IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DORDT COLLEGE and CORNERSTONE UNIVERSITY, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 5:13-cv-04100-MWB

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

Plaintiffs, Dordt College and Cornerstone University, have filed a motion for preliminary injunction, raising only their claim under the Religious Freedom Restoration Act (RFRA). *See* Pls.' Mot. for Prelim. Inj., ECF No. 44 (May 6, 2014). Defendants have already moved to dismiss or, in the alternative, for summary judgment on this claim (and the other claims plaintiffs raised in their complaint), and have explained why it is without merit. *See* Defs.' Mem. in Supp. of Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 12-3 ("Defs.' Mem."), at 9-27 (Jan. 10, 2014). Plaintiffs have filed a brief opposing that motion and making arguments with respect to, among others, their RFRA claim, *see* Pl.'s Opp'n to Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 35, at 6-27 (Feb. 7, 2014), and have now filed an additional brief in support of their preliminary injunction motion that largely repeats these arguments, *see* Pls.' Mem. in Supp. of Mot. for Prelim. Inj., ECF No. 44-1 (May 6, 2014) ("Pls.' PI Mem."). Defendants respectfully refer the Court to their brief in support of their dispositive motion, and make the following additional points occasioned by plaintiffs' preliminary injunction motion and brief.

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, plaintiffs have not satisfied any of the requirements for obtaining preliminary injunctive relief.

First, for the reasons defendants have stated in their previous filings, plaintiffs have not shown that they are likely to succeed on the merits of their RFRA claim—the only claim on which they rely in support of their motion for preliminary injunction. Defendants have already fully addressed the merits of this claim (as well as the arguments plaintiffs reiterate in their motion for preliminary injunction) in their brief in support of their motion to dismiss or for summary judgment. *See* Defs.' Mem. at 9-27. Instead of repeating all of those arguments here, defendants incorporate them by reference and respectfully refer the Court to their brief cited above, which demonstrates that plaintiffs are not likely to succeed on the merits of their RFRA claim (or any of their claims).

Further, plaintiffs are wrong to rely in support of their RFRA claim on cases involving the RFRA claims of for-profit employers challenging regulations applicable to for-profit employers. *See* Pls.' PI Mem. at 8, 11-12. The Eighth Circuit's grants of injunctions pending appeal in two cases involving for-profit plaintiffs, *see Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (motions panel); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, Order (8th Cir. Nov. 28, 2012) (motions panel), are inapposite here, where differently situated plaintiffs seek an injunction against the operation of a different regulatory scheme—one that provides these plaintiffs with accommodations not available to for-profit companies.[1] Similarly, the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v.*

[1] In any event, motions panel decisions do not bind this Court. *See In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001) ("Decisions by motions panels are summary in character, made often on

Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013); the D.C. Circuit's decision in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); and the Seventh Circuit's decision in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), are of little help to plaintiffs. As the Seventh Circuit itself explicitly recognized when it became the first and, thus far, only Court of Appeals to have addressed the merits of claims made by religious non-profit employers like plaintiffs, which do not have to provide or pay for contraceptive coverage, "Notre Dame can derive no support from our decision in *Korte* . . . . The question in that case was whether two for-profit companies that had health plans for their employees could refuse, because of the religious beliefs of their Catholic owners, to comply with the contraceptive regulation. We ordered the district court to enter a preliminary injunction against enforcing the mandate against the employers. But Notre Dame is authorized to refuse, and it has refused." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014), *pet'n for reh'g en banc denied*, No. 13-3853 (7th Cir. May 7, 2014); *see Priests for Life v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6672400, at *6, 10 (D.D.C. 2013), *appeal pending*, No. 13-5368 (D.C. Cir.) (explaining why *Gilardi* is inapposite in challenge to regulations applicable to religious non-profit organizations); *Diocese of Cheyenne v. Sebelius*, Case No. 14-CV-21-SWS, 2014 WL 1911873, at *10-11 (D. Wyo. May 13, 2014) (explaining why *Hobby Lobby* is not controlling in challenge to regulations applicable to religious non-profit organizations).

Indeed, not only do the regulations in no way prevent plaintiffs from fostering their religious convictions in their community, "mak[ing] and enforc[ing] religiously-rooted rules of conduct" for employees, or "communicat[ing] their pro-life messages to students, faculty, staff, and the broader community," Pls.' Mem. at 10, they simply do not impose a substantial burden on plaintiffs' religious exercise because plaintiffs, as eligible organizations, may opt out of the contraceptive coverage requirement. "The fact that the scheme will continue to operate without

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a scanty record, and not entitled to the weight of a decision made after plenary submission." (quotations omitted)); *United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *Lambert v. Blackwell*, 134 F.3d 506, 513 n.17 (3d Cir. 1997).

[plaintiff] may offend [plaintiff's] religious beliefs, but it does not substantially burden the exercise of those beliefs." *Mich. Catholic Conf. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 6838707, at *8 (W.D. Mich. 2013), *appeal pending*, No. 13-2723 (6th Cir.); *see also, e.g.*, *Notre Dame*, 743 F.3d at 556-57 (rejecting plaintiffs' "trigger" theory).

Second, plaintiffs have not established that they are likely to suffer irreparable harm in the absence of preliminary relief because, as explained above and in defendants' previous filings, plaintiffs have 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 plaintiffs 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]

[2] Where appropriate, defendants have provided parallel citations to the Administrative Record (AR), on file with the Court. *See* ECF No. 11.

It would also be contrary to the public interest to deny plaintiffs' employees (and their families) and plaintiffs' 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 plaintiffs, 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 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"). Plaintiffs' employee health plans cover approximately 1,200 individuals, *see* Compl. ¶¶ 36, 68, and its student health plans cover additional individuals. Accordingly, even assuming plaintiffs were likely to succeed on the merits (which they are not for the reasons already explained), plaintiffs' displeasure with a third

party providing payment for contraceptive services—at no cost to, and with no administration by, plaintiffs—is outweighed by the significant harm an injunction would cause plaintiffs' employees (and their families) and plaintiffs' students by depriving them of payments for important medical services.

For these reasons, and those contained in defendants' brief in support of their motion to dismiss or for summary judgment, plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted this 20th day of May, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michael C. Pollack
MICHAEL C. POLLACK