UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 03, 2014

Ms. Jennifer Brinkman Flannery
Jones Day
901 Lakeside Avenue, E.
Cleveland, OH 44114

Mr. Adam C. Jed
U.S. Department of Justice
Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. Matthew A. Kairis
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, OH 43215

Ms. Alisa B. Klein
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. Jacek Pruski
U.S. Department of Justice
20 Massachusetts Avenue, NW
P.O. Box 883
Washington, DC 20044-0000

Mr. Mark B. Stern
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.

Room 7531
Washington, DC 20530

Ms. Paula Batt Wilson
Jones Day
901 Lakeside Avenue, E.
Cleveland, OH 44114

Re: Case No. 13-2723, *Michigan Catholic Conference, et al v. Kathleen Sebelius, et al*
Originating Case No. : 1:13-cv-01247

Dear Sir or Madam,

The Court issued the enclosed Order today in this case. The order is amended to include Judge Stranch's dissent.

Sincerely yours,

s/Julie Brock
Case Manager
Direct Dial No. 513-564-7011

cc: Ms. Tracey Cordes

Enclosure

No. 13-2723

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE, in its own name and, obo Michigan Catholic Conference Second Amended And Restated Group Health Benefit Plan for Employees; CATHOLIC FAMILY SERVICES, dba Catholic Charities Diocese of Kalamazoo,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF TREASURY

Defendants-Appellees.

FILED
Jan 03, 2014
DEBORAH S. HUNT, Clerk

A M E N D E D O R D E R

Before: BATCHELDER, Chief Judge; SILER and STRANCH, Circuit Judges.

The plaintiffs appeal the denial of their motion to preliminarily enjoin the defendants from enforcing requirements under the Affordable Care Act that result in the provision of cost-free coverage for contraceptive services to their employees. The plaintiffs move for an injunction pending appeal, alleging that the provision violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq*. The defendants oppose an injunction, and the plaintiffs reply.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573; *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

To demonstrate a likelihood of success on appeal, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks and citation omitted). The Supreme Court has never considered similar RFRA claims. No circuit court has considered these claims on the merits. The district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. *Compare, e.g.*, *Mich. Catholic Conference v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400, at *5–10 (D.D.C. Dec. 19, 2013), *with S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265, at *8–9 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of NY v. Sebelius*, No. 12 CIV. 2542 BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, Nos. 13cv1459/0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). The

divergence of opinion by the district courts establishes more than a mere possibility of success on the merits.

Congress passed the RFRA "to restore the compelling interest test for free-exercise cases . . . and to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013) (internal quotations omitted), *pet. for cert. filed*, 82 U.S.L.W. 3245 (Oct. 15, 2013) (No. 13-482). The denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet*, 305 F.3d at 578; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *cf. McNeilly v. Land*, 684 F.3d 611, 620–21 (6th Cir. 2012) ("Once a probability of success on the merits was shown, irreparable harm followed . . . . [b]ecause [the plaintiff] does not have a likelihood of success on the merits, . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."). Given the divergence of opinions and the arguable merit of both the plaintiffs' and the government's position, it is not clear that the accommodation violates the RFRA. But the possibility that the plaintiffs' constitutional rights may be violated weighs heavily in our decision, particularly given that there does not appear to be a substantial harm to others. The entities here presently have insurance plans that do not provide contraceptive services to their employees. The contraceptive mandate itself does not apply to three groups, all of which are large in number—employers with less than fifty employees, religious employers, and employees subject to grandfathered plans. Moreover, the government has already delayed implementation of the contraceptive mandate to the plaintiffs, and other entities similarly situated, during the safe harbor. Therefore, at this juncture, we believe that the factors weigh in support of an injunction pending appeal.

Finally, this appeal focuses on legal issues that have already been briefed below. The district court's decision on appeal, as well as the district court's decision in *Catholic Diocese of Nashville*

v. Sebelius, No. 3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), conflict with another district court's decision in this circuit. *See Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013). Therefore, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **GRANTED**. The government is hereby **ENJOINED** from enforcing the provision in question against the plaintiffs pending the disposition of this appeal. The appeal shall be expedited for briefing and submission, and no extensions of time of the briefing schedule will be granted absent extraordinary circumstances.

Stranch, Circuit Judge, Dissents. The reasons for my dissent will be submitted in a separate writing at a future time.

Jane B. Stranch, Dissenting.

The litigation before this panel presents issues of law seated at the intersection of the Mandate of the Affordable Care Act (ACA)—enacted in part to provide comprehensive women's preventative health care, including contraceptive coverage—and the Religious Freedom Restoration Act (RFRA)—enacted to protect our nation's plural and diverse expressions of religious belief. Plaintiffs seek an injunction pending appeal, "extraordinary relief" available only upon their clear showing that they are likely to succeed on the merits, that they will suffer irreparable harm without relief, that the equities tip in their favor, and that the injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20-22 (2008). We are to review the district court's denial of an injunction pending appeal under the familiar abuse of discretion standard, examining findings of fact for clear error and legal conclusions de novo. *See Autocam, Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013) (applying the abuse of discretion standard for denial of a preliminary injunction); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572-73 (6th Cir. 2002) (reviewing a motion for injunction pending appeal under abuse of discretion standard). Relying on the

divergence of district court opinions and noting the "arguable merit" of the position of *both* parties, the majority grants an injunction pending appeal. This is not the correct standard. Because application of the proper standard reveals that plaintiffs have failed to carry their burden to prove a likelihood of success on the merits and that the district court did not abuse its discretion, I respectfully dissent.

Proper analysis begins with determining whether the findings of fact made below are clearly erroneous. The district court made specific findings that impact coverage under the ACA: (1) that plaintiffs' religious objection is to taking actions that "trigger" its third party administrator to provide contraceptive services; (2) that plaintiffs provide to their employees a self-funded healthcare plan administered by a third-party and excluded from the Mandate's ERISA enforcement mechanism; and, (3) that one of the plaintiffs is exempt from the Mandate as a religious employer and the other is eligible for the "religious accommodation." The court found that under the accommodation, plaintiffs are not required to comply with the Mandate as long as they self-certify that they object to contraceptive coverage for religious reasons. *See* 45 C.F.R. § 147.131(b). Upon self-certification, the third party administrator may separately pay for contraceptive services to participants and may be reimbursed by the federal government. *See* 78 Fed. Reg. 39,870, 39,987, 39,880 (Health and Human Servs. July 2, 2013) (final rule). There is nothing in these factual findings that could constitute clear error; they are taken directly from the plaintiffs' complaint and from the rules in question.

The next step looks to RFRA, the requirements of which set the stage for the appropriate analysis. Recognizing the right of free exercise of any religious faith, 42 U.S.C. § 2000bb, RFRA protects in equal measure the established, the well-regarded, the obscure, the disfavored and even the despised expressions of religious belief. Courts therefore must honor a plaintiff's declaration of religious belief, *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (pre-

RFRA application of substantial burden test), and may ask only whether the belief is sincere and religious in nature, *United States v. Seeger*, 380 U.S. 163, 184-85 (1965); *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). The questions of sincerity and religiosity are "factual inquiries within the court's authority and competence." *Id.* at 683.

To identify proscribed interference, RFRA incorporated the "substantial burden" standard previously articulated by the Supreme Court: where a governmental entity "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-18. In the context of zoning, we have noted that the "'substantial burden' hurdle is high" and that a substantial burden does not exist where "although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007). Other circuits have noted that the focus of the substantial burden test is on the "intensity of the coercion . . . to act contrary to [religious] beliefs." *Korte*, 735 F.3d at 683 (internal quotation marks and italics omitted).[1] We have also recognized that "determining its existence is fact intensive." *Living Water*, 258 F. App'x at 734. The findings of the district court thus govern analysis of the application of RFRA's substantial burden hurdle to the motion before this panel.

[1]Plaintiffs rely on *Korte* (in which the Seventh Circuit held that the contraception mandate is a substantial burden on the religious rights of for-profit companies) to support its position here. 735 F.3d at 683-85. But *Korte* is inapposite because the court there reasoned that the Mandate is coercive to for-profit companies because they are forced to provide and pay for contraceptive coverage—something not required of the plaintiffs here because religious non-profits may take advantage of the accommodation. *Id.*

The district court began by accepting the plaintiffs' objection to the contraceptive Mandate, and then found it to be sincere and religious. I agree that plaintiffs needed only to have declared their religious objection—through self-certification—and that under RFRA, we must accept their declaration of belief. As recognized by the district court, however, that is not the same as authorizing the plaintiffs—through their declaration—to determine that the Mandate substantially burdens their belief. It is the province of the courts to make that determination.

The district court resolved this "fact intensive" question by holding that the Mandate does not substantially burden plaintiffs' religious belief because it does not in any way coerce their behavior. The district court found that the actions that plaintiffs have always done are all that is necessary to receive the accommodation—they sponsor a health plan, they contract with a third party to administer the plan, and they notify the third party that they oppose contraceptive coverage. Thus, plaintiffs' only objection refers to the *effect* of self-certification. The court further found that the religious accommodation does not "trigger" contraception coverage, as plaintiffs contend, but instead allows plaintiffs to "step aside" and remove itself from the process while another party provides coverage. *See* 45 C.F.R. § 147.131(b). The third party administrator is then asked to separately pay for contraceptive services to participants and is allowed to seek reimbursement from the federal government. *See* 78 Fed. Reg. at 39,987, 39,880. The third party administrator carries out the preventative services scheme for plaintiffs' employees but does so wholly *without* plaintiffs.

Plaintiffs argue that the Mandate violates their religious rights under RFRA because by filing the self-certification form, they facilitate the provision of independent coverage. Not only did the district court find this to be false, but the independent action of third party entities with which plaintiffs disagree does not impose a substantial burden on plaintiffs' exercise of their religious beliefs. *See Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) (rejecting claim of plaintiffs who believed that the state's use of their child's social security number would harm her spirit because plaintiffs

could not demand that the government join their religious preference); *Kaemmerling v. Lapin*, 553 F.3d 669, 678-79 (D.C. Cir. 2008) (concluding that although the government's storage of a prisoner's tissue samples may offend the prisoner's religious beliefs, it cannot be a substantial burden to his religious exercise because the government did not pressure him to modify his behavior). Nor can plaintiffs' inability to prevent their employees from independently obtaining contraceptives in opposition to plaintiffs' religious beliefs be a substantial burden on plaintiffs' religious beliefs. That RFRA is rightly used as a shield does not make proper its use as a sword. If the full range of religious beliefs in our pluralistic society that are protected by RFRA were authorized to be used as a sword, there would exist no limiting principle on an employer's right to intrude into the private choices and lives of its employees.

The findings of the district court are supported by the language of the regulations and the factual record. They are not clearly erroneous. Given these findings and our standard of review, plaintiffs have not shown that they are substantially burdened by the ACA's Mandate and religious accommodation. Plaintiffs will not be denied a benefit if they self-certify; they will gain the benefit of removing their entity entirely from the government mandated provision of preventative services coverage. The regulation also does not require the plaintiffs to modify their behavior—they already inform their third party administrator that they object to contraceptive coverage, and they already provide a list of names of those employees they wish to insure.

Unique to this case is also the district court's finding that these plaintiffs provide to their employees a self-funded health plan, which is administered by a separate third party administrator, and which is not subject to the Mandate's enforcement mechanism. Without an enforcement mechanism, the accommodation cannot impose a "substantial burden" on plaintiffs because there is no government coercion. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013). Nor could a denial of an injunction run afoul of RFRA based on

plaintiffs' speculative argument that they are substantially burdened by the Mandate because it requires them to maintain a business relationship with a third party that provides contraceptive coverage. Because the self-funded health plan can refuse to comply with the Mandate without any legal consequences, plaintiffs cannot show that they are coerced into maintaining a business relationship that is contrary to their religious beliefs.

For these reasons as well as the ones explained by Judge Quist below and by Judge Campbell in the similar case of the *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), I do not think that plaintiffs carried their burden to prove a likelihood of success on the merits. Nor have plaintiffs shown that they will suffer irreparable harm or that the balance of the equities and public interest weigh in favor of an injunction. Thus, plaintiffs have failed to meet their burden to establish that the district court abused its discretion in denying a preliminary injunction or injunction pending appeal.

Therefore, I respectfully dissent from the panel decision granting an injunction pending appeal. I would instead join my colleagues in the Tenth and Seventh Circuits in denying an injunction. *See Little Sisters*, No. 13-1540; *University of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Dec. 30, 2013).

ENTERED BY ORDER OF THE COURT

Clerk