

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

FRANK R. O'BRIEN JR., )  
O'BRIEN INDUSTRIAL HOLDINGS, LLC, )  
 )  
PLAINTIFFS, )

CASE NO. 4:12-cv-476

vs. )

**FIRST AMENDED  
COMPLAINT**

UNITED STATES DEPARTMENT )  
OF HEALTH AND HUMAN SERVICES; )  
KATHLEEN SEBELIUS, in her official capacity )  
as the Secretary of the United States Department )  
of Health and Human Services; )  
UNITED STATES DEPARTMENT OF )  
THE TREASURY; TIMOTHY F. GEITHNER, )  
in his official capacity as the Secretary of the )  
United States Department of the Treasury; )  
UNITED STATES DEPARTMENT OF LABOR; )  
and HILDA L. SOLIS, in her official capacity as )  
Secretary of the United States Department of Labor, )  
 )  
DEFENDANTS. )

Plaintiffs, Frank R. O'Brien Jr. and O'Brien Industrial Holdings, LLC, through their attorneys, say:

NATURE OF ACTION

1. In this case, Plaintiffs seek judicial review of Defendants' violations of constitutional and statutory provisions in connection with the Defendants' promulgation and implementation of certain regulations adopted under the 2010 Patient Protection and Affordable Care Act

(“PPACA”), specifically those regulations mandating that employers include in employee health benefit plans coverage of services that violate an employer’s religious and moral values.

2. Specifically, Plaintiffs ask the court for declaratory and injunctive relief from the operation of the Final Rule confirmed and promulgated by the Defendants on February 15, 2012, mandating that group health plans include coverage, without cost sharing, for “all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity” in plan years beginning on or after August 1, 2012 (hereafter, “the Mandate” or “the Final Rule”) see 45 CFR § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines found at <http://www.hrsa.gov/womensguidelines>.

3. Plaintiff, Frank R. O’Brien Jr., is an adherent of the Catholic religion. As the individual with the controlling interest in Plaintiff, O’Brien Industrial Holdings, LLC (“OIH”) and its subsidiaries, O’Brien wishes to conduct his business in a manner that does not violate the principle of his religious faith.

4. O’Brien has concluded that complying with the Mandate would require him to violate his religious beliefs because it would require him and/or the corporations he controls to pay for, not only contraception and sterilization, but also abortion, because certain drugs and devices such as the “morning-after pill,” “Plan B,” and “Ella” come within the Mandate’s and HRSA’s definition of “Food and Drug Administration-approved contraceptive methods” despite their known abortifacient mechanisms of action.

5. O’Brien contends that by requiring him to choose between conducting his business in a manner consistent with his religion, or paying ruinous fines and penalties, the Mandate violates

his rights under the First Amendment, the Religious Freedom Restoration Act, and violates the Administrative Procedure Act.

JURISDICTION AND VENUE

6. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and laws of the United States. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. § 2201 and § 2202 and 42 U.S.C. § 2000bb-1.

7. Venue is appropriate in this district pursuant to 28 U.S.C. §1391(e)(3) as the Plaintiffs reside within this district.

IDENTIFICATION OF PARTIES

8. Plaintiff, Frank R. O'Brien Jr., is an individual and a citizen of the State of Missouri and the United States.

9. O'Brien holds the sole voting interest in Plaintiff, O'Brien Industrial Holdings, LLC, a Missouri limited liability company. Plaintiff, OIH, is the holding company for and owner of the Christy family of companies: Christy Catalytics, LLC, Christy Industrial Services Co., LLC, Christy Minerals Company, LLC, and the Christy Refractories Company, L.L.C. and O'Brien Asset Management, LLC.

10. Frank R. O'Brien Jr. is the Chairman and Managing Member of OIH. He is responsible for setting all policies governing the conduct of all phases of the business of OIH and the Christy family of companies.

11. Defendant United States Department of Health and Human Services ("HHS"), is an

agency of the United States, and is responsible for administration and enforcement of the Mandate/Final Rule.

12. Defendant Kathleen Sebelius is Secretary of HHS, and is named as a party in her official capacity.

13. Defendant United States Department of the Treasury is an agency of the United States, and is responsible for administration and enforcement of the Mandate/Final Rule.

14. Defendant Timothy F. Geithner is Secretary of the Treasury, and is named as a party in his official capacity.

15. Defendant United States Department of Labor (“DOL”) is an agency of the United States, and is responsible for administration and enforcement of the Mandate/Final Rule.

16. Defendant Hilda L. Solis is Secretary of DOL, and is named as a party in her official capacity.

#### FACTUAL ALLEGATIONS

17. Plaintiff, OIH, through its subsidiaries is engaged in the exploration, mining and processing of refractory and ceramic raw materials (Christy Minerals); the manufacturing and distribution of refractory and insulatory products (Christy Refractories); the installation of refractory products for all types of industries (Christy Industrial); and the supplying of ceramic and alumina balls to over 40 countries as well as mass transfer media for the hydrocarbon and chemical processing industries (Christy Catalytics).

18. Plaintiff, OIH, has its main offices at 4641 McRee Avenue in St. Louis, Missouri.

Prominently displayed in the company's lobby is a statue of the Sacred Heart of Jesus.<sup>1</sup>

19. Plaintiff, OIH and its subsidiaries, share a common Mission and Values, which is published on OIH's website.

20. According to the company's website, OIH's Mission "is to make our labor a pleasing offering to the Lord while enriching our families and society."

21. OIH's statement of the company's values begins with the following: "Integrity. Our conduct is guided by the Golden Rule and the Ten Commandments. We will not discriminate based on anyone's personal belief system." The statement of company values contains a link to "more information about our mission and values."

22. OIH's "Explanation of Mission & Values" posted on its website begins with a direct quotation from Ephesians 6:1-9, and proceeds to list the following company goals.

- \* For all of OIH's employees to have the ability to own their own home accomplished through each employee's personnel's pay and an annual profit sharing bonus;
- \* For all of OIH's employees to have the ability to send their children to college, accomplished through a generous company scholarship program.
- \* For all of OIH's employees to have the opportunity to retire with dignity through participation in a 401(k) profit sharing plan.

23. OIH explains its mission of "enriching society" by stating that OIH and its subsidiaries "pledge to tithe on the earnings of the Companies." Part of the tithing is accomplished through a "St. Nicholas Fund," named for the fourth century bishop of Myra. OIH asks its employees to "keep their eyes open" for situations where "a little monetary help may

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<sup>1</sup> Catholic devotion to the Sacred Heart of Jesus is focused on Christ's love, of which his Heart is said to be the living and expressive symbol. Some Catholics display images pertaining to this devotion in their homes and workplaces.

make a big difference to someone” and to contact the company’s St. Nicholas Committee. The committee investigates such referrals and responds to them anonymously.

24. OIH and its subsidiaries currently have 87 employees. The employees are covered by a group policy of health insurance offered and underwritten by United Healthcare Insurance Company. The plan’s annual renewal date is January 1. Like its profit sharing, retirement plan, and scholarship program and tithing efforts, Plaintiffs consider the provision of employee health insurance an integral component of furthering the Company’s mission and values.

25. Plaintiff O’Brien holds to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. He believes that actions intended to terminate an innocent human life by abortion are gravely sinful. Further, O’Brien adheres to Catholic Church teaching regarding the immorality of artificial means of contraception and sterilization.

26. Plaintiff O’Brien believes that he cannot pay for and provide coverage for contraceptives, sterilization, abortion or related education and counseling without violating his religious beliefs.

27. Since at least 1992, OIH and its predecessor companies have sought to exclude contraceptive services from employee health plans. During most of that time period, the company’s plan descriptions have indicated that the company does not provide coverage for contraceptive services. Furthermore, during that period OIH has disqualified companies or other insurance schemes that would not exclude contraceptive coverage.

28. When OIH switched from a self-insured plan to a fully-insured plan several years ago, coverage of contraceptive services was inadvertently included contrary to the company’s longstanding practice and intentions, as well as the actual coverage request and without OIH’s knowledge. Subsequently, the company has investigated ways to obtain new coverage that would

exclude coverage for contraceptive services, as permitted by Missouri law, §376.1199, 4(1), R.S. Mo., as well as federal law prior to the promulgation of the Mandate at issue herein.

29. On information and belief, the Plaintiffs' current employee health plan is "grandfathered" as that term is used in PPACA and the regulations challenged herein.

#### APPLICABLE PROVISIONS OF THE MANDATE

30. Under the Mandate or Final Rule being challenged herein, employers with more than 50 full-time employees are required to include in group health plans coverage for all FDA-approved contraceptive methods, sterilization, and education and counseling for same.

31. Plaintiff, OIH and its subsidiaries constitute a "single employer" for purposes of PPACA as defined at 42 U.S.C. § 18024(b)(4)(A), and are, thus, subject to the Mandate.

32. Plaintiff, OIH's group health plan is due for renewal on January 1, 2013. Plaintiff wishes to renew coverage for its employees while, at the same time, excluding coverage for all FDA-approved contraceptive methods, sterilization procedures and patient education and counseling regarding such procedures, consistent with the company's longstanding policy.

33. Under the terms of the Mandate, Plaintiffs will not be permitted to obtain coverage that excludes the aforementioned drugs and services. On the contrary, the Mandate will require that Plaintiffs provide their employees with coverage of those services that Plaintiffs consider sinful and immoral, something the plaintiffs would not be required to do under Missouri state law.<sup>2</sup>

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<sup>2</sup> The State of Missouri has its own version of a contraceptives mandate. § 376.1199 R. S. Mo. Unlike the federal Mandate being challenged here, however, the Missouri statute contains a *complete* exemption — not limited to "religious" employers — for any employer for whom "the use of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity." § 376.1199, 4(1), R. S. Mo.

34. The Plaintiffs do not qualify for the “religious employer” exemption contained in the Final Rule. *See* 45 CFR § 147.130 (a)(1)(A) and (B)

35. Because Plaintiffs do not qualify for the “religious employer” exemption, they are not permitted to take advantage of the “temporary safe-harbor” as set forth by the Defendants at 77 Fed. Register 8725 (Feb. 15, 2012).

36. Plaintiffs are thus subjected to the Mandate now and are confronted with choosing between complying with its requirements in violation of their religious beliefs, or paying ruinous fines that would have a crippling impact on their ability to survive economically.

37. The Mandate coerces Plaintiffs into complying with its requirements or abandoning integral components of the Plaintiffs’ religiously inspired mission and values.

## CAUSES OF ACTION

### Count I

#### Violation of the Religious Freedom Restoration Act

38. Plaintiffs incorporate by reference paragraphs 1-37 of this Complaint.

39. Plaintiffs’ sincerely held religious beliefs prevent them from providing coverage for “all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling related to such procedures.”

40. The Mandate/Final Rule, by requiring Plaintiffs to provide said coverage, imposes a substantial burden on Plaintiffs’ free exercise of religion by coercing Plaintiffs to choose between conducting their business in accordance with their religious beliefs or paying substantial penalties to the government.

41. The Mandate/Final Rule furthers no compelling governmental interest.

42. The Mandate/Final Rule is not narrowly tailored to furthering any compelling



interest.

43. The Mandate/Final Rule is not the least restrictive means of furthering the Defendants' stated interests.

44. The Mandate/Final Rule and the Defendants' threatened enforcement of same violate rights secured to the Plaintiffs by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*

45. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed.

## Count II

### Violation of the First Amendment to the United States Constitution Free Exercise Clause

46. Plaintiffs incorporate by reference paragraphs 1-45 of this Complaint.

47. Plaintiffs' sincerely held religious beliefs prevent them from providing coverage for "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling related to such procedures."

48. The Mandate/Final Rule, by requiring Plaintiffs to provide coverage imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between conducting their business in accordance with their religious beliefs or paying substantial penalties to the government.

49. The Mandate/Final Rule furthers no compelling governmental interest.

50. The Mandate/Final Rule is not narrowly tailored to furthering any compelling interest.

51. The Mandate/Final Rule is not the least restrictive means of furthering the Defendants' stated interests.

52. The Mandate/Final Rule is neither neutral nor generally applicable.

53. The Mandate/Final Rule and the Defendants' threatened enforcement of same violate Plaintiffs' rights to free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

54. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed.

### Count III

#### Violation of the First Amendment's Establishment Clause

55. Plaintiffs incorporate by reference paragraphs 1-54 of this Complaint.

56. The First Amendment's Establishment Clause prohibits the establishment of any religion and/or excessive government entanglement with religion.

57. The provisions of the Mandate, including the "religious employer exemption," require the government to examine and evaluate the religious beliefs of the plaintiffs, require the government to discriminate among religious beliefs and organizations, and require the government to adopt particular theological viewpoints and discriminate against others.

58. The Mandate/Final Rule thus violates the Establishment Clause of the First Amendment.

59. Absent injunctive and declaratory relief against the Mandate/Final Rule, plaintiffs have been and will continue to be harmed.

Count IV

Violation of the First Amendment to the United States Constitution Free Speech Clause

60. Plaintiffs incorporate by reference paragraphs 1-59 of this Complaint.
61. Plaintiffs believe that the aforementioned services covered by the Mandate/Final Rule are contrary to their religious beliefs.
62. The Mandate/Final Rule would compel the Plaintiffs to subsidize activities the Plaintiffs believe to be immoral.
63. The Mandate/Final Rule compels the Plaintiffs to pay for and/or provide education and counseling related to contraception, sterilization, and abortion.
64. Defendants' actions thus violate the Plaintiffs' free speech rights as guaranteed by the First Amendment to the United States Constitution.
65. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed.

Count V

Violation of the Administrative Procedure Act

66. Plaintiffs incorporate by reference paragraphs 1-65 of this Complaint.
67. The Mandate/Final Rule is contrary to Section 1303(b)(1)(A) of PPACA which provides that "nothing in this title" . . . "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."
68. The Defendants, in promulgating the Mandate/Final Rule, failed to consider the

constitutional and statutory implications of the Mandate on for-profit, secular employers such as Plaintiffs.

69. The Mandate/Final Rule is contrary to existing law and is in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

70. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs' have been and will continue to be harmed.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

a. Declare that the Mandate/Final Rule and Defendants' enforcement of same against the Plaintiffs violate the Religious Freedom Restoration Act;

b. Declare that the Mandate/Final Rule and Defendants' enforcement of same against the Plaintiffs violate the First Amendment to the United States Constitution;

c. Declare that the Mandate/Final Rule and Defendants' enforcement of same against the Plaintiffs violate the Administrative Procedure Act;

d. Issue a permanent injunction prohibiting the Defendants from enforcing the Mandate/Final Rule against the Plaintiffs and others not before the court with religious objections to providing health insurance coverage for "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling" for same;

e. Award the Plaintiffs costs and reasonable attorney's fees;

f. Award such other relief as the court deems just.

Submitted this 11<sup>th</sup> day of June, 2012.

/s/ Francis J. Manion

Francis J. Manion (KY Bar No. 85594)\*  
Geoffrey R. Surtees (KY Bar No. 89063)\*  
AMERICAN CENTER FOR LAW & JUSTICE  
PO Box 60  
New Hope, KY 40052  
Tel: (502) 549-7020  
Fax: (502) 549-5252  
fmanion@aclj.org

Edward L. White III (MI Bar No. P62485)\*  
AMERICAN CENTER FOR LAW & JUSTICE  
5068 Plymouth Rd.  
Ann Arbor, MI 48105  
Tel: (734) 662-2984  
Fax: (734) 302-1758

Patrick T. Gillen (MI Bar No. 47456)\*  
FIDELIS CENTER FOR LAW AND POLICY  
1025 Commons Circle  
Naples, FL 34119  
Tel: (239) 687-5311  
Fax: (312) 276-5129

Attorneys for Plaintiffs

*\*Pro hac vice granted*

**CERTIFICATE OF SERVICE**

I, Francis J. Manion, plaintiffs' co-counsel, hereby certifies that on June 11, 2012, a true and correct copy of the foregoing was caused to be filed electronically with this Court through the CM/ECF filing system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system. Parties may access this filing through the Court's CM/ECF system.

Eric H. Holder, Jr.  
U.S. Attorney General  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Timothy F. Geithner  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Kathleen Sebelius  
U.S. Depart. of Health & Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Richard Callahan  
U.S. Attorney  
Thomas Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> St., 20<sup>th</sup> Floor  
St. Louis, MO 63102

Hilda Solis  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

**/s/ Francis J. Manion**

Francis J. Manion (KY Bar No. 85594)\*  
Geoffrey R. Surtees (KY Bar No. 89063)\*  
AMERICAN CENTER FOR LAW & JUSTICE  
PO Box 60  
New Hope, KY 40052  
Tel. (502) 549-7020  
Fax (502) 549-5252  
fmanion@aclj.org

Edward L. White, III (MI Bar No. P62485)\*  
AMERICAN CENTER FOR LAW & JUSTICE  
5068 Plymouth Rd.  
Ann Arbor, MI 48105  
Tel. (734) 662-2984  
Fax (734) 302-1758

*\*Pro hac vice granted*