**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*,<br><br>Defendants. | ) | Civil Action No. 13-1441 (ABJ) |

**MEMORANDUM OPINION AND ORDER**

Plaintiffs the Roman Catholic Archbishop of Washington ("the Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., the Catholic Information Center, Inc., Catholic University of America, and Thomas Aquinas College brought this action against defendants Kathleen Sebelius, the Secretary of Health and Human Services; Thomas Perez, the Secretary of Labor; Jacob Lew, the Secretary of the Treasury; the U.S. Department of Health and Human Services; the U.S. Department of Labor; and the U.S. Department of the Treasury. They allege that the contraceptive mandate, even as it has been modified through the accommodation, violates the Religious Freedom Restoration Act ("RFRA") as applied to them and the Free Exercise Clause, the Free Speech Clause, and the Establishment Clause of the First Amendment to the U.S. Constitution. They also allege that defendants violated the Administrative Procedure

Act and advanced an erroneous interpretation of the religious employer exemption to the mandate when they adopted the contraceptive mandate in its final form. On December 20, 2013, this Court issued its final appealable Order [Dkt. # 47], granting summary judgment in favor of defendants on plaintiff Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to law claims in Count VII. The Court dismissed the RFRA claims in Count I advanced by the seven plaintiffs who are covered under the Archdiocese's healthcare plan, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Finally, the Court granted plaintiff Thomas Aquinas College's cross-motion for summary judgment on its RFRA claim in Count I, and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV.

Plaintiffs have appealed the part of the Order that grants defendants' motions for summary judgment and motions to dismiss, and they now move this Court to enjoin defendants from implementing or enforcing the contraceptive mandate and accommodation against them pursuant to Federal Rule of Civil Procedure 62(c). Pls.' Mot. for Inj. Pending Appeal ("Pls.' Mot.") [Dkt. # 49]. The motion is filed on behalf of "plaintiffs" collectively, even though the opinion makes clear differentiations among them based upon the nature of their health insurance plans and the regulations that apply to each.[1]

1 For example, the Court entered summary judgment in *favor* of plaintiff Thomas Aquinas College on its RFRA claim, so the Court assumes that the use of the word "plaintiffs" in the motion for an injunction pending appeal is not meant to include the College.

An injunction pending appeal is an extraordinary remedy. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). It is "an intrusion into the ordinary process of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). Instead, an injunction is an exercise of judicial discretion, and whether to grant it depends upon the specific circumstances of the case. *Id.* at 433. The moving party bears the burden of justifying why the court should grant this extraordinary remedy. *Id.* at 433–34.

> A court must consider four factors in reviewing the motion:
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> (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[2]

*Id.* at 434. The first two factors are the most critical. *Id.* The moving party must make a strong showing on at least one of them and some showing on the other. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2011), citing *Cuomo*, 772 F.2d at 974. So, the movant's failure to make any showing of irreparable harm is grounds for refusing to grant a stay, even if the other three factors merit relief. *Nken*, 556 U.S. at 434 ("[S]imply showing some possibility of irreparable injury . . . fails to satisfy the second factor.") (internal quotation marks and citations omitted); *see also Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S. 7, 22 (2008) (rejecting the premise that "when a

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2 *Cuomo* and *Nken* actually concerned motions for stays pending appeal, rather than injunctions pending appeal. However courts apply the same test for a stay or injunction pending appeal, which "substantial[ly] overlap[s]" with, but is not the same as, the test for a preliminary injunction. *Nken*, 556 U.S. at 434; *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 n.5 (D.D.C. 2005).

plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm").

Plaintiffs fail to meet their burden to establish that they are entitled to an injunction pending appeal. First, the Court notes that it dismissed the claims brought by seven of the plaintiffs – Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center (collectively, the "church plan plaintiffs") – for lack of jurisdiction because their asserted injury was so speculative that it defeated standing. In the absence of jurisdiction over their claims, the Court lacks the power to enter an injunction pending appeal on behalf of the church plan plaintiffs. The lack of injury also undermines any claim of irreparable harm.[3]

Second, the Court rejects Catholic University's argument that it is entitled to an injunction pending appeal in this case. While the University did have standing to press its RFRA claim, and the Court recognizes the sensitivity of the issues it raised, its motion for an injunction pending appeal does not proffer any new information to support a finding that the University is likely to succeed on the merits of its claim. Instead, Catholic University states: "For all the reasons advanced in Plaintiffs prior filings and argument before the Court on November 22, 2013, (1) Plaintiffs are likely to succeed on the merits of their Religious Freedom Restoration Act claim." Pls.' Mot. at 1. That is not sufficient to satisfy the burden to show that an injunction pending

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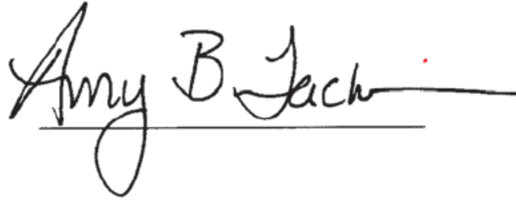
3 Even if the Court has jurisdiction to enter an injunction pending appeal on behalf of the church plan plaintiffs, the injunction is not warranted. Since the church plan plaintiffs offer their employees coverage under the Archdiocese's plan, which is managed in conformity with Catholic principles, and since the government has informed the Court that it has no authority to enforce the contraceptive mandate against the plan's third-party administrator, it is highly speculative and not at all likely that the church plan plaintiffs' self-certification would actually lead to the provision of contraceptive services to its employees. So they cannot demonstrate that there is a substantial likelihood that they will succeed on the merits or that they would be irreparably injured if they are required to comply with the mandate prior to resolution of this appeal.

appeal is warranted. *See Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 847 (D.D.C. 1996) (noting that the movant did not "allege any change in circumstances or novel argument that leads the Court to conclude that they bear a substantial chance of success on appeal"); *Abrams v. Comm'ns Workers of Am.*, 702 F. Supp. 920, 925 (D.D.C. 1988) (denying a motion for an injunction pending appeal where the movant merely restated grounds for relief that were previously rejected), *aff'd*, 884 F.2d 628 (D.C. Cir. 1989).

Moreover, there is no indication that Catholic University will be irreparably injured absent an injunction. Plaintiffs argue that an injunction is necessary because, without one, "irreparable harm . . . will befall Plaintiffs in only ten days if they are forced to choose between taking actions that violate their religious beliefs or paying onerous penalties." Pls.' Mot. at 2. That statement is not accurate with respect to the only plaintiff left standing: Catholic University. Compliance with the contraceptive mandate must occur "by the beginning of the next plan year on or after January 1, 2014." Compl. ¶ 227. Catholic University's next plan year begins on August 14 for its students and December 1 for its employees; this means that the University has almost eight months to litigate its appeal before it will be required to take any action that complies with the contraceptive mandate. Thus, the University fails to show that it will be irreparably injured absent an injunction pending appeal in this case. Given plaintiffs' failure to meet the first two elements, an injunction is not warranted. *See Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("We believe that analysis of the second factor disposes of these motions and, therefore, address only whether the petitioners have demonstrated that in the absence of a stay, they will suffer irreparable harm."); *see also Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard are most critical.").

It is therefore ORDERED that plaintiffs' motion for an injunction pending appeal is denied.



AMY BERMAN JACKSON
United States District Judge

DATE: December 23, 2013