UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANK R. O'BRIEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 4:12-CV-476 (CEJ)
	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motion to dismiss plaintiffs' amended complaint pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure. Plaintiffs oppose the motion, and the issues are fully briefed.[1]

Plaintiffs bring this action for declaratory and injunctive relief, claiming that regulations promulgated under the Patient Protection and Affordable Care Act (ACA) Pub. L. No. 111-148, 124 Stat. 119 (2010), violate plaintiffs' statutory and constitutional rights. Specifically, plaintiffs allege violations of the First Amendment, the Religious Freedom Restoration Act (RFRA), and the Administrative Procedure Act (APA).[2] Defendants move to dismiss the entire amended complaint for failure to state a claim upon which relief can be granted and to dismiss the Administrative Procedure Act claim for lack of subject matter jurisdiction.

I. Background

[1]The American Civil Liberties Union has submitted an amicus curiae brief in support of defendants' motion to dismiss.

[2] This suit is one of over 30 cases filed challenging the constitutionality of the ACA regulations. See The Becket Fund for Religious Liberty - HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited September 24, 2012).

The plaintiffs in this case are Frank O'Brien and O'Brien Industrial Holdings, LLC (OIH), the limited liability company in which he holds the sole voting interest and of which he is the chairman and managing member. OIH is a secular, for-profit company in St. Louis, Missouri, that is engaged in the business of mining, processing, and distributing refractory and ceramic materials and products. Frank O'Brien is Catholic and tries to manage and operate OIH in a manner consistent with his religion.[3]

Defendants are the U.S. Department of Health and Human Services (HHS), Kathleen Sebelius in her official capacity as Secretary of HHS, the U.S. Department of Treasury, Timothy F. Geithner in his official capacity as Secretary of the Treasury, the U.S. Department of Labor (DOL), and Hilda L. Solis in her official capacity as Secretary of the DOL. Collectively, defendants are the departments and officials responsible for adopting, administering, and enforcing the regulations to which plaintiffs object.

[3] In OIH's main lobby is a statue of the Sacred Heart of Jesus. OIH's mission, as it appears on the company website, is "to make our labor a pleasing offering to the Lord...." OIH's statement of values includes references to the Golden Rule and the Ten Commandments, and OIH's "Explanation of Mission & Values" includes a direct quotation from the New Testament. Finally, OIH and its subsidiaries "pledge to tithe on the earnings of the Companies." Am. Compl. ¶¶ 20-23, [Doc. #19].

[4] This provision was added as the "Women's Health Amendment" to the ACA during the legislative process.

(HRSA), an agency within HHS, commissioned the Institute of Medicine (IOM) to conduct a study on preventive services necessary to women's health. The IOM, in a

[5] This regulation is referred to by plaintiffs as "the Mandate" or "the Final Rule." Am. Compl. ¶ 2, [Doc. #19], and by defendants as "the preventive services coverage regulations."

> (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization;(3) The organization serves primarily persons who share the religious tenets of the organization; (4) The organization is a nonprofit organization as described in [provisions of the Internal Revenue Code referring to churches, associations of churches, and exclusively religious activities of religious orders].

45 C.F.R. §147.130(a)(1)(iv)(B); 76 Fed. Reg. 46621-01, 46623 (Aug. 3, 2011). Second, "grandfathered" health plans (plans in which individuals were enrolled on March 23, 2010, the date the ACA was enacted) are not subject to the preventive services provision of the ACA. 75 Fed. Reg. 34538-01 (June 17, 2010). Third, a temporary enforcement safe-harbor provision applies to certain non-profit organizations not qualifying for any othe

[6] The departments have issued an advanced notice of proposed rulemaking (ANPRM), stating that during the safe-harbor, the departments will consider amending the definition of "religious employer." 77 Fed. Reg. 16501, 16504 (March 21, 2012).

[7] This distinguishes the current case from other similar cases against HHS that have been dismissed for lack of Article III standing or ripeness. See, e.g., Wheaton College v. Sebelius, Civ. A. 12-1169 ESH, 2012 WL 3637162 (D.D.C. August 24, 2012); State of Nebraska v. HHS, 4:12cv3035, 2012 WL 2913402 (D. Neb. July 17, 2012).

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injunction, to prevent defendants from enforcing the challenged regulations against plaintiffs as they select a new employee health plan before January 1, 2013. [Doc. #38].

II. Legal Standard

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of the complaint. The factual allegations of a complaint are assumed true and construed in favor of the plaintiff, "even if it strikes a savvy judge that actual proof of those facts is improbable." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) citing Swierkiewicz v. Sorema N.A., 534 U.S.506, 508 n.1 (2002); Neitzke v. Williams, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. Id. A viable complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp., 127 S. Ct. at 1974; See also id. at 1969 ("no set of facts" language in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), "has earned its retirement."). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. at 1965.

Dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure is appropriate if the plaintiff has failed to satisfy a threshold jurisdictional requirement. See Trimble v. Asarco, Inc., 232 F.3d 946, 955 n.9 (8th Cir. 2000). A dismissal for

lack of subject matter jurisdiction requires that the complaint be successfully challenged on its face or on the factual truthfulness of its averments. Titus v. Sullivan,4 F.3d 590, 593 (8th Cir. 1993). In a facial attack, the court restricts itself to the face of the pleadings, and all of the factual allegations concerning jurisdiction are presumed to be true. Id. However, in a factual challenge, the court considers matters outside of the pleadings, and no presumptive truthfulness attaches to the plaintiff's allegations. Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Furthermore, the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Id. at 729. "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction – its very power to hear the case – there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Id. The burden of proving that jurisdiction exists rests with the plaintiff. Id.

III. Discussion

A. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) forbids government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a), (b). RFRA was enacted by Congress in response to Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 879 (1990) (holding that, under the First Amendment, "the right of free exercise does not relieve an individual of the obligation to comply with a valid

and neutral law of general applicability") (internal quotations omitted). Congress intended RFRA "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." 42 U.S.C. §2000bb(b)(1).

In order to state a prima facie case under RFRA, plaintiffs must allege a substantial burden on their religious exercise. RFRA defines the "exercise of religion" broadly as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000bb-2(4); 42 U.S.C. §2000cc-5. In the instant case, the Court does not doubt the sincerity of plaintiffs' beliefs, nor does the Court question the centrality of plaintiffs' condemnation of contraception to their exercise of the Catholic religion. Indeed, as plaintiffs note, "[j]udging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims." Employment Div. v. Smith, 494 U.S. at 886 (quoting United States v. Lee, 455 U.S. 252, 263 (1982) (internal quotations omitted)).

Defendants assert that OIH, as a secular limited liability company, by definition cannot "exercise" a religion, and therefore cannot assert claims under RFRA or the First Amendment Free Exercise Clause. A district court in Colorado, currently considering another case in which a secular, for-profit corporation and its managers bring First Amendment and RFRA challenges to the coverage regulations, accurately noted that, "[t]hese arguments pose difficult questions of first impression. Can a corporation exercise religion?" Newland v. Sebelius, 1:12-cv-1123, 2012 WL 3069154, at *6 (D.

Co. July 27, 2012) (granting plaintiffs' motion for preliminary injunction, and enjoining the enforcement of the preventive services coverage regulations against plaintiffs).

Plaintiffs in this case argue that the Court should presume corporations are included within the word "person" in RFRA, and that it would be unreasonable to conclude that secular corporations cannot exercise religion after the Supreme Court's application of the First Amendment Free Speech Clause to corporations in Citizens United v. Fed. Election Com'n

Courts frequently look to free exercise cases predating Employment Div. v. Smith to determine which burdens cross the threshold of substantiality. See, e.g.,

threat of criminal sanction to perform acts undeniably at odds with the fundamental tenets of their religious beliefs.") More recently, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 426 (2006), the government conceded that the Controlled Substances Act imposed a substantial burden on the religious exercise when the Act prevented a religious sect from engaging in their traditional communion using a hallucinogenic tea.

Plaintiffs allege that the preventive services coverage regulations impose a

RFRA is a shield, not a sword. It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own.

Frank O'Brien pay salaries to their employees---money the employees may use to purchase contraceptives or to contribute to a religious organization. By comparison, the contribution to a health care plan has no more than a *de minimus* impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees.

Under plaintiffs' interpretation of RFRA, a law substantially burdens one's religion whenever it requires an outlay of funds that might eventually be used by a third party in a manner inconsistent with one's religious values. This is at most a de minimus burden on religious practice. The challenged

"Neutrality and general applicability are interrelated..." Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993), and a deficiency in one prong suggests a deficiency in the other. A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." Id. at 533. An impermissible object may be discerned through the law's text, legislative history, and the actual effect of the law in operation. Id. at 533, 535, 540. A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." Id. at 543.

In this case, the Court finds that the preventive services coverage regulations are neutral. The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs. This is evident from both the inclusion of the religious employer exemption, as well as the legislative history of the ACA's Women's Health Amendment. See, e.g., 2009 WL 4405642; 155 Cong. Rec. S12265, S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("The problem [with the current bill] is, several crucial women's health services are omitted. [The Women's Health Amendment] closes this gap.") See also 2009 WL 4280093; 155 Cong. Rec. S12021-02, S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("... in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men... This fundamental inequity in the current system is dangerous and discriminatory and we must act.")

Plaintiffs argue that, because many employers already provide coverage for women's preventive services, the law must have been purposefully targeted at religious objectors. However, a neutral and perfectly constitutional law may have a

Although neutral on its face, the Court found that the law effectively distinguished between "well-established churches" and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance of financial support from members." 456 U.S. at 247, n.23 [*quoting* Valente v. Larson, 637 F.2d 562, 566 (8th Cir. 1981)]. This was constitutionally problematic, not because the law discriminated between religious organizations based upon their structure, but because the law had both the purpose and the effect of discriminating against certain denominations. "This statute does not operate evenhandedly, nor [as its legislative history reveals] was it designed to do so: The fifty percent rule... effects the selective legislative imposition of burdens and advantages upon particular denominations." Id. at 253-54. The exemption in this case, unlike the exemption in Larson, was not designed as a "religious gerrymander," but as a permissible religious accommodation.

The religious employer exemption in the ACA is one of a number of instances of government accommodation of religion.[10] As the Supreme Court has frequently articulated, there is space between the religion clauses, in which there is "room for play in the joints;" government may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause. See, e.g., Walz, 397 U.S. at 669; Locke v. Davey, 540 U.S. 712, 718-19 (2004); Cutter v. Wilkinson, 544 U.S. 709, 713-14 (2005). Accommodations of religion are possible because the legislative line-drawing to which the plaintiffs object, between the religious and the secular, is constitutionally

[10] Just last term, the Supreme Court recognized the existence of the "ministerial exception," barring "ministers'" Title VII suits against their religious employers. Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 132 S.Ct. 694 (2012).

Plaintiff also suggests that certain denominations, such as Old Order Amish and Orthodox Jewish groups, may incidentally benefit from the exemption more frequently than other denominations. Even if this were true, it does not alter the fact that the exemption does not purposefully discriminate between religious sects. In Gillette, the Supreme Court rejected the argument that a conscientious objector statute, allowing for religious objections to war in general but not to particular wars, violated the Establishment Clause because it disproportionately excluded objectors from certain sects that did not condemn all war, but distinguished between just and unjust wars. 401 U.S. at 452-54. That religious exemption, like this one, had "nothing to do with a design to foster or favor any sect, religion, or cluster of religions." Id. at 452.

2. Excessive Entanglement

When analyzing a law for entanglement, "the questions are whether the [government] involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." In this case, there can be no entanglement as applied to these particular plaintiffs, since neither satisfies the non-profit criteria required for religious employer status. Thus, the government would not reach an assessment of whether h di

It is clear that the preventive services coverage regulations do not require plaintiffs to speak, in a literal sense. Plaintiffs remain free to express their views and to discourage their employees from using contraception. However, plaintiffs argue that the regulations require plaintiffs to subsidize other private individuals' speech and to subsidize "conduct [that] is inherently expressive." Pls.' Memo. at 36 [Doc. #31]. Plaintiffs encourage the Court to apply the strict scrutiny review that the Supreme

benefits for any plan year." 42 U.S.C. §18023(b)(1)(A)(i). Defendants argue that plaintiffs lack prudential standing to bring suit under the APA, and therefore their claims should be dismissed for lack of jurisdiction. In the alternative, defendants maintain that plaintiffs have misconstrued the phrase "abortion services," and thus the regulations are in accordance with existing law, and are neither arbitrary nor capricious.

1. Prudential Standing and the Zone of Interests

The APA grants standing to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. In addition to Article III standing, plaintiffs must also satisfy the requirements of prudential standing. As initially articulated by the Supreme Court, a plaintiff satisfies prudential standing if the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

Subsequent cases reveal that this standard is not particularly stringent. Instead, "we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Patchak, 132 S.Ct. 2199, 2210 (2012). In Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987), the Supreme Court emphasized the expansive nature of the "zone of interests" when challenging administrative action. "In cases where the plaintiff is not itself the subject of the contested regulatory action the [zone of interest] test denies a right of review if the plaintiff's interests are so marginally related or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not

[12] Exchanges are forums through which individuals and small businesses will be able to compare and purchase qualified health insurance plans. Affordable Insurance Exchanges,

Plaintiffs allege that the defendants arbitrarily and capriciously ignored the impact of the regulations upon secular, for-profit employers maintaining religious values. Review under the "arbitrary and capricious" standard is akin to rationality review:

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). See also Cent. S.D. Co-op, Grazing Dist. v. Sec'y of Dep't of Agric., 266 F.3d 889, 898 (8th Cir. 2001) ("When an agency has considered relevant evidence and arrived at a rational result, a party's mere dissatisfaction with the agency's decision does not entitle it to relief.")

Contrary to plaintiffs' assertions, defendants considered all religious objections to the regulations and arrived at a solution "intended to reasonably balance the extension of any coverage of contraceptive services... to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions." 76 Fed. Reg. 46621, 46623 (August 3, 2011). The temporary enforcement safe-harbor demonstrates that defendants considered and accommodated religious objections from organizations falling outside the definition of "religious employer." Finally, as explained in the departments' advanced notice of proposed rulemaking (ANPRM), during the temporary safe-harbor "the Departments seek comment on which religious organizations should be eligible for the accommodation and whether, as some religious stakeholders have suggested, for-

profit religious employers with such objects should be considered as well." 77 Fed. Reg. 16501, 16504 (March 21, 2012).

The challenged regulations are neither arbitrary nor capricious, and therefore Count V of plaintiffs' Amended Complaint will be dismissed.

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For the reasons set forth above,

IT IS HEREBY ORDERED that the defendants' motion to dismiss all counts of plaintiffs' Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) is granted .

An Order of Dismissal will be filed separately.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 28th day of September, 2012.