IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHNSON WELDED PRODUCTS, INC.; and LILLI JOHNSON, Plaintiffs, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary, United States Department of Health and Human Services; *et al.*, Defendants.	Case No. 16-cv-00557-ESH **PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY INJUNCTION AND STAY OF PROCEEDINGS**

Plaintiffs Johnson Welded Products, Inc. ("JWP") and Lilli Johnson (collectively referred to as "Plaintiffs"), by and through undersigned counsel, hereby submit this unopposed motion for a preliminary injunction based on their claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., and a stay of all proceedings in this case pending the resolution of the consolidated appeals in *Priests for Life v. U.S. Department of Health and Human Services*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir.), which were remanded to the U.S. Court of Appeals for the D.C. Circuit following the U.S. Supreme Court's *per curiam* decision in *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 U.S. LEXIS 3047 (U.S. May 16, 2016).

The requested injunction is consistent with the Supreme Court's opinion in *Zubik*, which vacated, *inter alia*, the panel decision in *Priests for Life* and remanded the consolidated appeals for further proceedings consistent with the Court's opinion.

Priests for Life involves legal claims similar to those advanced by Plaintiffs in this case, against the same federal regulations (as applied to closely-held for profit corporations), and the same federal defendants. Consequently, a final decision on the merits by the D.C. Circuit in *Priests for Life* will invariably affect the legal claims in this case.

Plaintiffs' plan year begins in July. Consequently, the challenged implementing regulations will be operating in full force against Plaintiffs as of July 1, 2016, subjecting Plaintiffs to fines of approximately $42,000 per day that they are not in compliance with the regulations.

In this motion, Plaintiffs request an order preliminarily enjoining Defendants as follows:

> Nothing in this [Order] is to affect the ability of the Government to ensure that women covered by [Plaintiffs'] health plans "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton College v. Burwell*, 573 U.S. __, __ (2014) (slip op., at 1). Through this litigation, [Plaintiffs] have made the Government aware of their view that they meet "the requirements for exemption from the contraceptive coverage requirement on religious grounds." *Id*. at __ (slip op., at 2). Nothing in this [Order] "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage" going forward. *Ibid*. Because the Government may rely on this notice, the Government may not impose taxes or penalties on [Plaintiffs] for failure to provide the relevant notice.

As noted and discussed further in the accompanying memorandum, this proposed order is consistent with the *Zubik* opinion.

Plaintiffs further ask this Court to stay all proceedings until thirty (30) days after the final resolution of the consolidated appeals in *Priests for Life*.

Pursuant to Local Rule 7(m), counsel for the parties discussed this motion on multiple occasions. Defendants' counsel stated that, in light of the Supreme Court's *per curiam* decision in *Zubik v. Burwell*, Defendants do not oppose entry of the order requested by this motion pending resolution of the consolidated appeals in *Priests for Life v. U.S. Department of Health and Human Services* (D.C. Cir.). Defendants' counsel has also indicated that Defendants do not request a bond.

WHEREFORE, Plaintiffs respectfully request that the Court grant this motion and enter the proposed order.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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JOHNSON WELDED PRODUCTS, INC.; and LILLI JOHNSON, Plaintiffs, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary, United States Department of Health and Human Services; *et al.*, Defendants.	Case No. 16-cv-00557-ESH **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY INJUNCTION AND STAY OF PROCEEDINGS**

INTRODUCTION

Plaintiffs request a preliminary injunction and a stay of all proceedings in this case pending the resolution of the consolidated appeals in *Priests for Life v. U.S. Department of Health and Human Services*, Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir.), which were remanded to the U.S. Court of Appeals for the D.C. Circuit following the U.S. Supreme Court's *per curiam* decision in *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 U.S. LEXIS 3047 (U.S. May 16, 2016).[1]

As noted in the motion, *Priests for Life* involves legal claims similar to those advanced by Plaintiffs against the same federal regulations and the very same defendants. Consequently, a decision on the merits by the D.C. Circuit in *Priests for Life* will invariably affect the legal claims in this case.

THE *HOBBY LOBBY* DECISION

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Court struck down the enforcement of the contraceptive services mandate of the Affordable Care Act as applied to closely-held, for profit corporations under the Religious Freedom Restoration Act, 42 U.S.C. §

[1] A copy of the slip opinion is attached.

2000bb *et seq*. ("RFRA"), concluding that least restrict alternatives were available, citing the so-called "accommodation" that the Government extended to non-exempt, nonprofit religious organizations as an example. However, the majority noted that "[w]e do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims." *Id*. at 2782. Consequently, *Hobby Lobby* did not resolve the question of whether the Government's proposed "accommodation" did in fact resolve the claims of those who object to this revision on religious grounds. Indeed, the consolidated cases at issue in *Zubik*, which includes *Priest for Life*, are all challenges to the "accommodation" brought on behalf of non-exempt, nonprofit religious organizations.[2]

As *Hobby Lobby* reaffirmed, the exercise of religion includes "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine," and RFRA accordingly protects the right "to conduct business in accordance with [one's] religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2770, 2778. Consequently, Plaintiffs are in the same position as the non-exempt, nonprofit religious organizations (*i.e.*, petitioners in *Zubik*) in this challenge to the "accommodation" as applied to closely-held, for profit corporations, such as JWP.

THE CHALLENGED "ACCOMMODATION"

Defendants initially offered to non-exempt, nonprofit religious organizations an alternative mechanism to "compl[y] with [the] requirement . . . to provide contraceptive

[2] The contraceptive services mandate as originally enforced beginning in August 2012 would have operated against Plaintiffs as of July 1, 2013. As a result, Plaintiffs commenced legal action in this Court on April 30, 2013. *See* Complaint, *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609 (ESH) (D.C. April 30, 2013), ECF No. 1. A preliminary injunction issued on May 24, 2013. Minute Order Granting Prelim. Inj., *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609 (ESH) (D.C. May 24, 2013). And following the U.S. Supreme Court's decision in *Hobby Lobby*, the mandate, as applied against Plaintiffs, was permanently enjoined, *see* Order & Judgment, *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609 (ESH) (D.C. Oct. 24, 2014), ECF No. 11. This action challenges the application of the so-called "accommodation," the same challenge at issue in *Priests for Life*.

coverage," which ensures that the organization's plan beneficiaries receive the mandated coverage from the organization's insurance companies in connection with the organization's health plans. 26 C.F.R. § 54.9815-2713A(b); 29 C.F.R. § 2590.716-2713A(b)(1); 45 C.F.R. §147.131(c)(1). (Compl. ¶ 58).

Defendants have labeled this requirement an "accommodation" because it does not allow the eligible organization to be billed directly for the objectionable coverage. However, this alternative regulatory scheme does not actually "accommodate" the practices of many religious organizations—or Plaintiffs in this case—who object to providing or facilitating the mandated coverage even if they do not have to pay for it. (Compl. ¶ 59; *see also Zubik*, Slip Op.).

Defendants' "accommodation" applies to "eligible" organizations that have faith-based objections to offering coverage for "some or all" of the mandated services. 26 C.F.R. § 54.9815-2713A(a). (Compl. ¶ 60).

Following its loss in *Hobby Lobby*, the Government expanded the definition of "eligible organizations" and thus expanded the alternative regulatory scheme (*i.e.*, the "accommodation") by which these organizations must comply with the contraceptive services mandate to include closely-held, for-profit corporations such as JWP and its owners. 80 Fed. Reg. 41326. Consequently, Plaintiffs must now comply with the contraceptive services mandate *via* the so-called "accommodation." (Compl. ¶ 61).

The final regulations subjecting Plaintiffs to this alternative regulatory scheme apply "beginning on the first day of the first plan year (or, in the individual market, the first policy year) that begins on or after September 14, 2015." 80 Fed. Reg. 41330. Consequently, Plaintiffs will be required to comply with the contraceptive services mandate *via* the so-called "accommodation" beginning on July 1, 2016. (Compl. ¶ 62).

To "compl[y]" with the mandate to provide contraceptive services under this regulatory scheme, an eligible organization, which includes JWP, must first "contract[] with one or more third party administrators" or "provide[] benefits through one or more group health insurance issuers." 26 C.F.R. § 54.9815-2713A(b)(1)(i), (c)(1). It must then either sign and submit a "self-certification" directly to its insurance company, or sign and submit a "notice" to the Government providing detailed information regarding its plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. § 54.9815-2713A(a); (b)(1), (c)(1). (Compl. ¶ 64).

The effect of either submission is the same: By signing and submitting the form, the eligible organization authorizes its insurance company to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. 26 C.F.R. § 54.9815-2713A(b)-(c). Thus, "if" and "when" the organization signs and submits the form—but only if and when it does so—its own insurance company becomes authorized and obligated to provide "payments for contraceptive services" to the organization's own plan beneficiaries in connection with the organization's own health plan. 26 C.F.R. § 54.9815-2713A(b)-(c). (Compl. ¶ 65).

PLAINTIFFS' RELIGIOUS OBJECTION TO THE "ACCOMMODATION"

Based on the teachings of the Catholic Church, and their own sincerely held beliefs, Plaintiffs do not believe that contraception, sterilization, abortifacients, or abortion are properly understood to constitute medicine, health care, or a means of providing for the well-being of persons. Plaintiffs firmly believe these procedures involve gravely immoral practices. (Compl. at ¶ 86).

The challenged regulatory scheme prohibits Plaintiffs from continuing to offer health coverage in a manner consistent with their Catholic faith. Plaintiffs sincerely believe that

compliance with the mandate—either directly or through one of the "alternative process[es]" offered by Defendants, such as the so-called "accommodation" at issue here—would force them to act in violation of their religious beliefs. (Compl. ¶ 72).

Specifically, Plaintiffs' religious beliefs prohibit them, *inter alia*, from signing or submitting the required "self-certification" or "notification," which authorizes, obligates, and incentivizes their insurance company to deliver abortifacient and contraceptive coverage to their plan beneficiaries. (Compl. ¶ 73).

Should Plaintiffs fail to comply with the challenged regulatory scheme, they would be subjected to daily fines and penalties of about $42,000, totaling over $15 million annually. (Compl. ¶ 100).

In order for Plaintiffs to act consistent with their religious beliefs until the resolution of *Priests for Life*, Plaintiffs request a preliminary injunction based on their claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

PLAINTIFFS' RFRA CHALLENGE

Under RFRA, which was passed in 1993 in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), the Government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). This general prohibition is not without exception. The Government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). In other words, Congress passed RFRA "to restore the compelling interest test" to neutral laws of general applicability that substantially burden religion. *See* 42 U.S.C. § 2000bb(b).

Pursuant to RFRA, "exercise of religion" is defined 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) (referencing 42 U.S.C. § 2000cc-5(7)(A)). Plaintiffs' sincerely held religious beliefs at issue in this case fall within the protections afforded by RFRA. *See Hobby Lobby*, 134 S. Ct. at 2770, 2778*; see also Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713, 717-18 (1981) (holding that by denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the government imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs," noting that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"). Consequently, Defendants must justify under strict scrutiny the burden imposed by the challenged regulations upon Plaintiffs' religious beliefs. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."). Defendants cannot carry this heavy burden.

***ZUBIK* AND THE PROPOSED ORDER**

In *Zubik*, the Supreme Court vacated the judgments below which held that the "accommodation" did not violate RFRA and remanded the cases to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits. Moreover, and more specifically for purposes of this motion, in its opinion, the Court stated as follows:

> Nothing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by petitioners' health plans "obtain, without cost, the full range of FDA approved contraceptives." *Wheaton College v. Burwell*, 573 U.S. __, __ (2014) (slip op., at 1). Through this

> litigation, petitioners have made the Government aware of their view that they meet "the requirements for exemption from the contraceptive coverage requirement on religious grounds." *Id.*, at ___ (slip op., at 2). Nothing in this opinion, or in the opinions or orders of the courts below, "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage" going forward. *Ibid*. Because the Government may rely on this notice, the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice.

(Slip. Op. at 5).

Plaintiffs' proposed order closely tracks the Court's opinion. Indeed, in light of the *Zubik* opinion, Defendants do not oppose the relief requested in this motion as set forth in the proposed order.

STAY OF PROCEEDINGS

In addition to requesting that this Court grant their unopposed motion for a preliminary injunction, Plaintiffs, without objection from Defendants, further ask this Court to stay all proceedings in this case until thirty (30) days after the final resolution of the consolidated appeals in *Priests for Life*. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

As noted previously, the court of appeals in *Priests for Life* will be addressing legal issues that are substantially similar to those presented in this case, involving facts that are analogous in many respects to those in this case, challenging the same regulations that are challenged in this case, and raising claims that are also largely indistinguishable from those in this case brought against the very same defendants. Even if the D.C. Circuit's opinion does not entirely dispose of this case, the outcome of the appeal is likely to substantially affect the

outcome of this litigation, and the Court and the parties will undoubtedly benefit from the appellate court's views. And, as noted, Defendants do not oppose Plaintiffs' request for a stay.

CONCLUSION

In the final analysis, the requested injunction will simply preserve the *status quo*, protect Plaintiffs' religious exercise to the extent possible, and not harm the interests of Defendants or the public while the D.C. Circuit resolves similar legal claims.

Therefore, for the foregoing reasons, Plaintiffs respectfully ask this Court to grant their unopposed motion for a preliminary injunction based on their RFRA claim and enter the proposed order (attached), enjoining Defendants and staying the proceedings until (30) days after the final resolution of the consolidated appeals in *Priests for Life.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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