IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:13-cv-08910
	)	
SYLVIA MATHEWS BURWELL, et al.,	)	Judge Robert M. Dow, Jr.
	)	
Defendants.	)	

ORDER

For the reasons stated below, Plaintiff's emergency motion for reconsideration or, in the alternative, for injunction pending appeal [64] is respectfully denied.

STATEMENT

Before the Court is Plaintiff's emergency motion for reconsideration [64] of the Court's June 23, 2014 order [62] denying Plaintiff's motion for preliminary injunctive relief. [1] In that motion, Plaintiff focuses on what it considers to be "two direct paths to a preliminary injunction, neither of which is controlled by the Seventh Circuit's opinion" in *Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). [2] After careful consideration of the expedited briefing [64, 68, 71] and supplemental authority [69] on Plaintiff's motion, the Court respectfully disagrees. In recognition of the difficult circumstances in which Plaintiff finds itself, the Court issues this abbreviated opinion setting forth in summary fashion its reasons for denying Plaintiff's motion

[1] The Court is aware that Plaintiff has filed a notice of appeal of the June 23 order. See Seventh Circuit Case No. 14-2396. The Court understands Plaintiff to have appealed under 28 U.S.C. § 1292(a)(1), not § 1291. Accordingly, Federal Rule of Civil Procedure 62(c) suggests that the Court may rule on a motion seeking reconsideration of its prior order denying injunctive relief. In addition, Plaintiff has invoked Federal Rule of Appellate Procedure 8 in bringing its alternative request for an injunction pending appeal to the district court in the first instance.

[2] Plaintiff also contends that the Court need not consider *Notre Dame* controlling because the panel itself described its discussion of the merits of the university's claim as "tentative." In this Court's view, the Court of Appeals used "tentative" to emphasize that its views were subject to being revisited on a fuller record – given that the "evidentiary record [was] virtually a blank." *Notre Dame*, 743 F.3d at 552. However, this Court does not read the panel's decision as expressing a "tentative" view of the law as it applies to the facts of record at the time. In considering Plaintiff's claims here, this Court has endeavored to point out similarities and differences in the state of the record, but concludes that Plaintiff's circumstances are not distinguishable from Notre Dame's in a way that would allow Plaintiff to escape *Notre Dame*'s controlling ambit.

so that Plaintiff may promptly seek emergency relief in the Seventh Circuit if Plaintiff so chooses.

In regard to Plaintiff's second "direct path" argument – namely, its "compelled speech" claim – the Court stands by the analysis in its June 23 Order [62 at 15-17] and has nothing further to add at this time.

Plaintiff's first "direct path" argument on what Plaintiff calls the "gag rule" imposed by the ACA's implementing regulations requires a longer discussion. At the status hearing held on June 24, the Court asked the parties to address more of the specifics in regard to what Plaintiff wanted to say and whether Defendants would attempt to stop Plaintiff from speaking as it desires. At that time, and subsequently in its briefs on the reconsideration motion, Plaintiff spelled out with specificity the message that it wishes to convey against the contraceptive mandate and both its and its TPA's perceived role in carrying it out. Government counsel stressed, both orally and in writing, that the Government does not believe that its regulations restrict speech; rather, all that is restricted (in the Government's view) is certain conduct that does not warrant First Amendment protection in any event. As example, the Government cites to a labor case involving the extent to which an employer can lawfully express its opposition to efforts to unionize. [68 at 8] (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969)).

In posing the questions that it asked counsel to address both at the status hearing and in their briefs, the Court was attempting to pin down the extent to which the parties disagree on the scope of permissible speech and/or conduct under the regulations. Both the Government and the courts are obliged, if at all possible, to construe statutes and regulations in a manner that avoids constitutional infirmities. See, *e.g.*, *Chowdhury v. Ashcroft*, 241 F.3d 848, 853 (7th Cir. 2001) ("Just as we would construe a statute in a way that avoids a constitutional problem, if that is fairly possible, both we and the Board should interpret and apply administrative procedures in a way that avoids constitutional issues.") In addition, it is well established that "an administrative agency may be influenced by constitutional considerations in the way it interprets or applies statutes." *Branch v. FCC*, 824 F.3d 37, 47 (D.C. Cir. 1987) (Bork, J.). Furthermore, the Supreme Court has explained that courts must give some deference to agency constructions of regulations, even if the agency's explanation is set forth in a brief, as is the case here. See *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997). As in *Auer*, given the steady stream of litigation across the country on the very issues now before this Court and the attention that the issue undoubtedly is receiving at the highest levels of the relevant executive branch departments, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 62. In these circumstances, the Court finds it appropriate to consider the Government's oral and written statements as providing its construction of ambiguous language in a regulation. As the Supreme Court has stressed, "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Id.* at 63. And there is no reason to think that the Secretary cannot construe (and likewise could not rewrite) the existing regulations to narrow their scope as well.[3]

[3] Plaintiff contends that deference to the Government's proffered construction of the regulation is not appropriate in this instance because the regulation is not ambiguous, and thus the Government is engaged in "creating *de facto* a new regulation." The Court respectfully disagrees. The critical terms in the

The upshot of the foregoing analysis is that, on the current record, the Court is not persuaded to issue a preliminary injunction prohibiting the Government from interfering with Plaintiff's First Amendment rights. As the Court reads the Government's representations, the Government will step in only if Plaintiff engages in conduct that is not protected by the First Amendment. Should that reading be inaccurate as the case moves forward, Plaintiff may return at once to seek appropriate relief.

In addition, at least for present purposes, it is worth noting that even if (a) the Government and the Court were not obligated to construe the regulation to avoid constitutional problems and (b) the Court could not accept the narrowing construction set out in the Government's brief, the Court would not be in position to enter the broad injunctive relief that Plaintiff seeks at this time in any event. For, when a portion of a statute or regulation is found to be constitutionally infirm, there is a presumption that the offending portion can be severed from the remainder unless Congress or the agency provided evidence to the contrary. See, *e.g., Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Here, the Court sees no indication that the regulation barring organizations like Plaintiff from seeking to "interfere with" or "influence" their TPP was so fundamental to the overall scheme as to be non-severable if it were infirm.

Finally, today's decisions in *Hobby Lobby* and *Conestoga* do not provide any basis for this Court either to grant reconsideration or an injunction pending appeal. Although the Justices discussed the accommodation for nonprofit organizations with religious objections (see *Burwell v. Hobby Lobby Stores, Inc.*, --- U.S. ---, slip op. at 43-44 (opinion of the Court); *id.* at 3 (Kennedy, J., concurring); *id.* at 29-30 & n.27 (Ginsburg, J., dissenting)), the Court expressly did not "decide today whether an approach of this type complies with RFRA for purposes of all religious claims" (*id.* at 44 (opinion of the Court); see also *id.* at 10 n.9). Most significantly for today's purposes, at least in the district court, nothing in the Supreme Court's ruling expressly overrules or abrogates *Notre Dame*, which thus remains binding on this Court. It is solely the province of the Seventh Circuit to decide whether to revisit *Notre Dame* today or at any other time in the future in light of new guidance from the Supreme Court and/or to issue an injunction pending appeal for that or any other reason. *Cf. Gacy v. Wellborn*, 994 F.2d 305, 310 (7th Cir. 1993) ("A district judge who thinks that new evidence or better argument 'refutes' one of our decisions should report his conclusions while applying the existing law of the circuit."); *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1415 (7th Cir. 1994) (Flaum, J., dissenting) ("In a hierarchical judiciary, judges of inferior courts may not limit decisions of superior courts."). To the extent

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regulation – "interfere" and "influence" – have many definitions and could be read narrowly, broadly, or anywhere in between. As noted above, both the Government and the courts are obliged to give those terms a construction that would avoid constitutional infirmity. Although it is impossible to set out precise boundaries, the First Amendment jurisprudence is abundant and the Government must be careful to give Plaintiff the First Amendment breathing space to which it is entitled. The labor case to which the Government cites in its leading example of conduct that may not be entitled to First Amendment protection does not provide a perfect analogy – the TPAs likely are in far different circumstances than the employees seeking to unionize for the first time, in that the market for the TPAs' services likely would enable Plaintiff's TPA to survive a decision by Plaintiff to take its business elsewhere while the employees in *Gissel Packing* faced a much stronger incentive to knuckle under to their employer's pressure. Regardless, the existing law provides myriad First Amendment decisions on which the parties can rely in shaping their conduct and the courts are available to mediate any disputes on that score.

that Plaintiff believes that the circumstances are appropriate for an injunction pending appeal, such as that granted by the Supreme Court in *Little Sisters of the Poor* or by the Third Circuit last week in the case submitted by Plaintiff as supplemental authority, Plaintiff must ask the Seventh Circuit for that relief, as this Court is bound to apply *Notre Dame* as it stands.

Dated: June 30, 2014

Robert M. Dow, Jr.
United States District Judge