Case No. CIV-12-1000-HE. July 2, 2013.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,
Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants.

REQUEST OF AMICUS CURIAE ERIC RASMUSEN TO FILE A BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

BRIEF OF AMICUS CURIAE ERIC RASMUSEN TO FILE A BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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MOTION OF ERIC RASMUSEN TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I am an economics professor who has taught and written on the subjects of value and tax. I have written numerous articles for law reviews and economics journals, co-authoring with judges Wiley and Posner and with professors at Harvard and Yale Law Schools. I am a former Director of the American Law and Economics Association, and have been a visiting scholar at Yale and Harvard Law Schools.

Amicus briefs are uncommon in trial courts, but they are permitted. "Federal courts have discretion to permit participation of amici where such participation will not prejudice any party and may be of assistance to the court." *Strougo v. Scudder, Stevens & Clark, Inc.*, 1997 WL 473566 (S.D.N.Y. Aug. 18, 1997) (*citing Vulcan Society of New York City Fire Dep't, Inc. v. Civil Service Comm'n*, 490 F.2d 387, 391 (2d Cir. 1973)). See also AUTOMOBILE CLUB OF NEW YORK, v. PORT AUTHORITY, (S.D.N.Y. November 23, 2011); *Zell/Merrill Lynch Real Estate Opportunity Partners Limited Partnership III v. Rockefeller Center Properties, Inc.*, 1996 WL 120672 (S.D.N.Y. March 19, 1996); *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y 1991); Waste Mgmt. v. City of York, 162 F.R.D. 34

(M.D. Pa. 1995). They are unmentioned in the Federal Rules of Civil Procedure or the Local Rules, and hence are completely at the discretion of the Court. Courts have two main reasons for disliking amicus briefs: that they are mere posturing that duplicate the parties' briefs, and that they are too disorganized to be easily skimmed. This brief avoids both dangers. Its deficiency is more likely to be amateurism and spotty presentation of the law. Its advantage is that it looks at the situation from the point of view of a law-and-economics scholar rather than an attorney, and so may come up with something new and useful.

The question in this case of whether to issue a preliminary injunction was recently remanded to the Court for consideration of (1) the public interest and (2) balancing the equities. The appellate briefs and opinions were almost entirely about other subjects such as the likelihood of success on the merits and whether a corporation has standing. I will discuss only the public interest and balancing the equities in this brief, and will only bring up ideas that I have not seen in the 10th Circuit opinion. Due to the short deadline, I have not asked the parties for permission to file this brief, and so ask permission of the Court directly. I apologize for any stylistic deficiencies; I have not had time to look at local rules and so have followed the stylistic rules of the Fifth Circuit, for which I am preparing an unrelated brief. I hope that the result nonetheless does satisfy local rules.

I have no stake in the outcome of this case, but I believe an economic approach can help courts organize their thoughts more simply on the topic of preliminary injunctions and that in this case certain factual features have been overlooked.

Conclusion

For the foregoing reasons, I respectfully submit that the Court grant me leave to file the proposed brief *amicus curiae*.

STATEMENT OF THE ISSUE

Should the Greens be granted their request for a preliminary injunction on actions of the United States?

(I will refer to the plaintiffs as “the Greens” and the defendants as “the United States”.)

In particular, how can the Court balance the equities between the possibility of wrongful denial of a preliminary injunction to the Greens and the possibility of a wrongful injunction imposed on the United States?

SUMMARY OF THE ARGUMENT

The United States wishes to require the Greens to provide health insurance to their employees that includes coverage of what I will call “the excluded contraception.” The Greens say that this offends their religious beliefs and so they are exempt from that requirement. They are asking for a preliminary injunction against imposition of fines for not providing the excluded contraception by the United States. The Court should use the methods described below to decide whether to grant the preliminary injunction. I think that will result in granting the injunction, but even if the Court adopts these methods, the result will depend on the Court’s assessment of the facts.

I will treat of four distinct issues:

1. Measuring the harm to the United States using the cost of the excluded contraceptives.

2. Measuring the harm to the Greens using evidence from their churches.

3. The irreparability of the harm to the Greens due to the qualified immunity of the United States.

4. Use of the Posner Rule to balance the equities.

THE ARGUMENT

I. Damages to the United States are limited to the cost of providing the excluded contraceptive services to Hobby Lobby employees.

The United States, can achieve its objective of having inexpensive access to the excluded contraception by paying for it itself during the period of the preliminary injunction. If that period is two years and 10,000 employees would spend $1,000 each on the contraception, surely an overestimate, then the amount is $20 million. The harm to the United States from an ex-post-mistaken preliminary injunction is therefore not irreparable at law.

Procedurally, the Court may wish to advise the Parties to agree to liquidated damages now. Liquidated damages would avoid later court proceedings and would also prevent the Greens from having to violate their beliefs by paying for the period's excluded birth control; instead, they would be paying damages only loosely related to the expenditures.

2. The harm to the Greens is irreparable because of the qualified immunity of the United States.

The harm to the Greens from an ex-post mistaken denial of a preliminary injunction is difficult to measure. Suppose, *arguendo*, it is $100 million, perhaps because the Greens eliminate employee health insurance altogether and need to pay

fines and to raise wages to compensate. In a typical lawsuit between two private parties, the Greens could later sue for damages and win compensation (if the other party were wealthy enough, as is the case here). The United States, however (or more precisely, any officer of the United States), has qualified immunity. "We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in the context of a *Bivens* suit). Thus, even if the cost to the Greens were completely objective dollars and cents, the Greens would not be able to recover.

The irreparability of the harm could be eliminated if the United States were to waive immunity and agree to pay the $100 million (or whatever is later determined by a court) if it loses the suit.

3. Evidence can be collected on the harm to the Greens.

Judge Bacharach notes in his concurrence (*Hobby Lobby. v. Sebelius* (10th Cir., June 27, 2013, p. 4) that neither side has introduced evidence as to the harm to the Greens, both seeming to leave it in the hazy region of religious convictions. Objective evidence can be collected with no great difficulty. To what churches do the Greens belong? Do those churches have public positions against the excluded

contraception, in documents or in preaching? Do the pastors and substantial portions of the congregation hold that position? What would happen if it were known that the Greens controlled a company that provided the excluded contraception--- is there any form of church discipline? Since this exact case is unusual: what does the church do about members who violate other of its beliefs, e.g. selling pornography in a member's store, fornication, divorce without Biblical justification? Answers to these questions would help determine the intensity of the Greens' beliefs. The Court should ask the parties to quickly provide answers to these questions.

4. Balancing the equities should use the Posner Rule.

The Supreme Court says, "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). This leaves open the question of how to balance the equities. A good short overview of methods courts have used is in Richard R.W. Brooks & Warren F. Schwartz, Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine, 58 STAN. L. REV. 381 (2005). They suggest their own law-and-economics-based method, but do not give

it practical enough form to be useful to the Court. What is useful, however, is what I will call "the Posner Rule". Judge Posner of the 7th Circuit says: "Grant the preliminary injunction if but only if $P \times Hp > (1 - P) \times Hd$, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error." A*m. Hosp. Supply Corp. v. Hosp. Prods*., 780 F.2d 589, 594 (7th Cir. 1986). Put as a verbal inequality, grant the injunction if:

(Probability plaintiff wins)(Irreparable harm to plaintiff from a mistake) > (Probability defendant wins)*(Irreparable harm to defendant from a mistake)*

or, put differently, if

(Probability injunction-requestor wins)(Irreparable harm to injunction-requestor from a mistaken denial of an injunction)*
> (Probability injunction-opposer wins)(Irreparable harm to injunction-opposer from a mistaken granting of an injunction),*

or, in the case before us, grant the injunction if

(Probability the Greens win)(Irreparable harm to the Greens from a mistaken denial of an injunction)*
> (Probability the United States wins)(Irreparable harm to the United States from a mistaken granting of an injunction),*

or, using my particular numbers (for concreteness only; I have no idea of the probability the Greens will win, especially, and the Court must fill in the numbers):

20% (100 million dollars) > 80% (20 million dollars)

which says to grant the injunction if

20 million dollars > 16 million dollars,

which is true under the speculative numbers.

These numbers may seem unrealistically precise, but they are just making obvious the difficulty of the judge's task. The Court cannot get away from estimating the probability of success, hard though that is. In truth, the probability of success is either 0% or 100%. But, as so often in the courts, the judge must do the best he can. This framework helps to organize his thoughts if he wishes to use the common-sense principle that he should grant the injunction if the probability of the injunction-seeker's eventual success is high and the cost to the injunction-seeker of not getting the injunction is high relative to the cost to the injunction-opposer of having to comply with the injunction. We might add that it is not necessary that the Court disclose its exact calculations, even if it uses this method.

I will add that in my quick investigation I have not found that the Tenth Circuit has precedent preventing use of the Posner Rule. There seems to be no clear guidance. For example, one case says:

"On balance, Lake has made the strong showing necessary to justify the issuance of a mandatory preliminary injunction. Lake's very liberty is at stake, and such a threatened harm outweighs the mere threat of monetary loss. Furthermore, Westar's

threatened harm is not the loss of 1227*1227 the entire sum of attorneys' fees it pays, but only that amount determined to be unreasonable. It contracted to accept that risk when it agreed to advance Lake's attorneys' fees. In this case, the district court's interim protest procedure diminishes that risk by allowing Westar to challenge any unreasonable invoice prior to payment. Under these circumstances, the threat to Lake's liberty strongly outweighs the threat of monetary loss to Westar." *Westar Energy, Inc. v. Lake*, 552 F. 3d 1215 - Court of Appeals, 10th Circuit 2009.

V. Conclusion.

The Court ought to use the methods described above to balance the equities. I believe this will lead to the granting of a preliminary injunction, but that depends on facts the Court will assess.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 3, 2013, copies of this brief will be sent by first class U.S. Mail and by email to the counsel for each party below.

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CERTIFICATE OF STYLISTIC COMPLIANCE, AUTHORSHIP AND FUNDING

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 2,466 words and 14 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It is written in a proportionally spaced typeface using MS-Word in 14-point Times New Roman font (with 12pt for indented quotations).

3. This brief is offered by Amicus as an individual. His institutional affiliation is for identity purposes only. No party's counsel authored this brief in whole or in part, and no party or other person contributed money to the preparation or submission of this brief.

/s/ Eric Rasmusen

Eric Rasmusen

Dated: July 2, 2013.