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

MOST REVEREND LAWRENCE E. BRANDT, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF GREENSBURG, as Trustee of the Roman Catholic Diocese of Greensburg, a Charitable Trust, *et al.* Plaintiffs, v. SYLVIA M. BURWELL, *et al.* Defendants.	Case No. 2:14-cv-00681-AJS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs—Lawrence E. Brandt, Bishop of the Roman Catholic Diocese of Greensburg; the Roman Catholic Diocese of Greensburg ("the Diocese"); Catholic Charities of the Diocese of Greensburg ("Catholic Charities"); and St. John the Evangelist Regional Catholic School ("St. John")—ask this Court to preliminarily enjoin regulations that are intended to accommodate religious exercise while helping to ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women's health and well-being.[1] Subject to an exemption for houses of worship and their integrated auxiliaries, and accommodations for certain other non-profit religious organizations, the regulations that plaintiffs challenge require certain group health plans and health insurance issuers to provide coverage, without cost-sharing (such as a copayment, coinsurance, or a deductible), for, among

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Sylvia M. Burwell has been substituted in her official capacity for Kathleen Sebelius as Secretary of Health and Human Services.

other things, all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

Plaintiffs' motion for preliminary injunction should be denied. To obtain a preliminary injunction, a plaintiff must make "a clear showing" 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 Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). For the reasons set forth in defendants' oppositions to plaintiffs' motions for preliminary injunctions in *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.) (ECF No. 23), and *Persico v. Sebelius*, No. 1:13-cv-00303 (W.D. Pa.) (ECF No. 28), and for the additional reasons explained below, plaintiffs have not satisfied any of these requirements for obtaining preliminary injunctive relief.[2]

Defendants have recently been given reason to believe that plaintiffs may offer a self-insured "church plan" to their employees. Although there is no indication in plaintiffs' complaint or other papers that it offers a self-insured church plan—nor was there in either *Zubik* or *Persico*—the same law firm representing the plaintiffs here has suggested in another similar case that all "Catholic entities like the Archdiocese participate in 'church plans.'" *See* Pls.' Reply in Supp. of Mot. for Prelim. Inj. & Resp. to Defs.' Second Mot. to Dismiss at 6, *Roman Catholic Archdiocese of St. Louis v. Sebelius*, No. 4:13-cv-02300 (E.D. Mo.) (ECF No. 54). Undersigned counsel contacted counsel for plaintiffs in an attempt to determine whether the plaintiffs in this case offer a self-insured church plan to their employees. Plaintiffs' counsel declined to take a position, explaining only that the complaint does not specifically allege whether the plan at issue

[2] Defendants respectfully disagree with the Court's analysis in *Zubik* and *Persico* for the reasons stated in defendants' oppositions to plaintiffs' motions for preliminary injunctions in those cases.

is a self-insured church plan. As explained more fully below, defendants lack regulatory authority to require the third-party administrators ("TPAs") of self-insured church plans to make the separate payments for contraceptive services for participants and beneficiaries in such plans under the challenged accommodations. Because the regulations allow plaintiffs to opt out of providing or paying for contraceptive services, and because defendants lack the authority to require the TPAs of self-insured church plans to make these payments, plaintiffs have not established an injury in fact to the degree plaintiffs have a self-insured church plan.

In general, under the challenged regulations, when a TPA receives a copy of the self-certification from an eligible employer that sponsors a self-insured group health plan, that TPA becomes an ERISA Section 3(16), 29 U.S.C. § 1002(16), plan administrator and claims administrator for the purpose of providing the separate payments for contraceptive services. *See* 29 C.F.R. § 2510.3-16(b). Thus, the contraceptive coverage requirements can be enforced against such TPAs through defendant Department of Labor's ERISA enforcement authority. *See* 78 Fed. Reg. 39,870, 39,879-80 (July 2, 2013), AR at 11-12. Church plans, however, are specifically excluded from the ambit of ERISA. *See* 29 U.S.C. § 1003(b)(2). Thus, ERISA enforcement authority is not available with respect to the TPAs of self-insured church plans under the accommodations, and the government has no statutory or regulatory authority to compel such TPAs to provide contraceptive coverage to self-insured church plan participants and beneficiaries. Further, there is also no reason to believe that the TPA of a self-insured church plan would voluntarily provide such coverage over their clients' stated religious objections to doing so.

It is undisputed that the Diocese, as a religious employer within the meaning of 45 C.F.R. § 147.131(a), remains entirely exempt from the challenged regulations, and Catholic Charities

and St. John, which share the Diocese's plan, remain eligible for the accommodations under the final regulations promulgated by defendant Department of Treasury, *see* 26 C.F.R. § 54.9815-2713A, and therefore need not contract, arrange, pay, or refer for contraceptive services. Moreover, Catholic Charities's and St. John's TPA need not provide separate payments for contraceptive services if the plan is in fact a church plan. Thus, even if the Court continues to accept the argument that an employer's signing a self-certification facilitates coverage of contraceptive services, there would be no such facilitation here. Accordingly, the injury of which plaintiffs complain—that the regulations somehow require them to facilitate access to contraceptive services to which they object on religious grounds—simply would not apply. Nor could plaintiffs complain that their TPA might voluntarily elect to provide contraceptive coverage notwithstanding the fact that defendants do not have the authority to require it to do so, as this allegation would be far too speculative for the purposes of Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

In a case similar to this one—*Roman Catholic Archbishop of Washington v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6729515, at *24-26 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013)—the court determined that the plaintiffs that provide coverage through a self-insured church plan lack standing. The court recognized that a church plan is not subject to regulation under ERISA, and noted the government's acknowledgment that it has no authority to require the TPA of a church plan to provide or arrange separate payments for contraceptive services. *Id*. The court held that the plaintiff organizations that provide coverage through the Archdiocese's church plan lack standing because they offered no evidence to show that the TPA of their church plan will provide or arrange separate payments for contraceptives. *Id*. To the degree that plaintiffs here provide

coverage through a self-insured church plan, the same is true here, and the court should deny plaintiffs' motion for preliminary injunction because plaintiffs lack standing.[3]

Even if the Court were to determine that plaintiffs have standing to assert their claims, the Court should deny plaintiffs' motion for preliminary injunction because plaintiffs have not shown that they are likely to succeed on the merits of any of their claims. Defendants have already addressed the merits of plaintiffs' claims in their opposition to plaintiffs' motions for preliminary injunctions in *Zubik* and *Persico*, which are factually similar and involve plans also offered under the Catholic Benefits Trust at issue in this case. Instead of repeating those arguments here, defendants incorporate them by reference and respectfully refer the Court to the filings cited above, which demonstrate that plaintiffs are not likely to succeed on the merits of their claims. Moreover, to the degree that plaintiffs offer a self-insured church plan to their employees, the challenged regulations do not require plaintiffs' TPA to provide separate payments to be made with respect to the participants and beneficiaries of plaintiffs' plan. The regulations, therefore, would impose absolutely no burden on plaintiffs' religious exercise, let alone a substantial burden. No plaintiff would have to provide or pay for contraceptive services, and neither would the TPA.

Defendants further note that the District Court for the District of Wyoming recently denied a motion for preliminary injunction in a similar case, concluding that plaintiffs failed to show a likelihood of success on their Religious Freedom Restoration Act ("RFRA") claim. *See Diocese of Cheyenne v. Sebelius*, 2014 WL 1911873 (D. Wyo. May 13, 2014). And the only Court of Appeals to have addressed the merits of claims like plaintiffs' affirmed the district

[3] Defendants did not raise this jurisdictional argument in *Zubik* and *Persico* because plaintiffs in those cases did not identify their health plan as a self-insured church plan in the complaint, in their motion for a preliminary injunction, or in any other filing or testimony. As defendants explained above, defendants only recently became aware that the plaintiffs here might be offering a self-insured church plan to their employees.

court's denial of a preliminary injunction because plaintiff had not shown a likelihood of success on the merits. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 559 (7th Cir. 2014). Indeed, if plaintiffs have a self-insured church plan, that revelation would render their RFRA claim even weaker than the claim asserted (and rejected) in *Notre Dame*, where plaintiffs did not have a self-insured church plan. Even assuming facts that plaintiffs have not alleged (*i.e.*, that their TPA will voluntarily choose to provide payments for contraceptive services despite being under no legal obligation to do so), a voluntary undertaking by a private third party to provide contraceptive coverage could not substantially burden plaintiffs' exercise of religion.[4]

Plaintiffs also have not established that they are likely to suffer irreparable harm in the absence of preliminary relief. Although "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), in this case, plaintiffs have not shown that the preventive services coverage provision intrudes upon their First Amendment rights, so there has been no "loss of First Amendment freedoms" for any period of time. In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because McNeilly 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.").

As to the final two preliminary injunction elements—the balance of equities and the public interest—"there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce."

[4] To the degree plaintiffs will rely on the Supreme Court's order in *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014), that reliance would be misplaced. The Supreme Court in *Little Sisters* emphasized that its "order should not be construed as an expression of the Court's views on the merits." *Id*.

Cornish v. Dudas, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Richenberg v. Perry*, 73 F.3d 172, 173 (8th Cir. 1995) (indicating that granting an injunction against the implementation of a likely constitutional statute would harm the government).[5] Moreover, it would be contrary to the public interest to deny Catholic Charities's and St. John's employees (and their families) the opportunity to obtain the benefits of the preventive services coverage regulations, should Catholic Charities's and St. John's TPA voluntarily elect to provide contraceptive coverage to Catholic Charities's employees. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Prior to the implementation of the preventive services coverage provision, many women did not use contraceptive services because they were not covered by their health plan or required costly copayments, coinsurance, or deductibles. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), AR at 317-18, 407; 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012), AR at 214; 78 Fed. Reg. 39,870, 39,887 (July 2, 2013), AR at 19. As a result, in many cases, both women and developing fetuses suffered negative health consequences. *See* IOM REP. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215. And women were put at a competitive disadvantage due to their lost productivity and the disproportionate financial burden they bore in regard to preventive health services. 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* IOM REP. at 20, AR at 318. Accordingly, even assuming plaintiffs were likely to succeed on the merits (which they are not for the reasons already explained), Catholic Charities's

[5] Plaintiffs' motion does not distinguish between the Diocese and the accommodated entities, Catholic Charities and St. John, presumably seeking a preliminary injunction as to both. But as defendants have explained, religious employers, such as the Diocese, are entirely exempt from the contraceptive coverage requirement, so there is nothing for the Court to enjoin as to the Diocese. *See Roman Catholic Archdiocese of Atlanta v. Sebelius*, 2014 WL 1256373, at *15-16 (N.D. Ga. Mar. 26, 2014); *Catholic Diocese of Nashville v. Sebelius*, 2013 WL 6834375, at *5 (M.D. Tenn. Dec. 26, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, 2013 WL 6579764, at *15 (E.D.N.Y. Dec. 16, 2013).

and St. John's displeasure with a third party voluntarily electing to provide payments for contraceptive services—at no cost to, and with no administration by, Catholic Charities or St. John's—is outweighed by the harm an injunction would cause their employees (and their families) by depriving them of payments for important medical services.

Respectfully submitted this 10th day of June, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS