IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02105-REB-MJW

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
THOMAS PEREZ, Secretary of the United States Department of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JACOB LEW, Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Colorado Christian University ("CCU"), has filed a motion asking the Court to expedite its consideration of the parties' pending dispositive motions or, in the alternative, to grant CCU a preliminary injunction. *See* ECF No. 64. Defendants have no objection to the first request. As CCU notes, the parties have already submitted fully briefed motions addressing the merits of this case. Defendants have moved to dismiss or, in the alternative, for summary judgment, on all of CCU's claims. *See* Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. and Mem. in Supp. Thereof, ECF No. 40 (Nov. 4, 2013). And CCU has moved for summary judgment on its Religious Freedom Restoration Act ("RFRA"), Free Exercise Clause, Establishment Clause, and Free Speech Clause claims. *See* Pl.'s Mot. for Partial Summ. J. and Mem. in Supp., ECF No.

27 (Sept. 30, 2013). Both of these motions are fully briefed. Defendants have no objection to the Court ruling on these dispositive motions at its earliest convenience, as doing so would dispose of this case and obviate the need for the Court to address CCU's alternative request for a preliminary injunction.

Defendants oppose CCU's alternative request for a preliminary injunction. 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' previous filings in this case, and for the additional reasons explained below, CCU has not satisfied any of the requirements for obtaining preliminary injunctive relief.[1]

First, CCU has not shown that it is likely to succeed on the merits of either its RFRA or Free Exercise Clause claim—the only two claims it relies on in support of its request for a preliminary injunction. Defendants have already fully addressed the merits of these claims (as well as the arguments CCU reiterates in its motion for preliminary injunction) in defendants' briefing on the pending dispositive motions and in other filings defendants have submitted to the Court. *See* Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. and Mem. in Supp. Thereof and Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial Summ. J., ECF No. 40 (Nov. 4, 2013); Defs.' Reply in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 52 (Dec. 18, 2013); Defs.' Opp'n to Pl.'s Rule 56(d) Mot., ECF No. 53 (Dec. 19, 2013); Defs.' Resp. to Court's Dec. 6, 2013 Ord. to Show Cause, ECF No. 58 (Jan. 10, 2014); Defs.' Notice of

[1] Defendants recognize that this Court recently granted a preliminary injunction against enforcement of the accommodations in a similar case. *See* Order Granting Motion For Preliminary Injunction, *Dobson v. Sebelius*, No. 1:13-cv-03326-REB-CBS, ECF No. 37 (Apr. 17, 2014). Defendants respectfully submit that *Dobson* was wrongly decided for the reasons set forth in Defendants' prior briefing in that case and this one.

Supplemental Auth., ECF No. 59 (Jan. 10, 2014); Defs.' Resp. to Pl.'s Second Notice of Supplemental Auth., ECF No. 62 (Feb. 12, 2014); Notice of Supplemental Auth., ECF No. 63 (Feb. 24, 2014). Instead of repeating those arguments here, defendants incorporate them by reference and respectfully refer the Court to the filings cited above, which demonstrate that CCU is not likely to succeed on the merits of its RFRA or Free Exercise Clause claim (or any of its claims).

Second, CCU has not established that it is likely to suffer irreparable harm in the absence of preliminary relief because, as explained above and in defendants' previous filings, CCU has not shown a likelihood of success on the merits of its claims. See *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc) (explaining that, in the RFRA and First Amendment context, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiff cannot show irreparable injury without also showing a likelihood of success on the merits).

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." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Enjoining the preventive services coverage regulations as to CCU would undermine the government's ability to achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women and men. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 102-04 (2011) ("IOM REP."), AR at 317-18, 400-02; 78 Fed. Reg. 39,870, 39,872, 39,887 (July 2, 2013), AR at 4, 19; 155 Cong.

Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009).[2]

It would also be contrary to the public interest to deny CCU's employees (and their families) and CCU's students the benefits of the preventive services coverage regulations. *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."). Those employees (and their covered family members) and students should not be deprived of the benefits of payments provided by a third party that is not their employer or university for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of their employer's or university's religious objection. 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. IOM REP. at 19-20, 109, AR at 317-18, 407; 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012), AR at 214; 78 Fed. Reg. at 39,887, 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.

Enjoining defendants from enforcing, as to CCU, the preventive services coverage regulations—the purpose of which is to eliminate these burdens, 75 Fed. Reg. 41, 726, 41,733 (July 19, 2010), AR at 233; *see also* 77 Fed. Reg. at 8728, AR at 215—would thus inflict a very real harm on the public and, in particular, a readily identifiable

[2] Where appropriate, defendants have provided parallel citations to the Administrative Record (AR), on file with the Court. *See* ECF No. 21.

group of individuals. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (vacating preliminary injunction entered by district court and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"). Plaintiff's employee and student health plans cover over 700 individuals. *See* Pl.'s Mot. to Expedite Summ. J. or, in the Alternative, for a Prelim. Inj., at 4, ECF No. 64. Accordingly, even assuming CCU were likely to succeed on the merits (which it is not for the reasons already explained), CCU's displeasure with a third party providing payment for contraceptive services—at no cost to, and with no administration by, CCU—is outweighed by the significant harm an injunction would cause CCU's employees (and their families) and CCU's students by depriving them of payments for important medical services.[3]

For these reasons, CCU's alternative request for a preliminary injunction should be denied.

[3] CCU notes that defendants have consented to preliminary injunctions in a few cases involving for-profit companies, *see* Pl.'s Mot. to Expedite Summ. J. or, in the Alternative, for a Prelim. Inj., at 14, ECF No. 64, but defendants' consent in those cases was nothing more than an effort to conserve judicial and governmental resources. Those cases were in the Eighth and D.C. Circuits, where motions panels had preliminarily enjoined the regulations pending appeal in similar cases. *See Mersino Mgmt. Co. v. Sebelius*, 2013 WL 3546702, at *16 (E.D. Mich.) ("[W]here the government has conceded to injunctive relief, it appears that it has generally done so in jurisdictions where the legal landscape has been set against them, and continuing to litigate the claims in those jurisdictions would be a waste of both judicial and client resources."). The government continues to oppose preliminary injunctions in cases and circuits, like this one, where there is no such motions panel decision.

Respectfully submitted this 21st day of April, 2014,

STUART F. DELERY
Assistant Attorney General

JOHN F. WALSH
United States Attorney

JENNIFER RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney (CO Bar No. 37050)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 305-8902
Fax: (202) 616-8470
Email: michelle.bennett@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 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/ Michelle R. Bennett
MICHELLE R. BENNETT