IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

GRACE SCHOOLS and BIOLA UNIVERSITY, INC., Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 3:12-cv-00459-JD-CAN

DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

In their Reply Memorandum of Law in Support of Their Cross Motion for Summary Judgment, ECF No. 78, plaintiffs claim that the Seventh Circuit's recent ruling in *Korte v. Sebelius*, __ F.3d __, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), controls this Court's approach to this case. As an initial matter, for the reasons stated in Judge Rovner's thorough dissent, *id.* at *27-67, in defendants' briefs in this case, and elsewhere, defendants believe that *Korte* was wrongly decided. And while defendants acknowledge that *Korte* is binding on this Court, it does not control this case. Because plaintiffs here—unlike the for-profit businesses that were plaintiffs in *Korte*—are eligible for the accommodations, which relieve them of the responsibility to contract, arrange, or pay for contraceptive coverage and which are designed to accommodate their religious concerns, the Seventh Circuit's conclusion that the regulations at issue in *Korte*—

which did require the plaintiffs in that case to contract, arrange, and pay for contraceptive coverage—imposed a substantial burden on those plaintiffs is unavailing to plaintiffs here.[1]

The plaintiffs in *Korte* were closely-held for-profit corporations and their individual owners. *See id.* at *1. Because for-profit corporations are not eligible for the accommodations for non-profit religious organizations with religious objections to contraceptive coverage, *see* 78 Fed. Reg. at 39,875, AR at 7, the challenged regulations require for-profit companies to contract, arrange, and pay for contraceptive coverage for the participants and beneficiaries of their group health plan. The Seventh Circuit concluded that such an obligation imposes a substantial burden on both the for-profit corporations and the owners because the regulations require that they "purchase the required contraception coverage" rather than "refrain from putting this coverage in place," *Korte*, 2013 WL 5960692, at *9, and that they "arrange for their companies to provide" such coverage, *id.* at *23.

Here, by contrast, plaintiffs are eligible for the accommodations, and thus are in a markedly different position than the *Korte* plaintiffs. As previously explained, in order to be relieved of the obligation to contract, arrange, and pay for contraceptive coverage, plaintiffs must take the simple step of completing the self-certification—which reiterates what they have already stated repeatedly in this case; that they have religious objections to providing contraceptive coverage—and providing a copy of the self-certification to their issuers/TPAs. Once that is done, it is third parties that provide separate payments for any contraceptive services that may be used by plaintiffs' employees or their dependents. Thus, under the accommodations, it is not plaintiffs that contract, arrange, or pay for coverage for contraceptive services. Indeed, plaintiffs will do the very opposite of arranging for such coverage when they complete the self-certification.

[1] Defendants recognize that *Korte* forecloses their arguments that the regulations satisfy strict scrutiny. Defendants believe the Seventh Circuit wrongly decided that question as well, but recognize that *Korte* controls this Court's consideration of that part of this case, and raise the issue merely to preserve it for appeal.

Instead, by professing their religious objection to contraceptive coverage, plaintiffs will ensure that they—unlike the plaintiffs in *Korte*—need not contract, arrange, or pay for contraceptive coverage.

This distinction is central. Because the plaintiffs here are not themselves required to contract, arrange, or pay for contraceptive coverage, their complaint is—indeed, must be—that in spite of their religious objection, someone else (their issuers/TPAs) will provide payments for contraceptive services to their employees. *See* Defs.' Reply Mem. in Supp. of Mot. to Dismiss or for Summ. J. & Mem. in Opp'n to Pls.' Cross-Mot. for Summ. J. ("Defs.' Reply Mem."), ECF No. 77, at 6-7; Am. Compl. ¶¶ 153, 155, ECF No. 54. This is the nature of plaintiffs' "trigger" theory, which, as defendants have shown, would transform RFRA into a cudgel that could be wielded by any number of people with any number of religious objections, and that would permit them to effectively veto (or, at least, subject to "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)) any number of government programs—including the provision of benefits to plaintiffs' employees by the government itself. *See* Defs.' Reply Mem. at 6-7; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). Because the Seventh Circuit was considering regulations under which the plaintiffs themselves were required to "arrange for their companies to provide" contraceptive coverage and to pay for such coverage, *Korte*, 2013 WL 5960692, at *23, it had no occasion to consider whether an objection to a third party's provision of payments for contraceptive services is sufficient to state a claim under RFRA. For the reasons set out in defendants' briefs, it is not sufficient, and plaintiffs' cross-motion for summary judgment should be denied and defendants' motion to dismiss or for summary judgment should be granted.

Respectfully submitted this 25th day of November, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, 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*_____
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