UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam § Plaintiff §
§
versus §
§ CIVIL ACTION NO. 4:16-cv-00307
§
Joseph R. Biden, in his official capacity § as President of the United States et. al. §
§
Defendants §

Opposed Motion For Temporary Injunction and Expedited Consideration on Defendant's Partial Motion To Dismiss

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Issues Presented

1) On 7/25/2022, HHS announced interim rules[1] (which will be referred to simply as the interim rules in this document) to include LGBTQI+ as protected classes under titles proscribing discrimination based upon sex as well as other changes which will extend its control over health care under the ACA. These new rules impact issues at the heart of this lawsuit and again violate constitutional principles and many of the same claims in the Complaint. It should be crystal clear the defendant's fully intend to continue their mischief of imposing their religious beliefs upon the population. I therefore request this Court grant a Prelminary Injunction as provided in FRCP 65 against the defendants to preserve the status quo and prevent continuing violations of Constitutional rights.

2) I also request this court expedite a decision on the defendant's MTD so that I may pursue an Appeal of this case without further delay.

Background

1 *United States, Department of Health and Human Services, "Nondiscrimination in Health Programs and Activities." Vol. 87 Fed. Reg. 47,824 (August 4, 2022)*

On February 4, 2016, I, John J. Dierlam, a citizen of Texas, the United States, and a life long Catholic, filed a complaint in the Southern District Court of Texas against the government, which includes the President of the U.S. and departments of Treasury, Labor, HHS, and their Secretaries. I challenged the constitutionality of defendant's implementation of provisions of the Patient Protection and Affordable Care Act (ACA). In other claims, I challenged the constitutionality of the minimum essential coverage provision, shared responsibility payment provision, and the ACA in general. In the final claim, I request clarification of the term direct taxes so that the principle of the Consent of the Governed is preserved.

This case is in its seventh year and remains in the pleading stage. It was initially dismissed in its entirety which was reversed and vacated on Appeal. Most recently, it was dismissed in part on 12/15/2021. A third amended Complaint was then filed. The defendants filed a PMTD in response to the third amended Complaint, which is now fully briefed. This case is currently awaiting a decision from this court on the defendant's motion.

Argument

A Standard of Review

A preliminary injunction is an "extraordinary and drastic remedy" which must be justified by a "clear showing" of the movant.[2] The movant must satisfy four elements

> 1) a substantial likelihood of success on the Merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.[3]

Even without the consideration of the numerous other violations in the Complaint, the defendants have admitted to a violation of RFRA. However, the government is only willing to consider retrospective relief. As described on p.25 of my Response to the Government's Partial

2 *Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997).*
3 *Citizens United v. Federal Election Com'n, 530 F. Supp. 2d 274 (D.C. 2008).*

Motion To Dismiss Plaintiff's Third Amended Complaint (RPMTD3AC), RFRA provides an entitlement to prospective relief. The only question is whether this court will enforce the law. Therefore, the first element has been established.

Eminent additional irreparable injuries, which in part will be described infra, will be caused by the proposed new rules to which I am entitled prospective relief. Among the claims in the Third Amended Complaint (3AC) is a violation of the establishment clause which is Claim 4 starting with ¶132. The new proposed ultra vires rules are a CONTINUING violation to advance a belief system without support of any rigorous evidence. See pp.6-7 of the RPMTD3AC and infra for more details. A "...party alleging a violation of the Establishment Clause per se satisfies the irreparable injury requirement of the preliminary injunction calculus."[4]

A preliminary injunction seeks to preserve the status quo until the merits of the issue can be heard by a court. See *Barringer v. Griffes, 810 F. Supp. 119 (D. Vt. 1992).* As the new rule is an expansion of the authority of HHS over insurance coverage, it very much is a movement away from the status quo to a belief system advocated by the Left. As suggested on p.6 of the RPMTD3AC, an injunction will not harm other interested parties and it may even save lives and reduce net human suffering.

It is the actions of HHS et. al. which are harming the public interest. See ¶114-120 of the 3AC for a discussion of the "public interest" in a somewhat different context. The public interest would be very much furthered by an injunction to stop the anti-human agenda of the current administration. See ¶44-51 and 141 of the 3AC. Unless stopped by court action, the Left will continue to harm individuals and the majority of society to further their control and dogma.

B The HHS proposed new rules extend the control and dogma of the Left

4 *Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006).*

HHS is extending the definitions to include practically every health insurance or health care provider into the scope of their ACA regulations. The proposed § 92.4 states,

> Covered entity means: (1) A recipient of Federal financial assistance; (2) The Department; and (3) An entity established under Title I of the ACA. Department means the U.S. Department of Health and Human Services. (p.47912 of the interim rules)

HHS with this rule is extending the definition of "Federal financial assistance" and "health program or activity" to include Medicare Part B as well as any participant in a health care exchange to include any and all their benefit plans whether offered on the exchange or not. See p.47875 of the interim rules.

This change in definitions is to cast as wide a net as possible and force these entities to comply with the agencies new guidance on section 1557 of the ACA and related provisions against discrimination. The agency is expanding the definition of sex such that,

> Proposed paragraph (a)(2) clarifies that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity. (p.47858 of the interim rules)

HHS further requires in the rules,

> Proposed paragraph (b)(1) specifies that covered entities are prohibited from denying, cancelling, limiting, or refusing to issue or renew health insurance coverage or other health-related coverage, or denying or limiting coverage of a claim, or imposing additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability (p.47859 of the interim rules)

Here "covered entities" would include inter alia,

> health insurance issuers, sponsors of group health plans, Medicare Advantage organizations, Medicare Part D plan sponsors, Medicaid managed care organizations, pharmacy benefit managers, third party administrators (as part of a covered entity's operations when it meets the criteria in paragraph (b) of the

> definition of 'health program or activity' in proposed § 92.4), and the Department.[5]

The rules on p.47878 mention prohibition of discrimination based upon "termination of pregnancy," but are rather vague on how this phrase will be interpreted. Given the proclivities of the current administration, it would not be an unreasonable conclusion this provision will be used to further expand abortion coverage.

I would also note a very hypocritical statement on p.47875 of the interim rules which is directed to any entity in disagreement with a treatment,

> When articulating a justification for a challenged action or practice that relies upon medical standards or guidelines, covered entities should be mindful that such standards and guidelines may be subject to additional scrutiny if they are not based on clinical, evidence-based criteria or guidelines.

As indicated in the Complaint in ¶¶27-32, the medical profession which is formulating these standards and guidelines has been corrupted. Especially given the short history with hormone blockers etc., it is very doubtful a proper evidence-based study justifies these standards and guidelines. See ¶¶33-43 of the 3AC. Just as with the HHS Mandate, evidence will not be allowed to overrule the dogma of the Left. The practice of medicine may be directed by consensus, but Science is not. No evidence for the efficacy or effectiveness of the new treatments and surgeries is provided in the interim rules. Evidence to the contrary exists see p.6 of the RPMTD3AC.

C The New rules run against the Catholic faith and will further prejudice the market

As indicated in the RPMTD3AC, Catholic teaching FORBIDS the activities in the agencies expanded definition of sex. Health insurance coverage for such is morally offensive and an invitation to sin. As discussed in the previous section, practically all health insurers will be forced or pressured to provide at least some coverage to LGBTQI+ individuals for these

5 *Footnote 435 of the interim rules.*

activities. As the rules forbid any increased cost sharing upon these individuals, any increased cost will be borne by the remainder of the participants in the health care plan. I understand the cost of hormone therapy and transgender surgeries can be very expensive.[6] I can not and will not participate in such a health insurance contract. I will not support or be a party to this egregious harm of another individual especially innocent children. I am placed in a worse situation than ascribed the original HHS Mandate in the Complaint. The market will also be further damaged by the defendants as health coverage compliant with my faith will again be impossible to find.

D The *Bostock* decision can not be used to justify the changes proposed by HHS

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 590 U.S. 140, 207 L. Ed. 2d 218 (2020) is often cited in the interim rules and is the primary support for their changes. The dissenting judges in that case provide overwhelming evidence the case was wrongly decided. In the words of the dissenters, "There is only one word for what the Court has done today: legislation." The majority confound the definition of sex, which in 1964 was a biological and genetically determined condition, with activities that occur well after birth. This case involved only two additional classifications homosexual activity and transgender activity. As pointed out by Justice Alito and Thomas, a great many things can be associated with sex as the majority has done. These associations can even include sexual assault. With the logic of this ruling by the court these other activities can not be used to discriminate against any activity associated with sex even if biological sex is not the primary factor used in the discrimination. Indeed, HHS has not stopped at the two additional classifications decided by the court but has expanded the definition of sex to near infinity with the inclusion of LGBTQI+ classifications of sex related activity.

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6 *See https://costaide.com/transgender-surgery-cost/ and https://www.talktomira.com/post/how-much-does-gender-affirming-hrt-cost-without-health-insurance*

Alito and Thomas successfully predicted many of the sad consequences of the majority's decision, including women's sports and health care. The decision also threatens freedom of speech and religion for which this motion is filed to defend. However, aside from this clearly wrongful decision there is another reason why the *Bostock* decision is inappropriate to the purpose the agency applies it. The decision is specific to Title VII, discrimination in employment. The three parties involved in insurance coverage lack an employer-employee relationship. The party purchasing the health insurance contract has the closest relationship to an employer but is also the party with the least power of the three. As described in Claims 8 and 9 of the Complaint and especially ¶179, a confiscation by the government has occurred. Here again the government extracts funds from most of the insurance participants in the form of premiums paid for a PRIVATE insurance contract without their permission to give to a group of its choosing. The value of the contract is obviously reduced to the non-beneficiary individuals in this system and constitute a confiscation of their funds. On the other hand, if government classifies this exaction as a tax then the Individual Mandate is a capitation which is unconstitutional because it is not apportioned to population.

In addition as seen above, HHS has included itself in the rule forbidding discrimination based upon sex. Hypocritically, HHS is in violation of its own rules. Even using the more traditional and limited definition of sex as a genetic condition of birth, the HHS Mandate as described in the Complaint does not allow men the same or the FDA approved male contraceptives free of any cost sharing. The majority in the *Bostock* decision cite *Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)* in which an employer required women to contribute more to their pension plans than men because

on average women live longer than men. The majority in *Bostock* indicated the only relevant question was whether discrimination based on sex occurred. The defendants justify the discrimination against men in the HHS Mandate in different documents as "gender equity," promoting public health, or as women simply being more needy. The decision by the *Bostock* majority would suggest just like the *Manhart* decision none of these concerns are relevant. The only relevant question is whether discrimination based upon sex has occurred. Clearly, the HHS Mandate discriminates against men based upon their sex in opposition to HHS rules and the *Bostock* decision..

Although the interim rules are not final as generally required for review under the APA, the continuing mischief of the defendants was predicted in the Complaint. See ¶¶179-182 of the 3AC. Here, the defendants are using the pretext of an anti-discrimination law to achieve the same results of confiscation, control, and denial of freedoms of the majority of the participants. The rare exception mentioned in *Cammermeyer v. Perry, 97 F.3d 1235, 1238 (9th Cir. 1996)* in which a case has been mooted by the repeal of a law which is certain to be reinstated is not at all necessary to invoke for the instant case since the Individual Mandate, Individual Mandate Penalty, HHS Mandate, and now the LGBTQI+ sex activities coverage contained in the interim rules have not been repealed. Further encroachments by the defendants on the 1st, 4th, 5th, 9th, and 10th amendments were fully anticipated in the Complaint. See inter alia ¶¶70, 179-182, 198-200, and 233-234 of the 3AC. Therefore, rather than viewed as a not yet final rule the current situation should be viewed as merely the continuation of previous bad behavior.

A judge in the court of the Northern District of Texas issued Order, *Tex. v. EEOC, et al, No. 2:21–cv–00194–Z (N.D. Tex. May 26, 2022).* On pp.4-13 of the order, the court applied a test

for final agency action found in *Bennett v. Spear, 520 U.S. 154, 178 (1997)*. The court found that the March 2, 2022 guidance letter from HHS signaled the completion of an HHS decision making process as it "extends beyond the provisions of Title IX and the limits of *Bostock*" rather than being a summary of previously defined law. The guidance letter threatens Texas with loss of funding if gender affirming care for minors was considered abuse by State law. Thereby binding HHS such that legal consequences to Texas would follow. A similar situation exists in the instant case.

E Additional Injuries are caused by the changes in Medicare

Congress at the time of passage of the ACA defined Medicare as meeting the "minimum essential coverage" requirement as it existed at that time. See p.248 of Public Law 111–148 or 26 U.S.C. § 5000A(f)(1)(i). Therefore, the additional requirements imposed by HHS on "minimum essential coverage" like the original HHS mandate do not apply to Medicare. With the change in definition of Medicare Part B at least, Medicare is being set up to supply contraceptives, abortion, and "gender affirming care" despite Congress specifically providing the exception mentioned above. HHS as with the HHS Mandate is again acting ultra vires, without the authority of Congress.

So far the measures I have taken appear to have helped preserve my health, but I know I face increasing risk of health issues with age which could be very expensive without insurance. The religious exemption in 45 CFR § 147.132 is specific for contraceptives specified by §147.130(a)(1)(iv) only. I am aware of no religious conscience exemption for the "gender affirming care" coverage. Therefore I am in a worse situation than I was before 2017 when 45 CFR § 147.132 was first promulgated. It will be impossible to find health insurance because of at least two separate regulations of the ACA. To further worsen the situation, the proposed changes

in Medicare will at least place the same "gender affirming care" into this system if not additional contraceptive and abortion coverage. I will be denied access to at least some parts of this important benefit when I reach the appropriate age in the near future. I face the possibility of having no health coverage for the rest of my life, which is current and eminent harm. Similar to the original HHS Mandate, I am required to sign a contract and/or pay premiums to support a system which will harm individuals including innocent children. The government will unconstitutionally be making an important benefit "enjoyed by other citizens" conditional upon the acceptance of its belief system.[7]

Conclusion

For the reasons stated above I request a preliminary injunction against the defendants to prevent them from enforcing or creating any additional health care regulations such as "gender affirming care" impacting faith and morals in order to preserve the status quo until the issues in this case have been settled. It is likely HHS will next attempt to incorporate euthanasia into their regulations. Canada is now seeing a tremendous expansion of deaths from its recent legal assisted suicide laws. See https://dailycaller.com/2022/08/12/canada-euthanasia-disability-human-rights-mental-health/ . Future ultra vires action such as described in this document could provide HHS this same tool to further its anti-human, Leftist agenda. With the adoption of such a rule, one who compromises their beliefs in fear of possible crippling cost may still be pressured or forced into an assisted suicide if the government believes it is in its interest to limit liability or eliminate a less favored group thus vitiating the purpose of the compromise.

I also request the court expedite a decision on the defendant's PMTD so that I may pursue an Appeal in this case without delay, which could compound the injuries mentioned above.

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7 *Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).*

Certificate of Service

I certify I have on 9/1/2022 mailed a copy of the above document to the clerk of the court at:

United States District Clerk
Southern District of Texas
515 Rusk, Room 5300
Houston, TX 77002

as I do not have access to the Court's electronic filing system. I have also mailed a copy to Defendant's Counsel at:

Rebecca M. Kopplin
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005

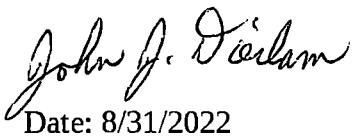
I have emailed a courtesy copy to the defendant's counsel at Rebecca.M.Kopplin@usdoj.gov as well as the Case Manager for the Judge of the Court at Arturo_Rivera@txs.uscourts.gov.

John J. Dierlam

Date: 9/1/2022
John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Phone: 281-424-2266

Certificate of Conference

I certify I have on August 31, 2022 conferred with Rebecca M. Kopplin via email. The government opposes this Motion.



Date: 8/31/2022
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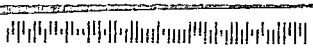

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam	§	
Plaintiff	§	
	§	
versus	§	
	§	CIVIL ACTION NO. 4:16-cv-00307
	§	
Joseph R. Biden, in his official capacity as President of the United States et. al.	§	
	§	
Defendants	§	

[Proposed] Order

Having found that the Plaintiff has met his burden to establish the elements for a preliminary injunction, the Court enjoins the Defendants from the creation or enforcement of any new rule which could impact faith and morals. This injunction is to include the enforcement of the rules in Vol. 87 Fed. Reg. 47,824 (August 4, 2022) against "covered entities" under the color of its new definition of sex as enforcement of Section 1557 of the ACA. It will also include any similar rule advancing euthanasia or assisted suicide.

This court retains jurisdiction to enforce the provisions of this Order.

The Honorable Keith P. Ellison
United States District Judge