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	§	

REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Argument

I The objections of the defendants concerning a preliminary injunction and the Complaint not mentioning Section 1557 of the ACA are invalid

The defendants mischaracterize the history of this case and the nature of the requested injunction on pp.1-2 of the Defendant's Opposition. Judge Ellison reflected these ideas in the Status Hearing of 9/20/2022. The defendants and the judge indicate the length of time since this suit was filed and the Complaint never mentions Section 1557 of the ACA, which purportedly is the authorizing statute of the regulation, make the current injunction request invalid.

A A preliminary injunction was requested at the beginning of this lawsuit and a permanent injunction was requested in the Third Amended Complaint.

First, a preliminary injunction was requested in the original Complaint and a Motion for such relief was filed on 12/8/2016, Dkt#44. Perhaps if the Court at that time had granted the request the current Motion would be unnecessary as the defendants would have been dissuaded from further mischief along the same lines. About a year after the request for an injunction, near the end of 2017, the defendants admitted a violation of the RFRA. Second, ¶295 of the Third

Amended Complaint (3AC) also requests a,

> permanent injunction upon the defendants to prevent them ever again to include in "minimum essential coverage" any requirement for coverage of sterilization, contraception, abortion, related counseling or any other coverage which can impact faith and morals.

It is the defendant's who seek to alter the status quo which gives rise to the current request for a preliminary injunction against their NEW attacks and harm to "faith and morals." The defendants attempt to argue that it is too late to request an injunction even though an injunction was previously requested and denied. These injuries continue to this day. Simultaneously, the defendants argue it is too early for a preliminary injunction as the rule is not yet final. The contradictory nature of these arguments should help tip the "balance of equities" in my favor.

B A challenge to a regulation is a challenge to the authorizing Statute

The case *FRANCISCAN ALLIANCE, INCORPORATED v. Becerra, No. 21-11174 (5th Cir. Aug. 26, 2022)* has many parallels to and is very apposite to the instant case. Franciscan Alliance is a Catholic organization. The 5th circuit concurred with the lower court's decision to grant the plaintiffs a permanent injunction against HHS rather than just vacatur of the regulation. The regulations could potentially force the Catholic organization to preform gender reassignment surgeries and abortions absent the injunction. The *Franciscan Alliance* lawsuit dates from a 2016 rule by HHS under the Obama administration. Initially the lower court did not issue a permanent injunction and stated with the vacatur of the rule there was no indication HHS would force the plaintiffs to perform the religiously prohibited operations. The plaintiffs appealed.

In *Franciscan Alliance* the plaintiffs like the instant case never mention Section 1557 in their Complaint but only challenge the regulation. HHS objected and the court corrected the government's mistake,

> HHS implicitly argues that a lawsuit challenging a regulation and a lawsuit challenging the underlying statute are different. But as the Court recently noted in FEC v. Cruz, a challenge to an agency regulation is necessarily a challenge to the underlying statute as well. Id.

In any case, FRCP 54(c) allows a court to grant entitled relief not requested.

In addition, the use of Section 1557 of the ACA is subterfuge and misdirection in the instant case. It is merely a back door to change "minimum essential coverage," which is a central subject of this lawsuit and the actual target of the defendants. The defendants would care little about Section 1557 if it could not be used to coerce health care insurers and providers into modifying their contracts and actions. It is the continuing corruption inherent in "minimum essential coverage" which allows the defendants to give certain groups benefits at no additional cost while acting to the detriment of all other groups forced to pay for these benefits. It is no coincidence the groups rewarded are political and religious allies. Also, the proposed rule seeks to change more than an interpretation of Section 1557 of the ACA. It alters other definitions and practices to expand coverage for abortion, contraception, sterilization, and related counseling to at least some parts of medicare. Again, these changes are a back door attempt to evade the definition by Congress in the ACA that medicare fully met the requirements of "minimum essential coverage."

II The defendants mischaracterize my position on HHS enforcement of Section 1557

The defendants state on p.1 of their opposition, "the content of any final rule promulgated by HHS regarding Section 1557 is yet unknown and will depend on HHS's consideration of comments received during the rulemaking process..." They indicate I acknowledge the truth of this statement. I most certainly do NOT acknowledge this statement. It is false for at least a couple of reasons. This statement contradicts the history and practice of HHS regarding this

issue. In *Franciscan Alliance*, the agency on more than one occasion sought to fashion rules which would force the plaintiffs to provide gender surgeries and abortions. "Consideration of comments" had little impact on the agency's dogmatic agenda. This statement is also contrary to the determination of the Judge in *Tex. v. EEOC, et al, No. 2:21–cv–00194–Z (N.D. Tex. May 26, 2022).* The Judge in this case determined the HHS guidance letter of March 2, 2022 was sufficient to cause legal consequences and therefore be considered final agency action. The same is true here. See also the quote infra from *Franciscan Alliance.* HHS may at any time enforce its interpretation of Section 1557. Health insurers and other covered entities who do not provide sufficient coverage for "gender affirming care" and abortion may be subject to HHS action. Coverage is determined by the terms in the contract for health care. The health insurer will be required to modify their contract to comply with this new expanded HHS Mandate regardless if they agree with the government's belief system or not. The individual in order to obtain any coverage must affirm the contract and pay the premiums. As given on p.11 of the Response to the Partial Motion to Dismiss the 3rd Amended Complaint, the defendant's appear to concede the obvious, the individual is directly the object of "government regulation." The final target of the Guidance of March 2, 2022 is the individual policy holder who fuels the entire system.

III The defendants mischaracterize my position on HHS enforcement of Section 1557

The defendants state on p.2 that I, "cannot currently identify any non-speculative injuries caused by the notice of proposed rulemaking." The injury is on going and not speculative. I currently do not have health insurance. I am keenly aware of the crippling costs a traumatic event or disease could cause. Within the past year, two renters in my RV park have died of cancer. At least one and probably both were younger than myself. My advancing age increasingly makes it likely a health related event will occur. The defendants have damaged the market in a manner to

make it difficult at best to find health insurance compliant with my faith. The proposed rulemaking creates a greatly expanded HHS Mandate FAR WORSE than the original, which is currently still in effect. It will make it impossible to find health insurance compliant with my faith or enroll in at least some parts of Medicare, if any. The HHS guidance of 3/2/2022 is already in effect and will impact "minimum essential coverage." The extensive litigation history of HHS et. al. on this subject also argues HHS very much prefers to fight religious concessions in court rather than make accommodation to religion in advance in violation of the 1st amendment to the Constitution.

IV Irreparable harm has been shown as a matter of Law

On p.3-5 of the Defendant's Opposition To Plaintiff's Motion For Preliminary Injunction the defendant's make arguments similar to the statement, "To obtain emergency relief Mr. Dierlam must demonstrate that irreparable harm is likely, not merely possible..." One of the appellants in the *Franciscan Alliance* case made an similar assertion that the plaintiff in that case had not satisfied the "irreparable harm standard." The court responded, "We have recognized that the loss of freedoms guaranteed by the First Amendment, RLUIPA, and RFRA all constitute per se irreparable harm." The court refused to consider the matter any further. This topic is also mentioned on p.3 of my Motion for Preliminary Injunction. My Complaint contains First Amendment violations, Claims 4-6 and 10-12, as well as an RFRA violation, Claim 4, to which the defendants have admitted some culpability. The defendants should address this argument to the 5th circuit court, as their disagreement is with a pronouncement of Law by this court and not myself.

V The relief requested is consistent with the relief specified in the 3AC

Contrary to the statements on p.5 of the defendant's opposition, the relief sought is well

within the bounds of the Complaint, falling within the Claims against the HHS Mandate and "minimum essential coverage." See also the quote supra from ¶295 of the Complaint. Fresh and as well as continuing injuries exist. No religious exemption exists for the new injuries. The Court in *FRANCISCAN ALLIANCE, INCORPORATED v. Becerra, No. 21-11174 (5th Cir. Aug. 26, 2022)* ruled for the plaintiffs as HHS tried to force medical professionals to act against their religious belief and medical judgment. That case has been fought for many years and demonstrates how dug in, dogmatic, and unconscionable are the defendants. Overwhelming evidence exists the rule will be finalized by this administration, but the guidance of March 2, 2022 is currently effective regardless. The opposition will not be given any consideration just as with the original HHS Mandate. An extraordinary remedy is justified by the extraordinary nature of the violations of the defendants and their hostility to religion especially Catholic.

The argument advanced by the defendants on pp.5-6 of the opposition causes me pause to wonder if opposing counsel has read the 3AC. The defendants indicate that the only relief which can be requested is necessarily "...relating to only the provisions of the ACA that Mr. Dierlam challenges in this Third Amended Complaint." The 3AC contains 21 claims, which challenge the constitutionality of the HHS Mandate, many provisions of the ACA including "minimum essential coverage," as well as the premises the ACA is based upon. (See especially Claims 11 – 20 in the 3AC.) As previously stated in the 3AC as well as other filings the relief which can satisfy most of the claims is a declaration the ACA is unconstitutional and all its supporting regulations are null and void. I am not asking this court to suspend all operation and enforcement of the ACA, which by the defendant's words would be the maximum extent of the relief I could request in a preliminary injunction. I request a much smaller subset of this relief. As stated in the

Motion, I request that this court prevent the defendants from creating any new requirements in "minimum essential coverage" which can affect faith and morals. Health Care involves questions central to life and death, which is the domain of much religious thought. It is expected different religions will address these questions with different approaches and different prohibitions and permissions. In this area, it may be difficult to craft rules which do not touch upon the faith and morals of some religion, but that is the can of worms opened by Congress and the defendants when they went down a path which trod roughshod over Constitutional rights. For the Catholic faith, I would suggest consulting a well established book on Catechism. Fr. Ripperger has recommended, THE CATECHISM EXPLAINED by Francis Spirago, Benziger Brothers, New York.

VI This Case is NOT moot and review under the APA is appropriate in the instant case

The current controversy should also amply demonstrate that the claims in the Complaint are not moot as the major arguments have shifted to unripeness and the requested relief is outside the scope of the Complaint. The defendants also claimed the RFRA violation in *Franciscan Alliance* was moot. However, the court rejected this assertion,

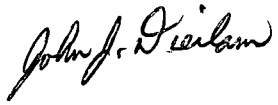
> ...it has become even clearer that Franciscan Alliance's RFRA claim is not moot. Just months ago HHS issued the 2022 Notice, which warned covered entities like Franciscan Alliance that refusing to offer gender-reassignment surgeries violates Section 1557. HHS has also repeatedly refused to disavow enforcement against Franciscan Alliance. In its brief on appeal, HHS simply says it "has not to date evaluated" whether it will enforce Section 1557 against Franciscan Alliance—in other words, it concedes that it may. Id. (footnotes omitted)

Although the court in *Franciscan Alliance* indicated the defendants unfairly confounded the issues of review of the 2016 rule involving the gender and abortion Mandate under the APA with the RFRA claim, in the instant case the APA is applicable. The court declared the APA claim moot in the *Franciscan Alliance* case.

Judge Kacsmaryk in his order in *Tex. v. EEOC, et al, No. 2:21–cv–00194–Z (N.D. Tex. May 26, 2022)* defines, "Final agency action is action that: (1) 'mark[s] the consummation of the agency's decision-making process' and (2) 'by which rights or obligations have been determined, or from which legal consequences will flow.' *Bennett v. Spear, 520 U.S. 154, 178 (1997)* (internal marks omitted)." In *Bennett*, the Supreme court found that a "Biological Opinion" and accompanying "Incidental Take Statement" could be considered final agency action as it altered the legal landscape for the plaintiffs. Judge Kacsmaryk in his order noted differences in the language between Title VII under which Bostock is predicated and Title IX associated with Section 1557. He concluded the HHS Guidance of March 2, 2022 goes far beyond Bostock and Title IX and is therefore a legislative rule. The Judge indicates legislative rules are final agency action. The guidance also satisfies the second prong in that it binds HHS enforcement employees to act a certain way. The quote above from the *Franciscan Alliance* decision similarly imposes "legal consequences" upon any covered entity. Covered entities include health insurance providers. Any individual purchasing the contract would be legally bound by the terms imposed by HHS. Therefore, agency action is final and review under the APA is appropriate, I have standing, and this court has jurisdiction.

Conclusion

The paragraphs above address and invalidate the arguments in the Defendants' Opposition To Plaintiff's Motion For Preliminary Injunction. For the reasons stated above and in the Opposed Motion For Temporary Injunction and Expedited Consideration on Defendant's Partial Motion To Dismiss, I request the relief given in that Motion.



Certificate of Service

I certify I have on 9/27/2022 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

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