between violating its sincerely-held religious beliefs and $25 million in fines. 79 Fed. Reg. 51,092 (Aug. 27, 2014). Now that the government has admitted that this scenario violates RFRA, a permanent injunction is appropriate.

Entering a permanent injunction here tracks what courts have done in parallel Mandate litigation. After the Supreme Court ruled that it was illegal for the Departments to enforce their mandate against closely held corporations, *see Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2784 (2014), for-profit corporations challenging the mandate obtained permanent injunctions from the lower courts. *See e.g.*, *Grote Industries, LLC v. Burwell*, No. 4:12-cv-00134 (S.D. Ind. Apr. 30, 2015); *Tonn & Blank Construction, LLC v. Burwell*, No. 1:12-cv-00325 (N.D. Ind. Nov. 6, 2014); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02253 (N.D. Ill. Nov. 3, 2014); *Lindsay v. Burwell*, No. 1:13-cv-01210 (N.D. Ill. Dec. 3, 2013). Similarly, following the Supreme Court's order in *Zubik* and the IFR, religious objectors have received permanent injunctions. *See, e.g.*, *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489, 2014 WL 1256373, at *33-34 (N.D. Ga. Mar. 26, 2014) (issuing permanent injunction), *appeal dismissed sub nom. Roman Catholic Archdiocese of Atlanta v. Sec'y of U.S. Dep't of HHS* (11th Cir. Nov. 7, 2017) (No. 14-12890-CC); *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 111 (D.D.C. 2013) (issuing permanent injunction for Thomas Aquinas College), *appeal dismissed sub nom. Priests for Life v. U.S. Dep't of HHS* (D.C. Cir. Nov. 6, 2017) (Nos. 13-5368, 13,5371, 14-5021) (leaving permanent injunction in place); *Perisco v. Sebelius* (W.D. Pa. Dec. 20, 2013) (No. 1:13-00303) (issuing permanent injunction), *appeal dismissed sub nom. Perisco v. Sec'y of U.S. Dep't of HHS* (3d Cir. Oct. 20, 2017) (Nos. 14-1376, 14-1377) (leaving permanent injunction in place); *Brandt v. Burwell*, 43 F. Supp. 3d 462, 495 (W.D. Pa. 2014) (issuing permanent injunction), *appeal dismissed sub nom. Brandt v. Sec'y of U.S. Dep't of HHS* (3d Cir. Oct. 19, 2017) (Nos. 14-3663, 14-4087) (leaving permanent injunction in place); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp. 3d 725, 736–37 (E.D. Tex. 2014) (issuing permanent injunction), *appeal dismissed sub nom. Catholic Diocese of Beaumont v. Hargan* (5th Cir. Oct. 19, 2017) (No. 14-40212)

(leaving permanent injunction in place); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232, 259 (E.D.N.Y. 2013) (entering permanent injunction), *appeal dismissed sub nom. Catholic Health Care Sys. v. Burwell* (2d Cir. Oct. 17, 2017) (No. 14-427) (leaving permanent injunction in place).

Just like the plaintiffs in these other cases, Wheaton seeks a final resolution to its case so that it can stop focusing on litigation and instead focus on its religious mission.

CONCLUSION

In light of the above, Wheaton College respectfully requests that this Court grant its motion and enter an order granting Wheaton a permanent injunction and declaratory relief from the mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on January 18, 2018, and was thereby electronically served on counsel for Defendants.

s/ Mark L. Rienzi
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