

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, et al.,

Defendants.

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION  
FOR INJUNCTION PENDING APPEAL**

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Plaintiffs' motion for an injunction pending appeal (ECF No. 54) should be denied. The standard for the relief plaintiffs now seek is identical to the standard for the relief this Court denied to plaintiffs in its order denying plaintiffs' motion for preliminary injunction (ECF No. 52). *See Town of Superior v. U.S. Fish & Wildlife Serv.*, 2012 WL 6737183, at \*1 (D. Colo. 2012).

In support of the motion now before this Court for an injunction pending appeal, plaintiffs have merely "incorporated by reference" the arguments they made in support of their motion for preliminary injunction. *See* ECF No. 54, at 3 n.1. This Court properly found those arguments insufficient to justify such relief because, among other reasons, the challenged regulations will not substantially burden plaintiffs' religious beliefs. For the reasons set out in defendants' brief in opposition to the motion for preliminary injunction, ECF No. 29, and for all the reasons set out in this Court's order denying that motion, ECF No. 52, the instant motion for an injunction pending appeal should likewise be denied. *See, e.g.,* Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction Pending Appeal, *Univ. of Notre Dame v. Sebelius*, 3:13-cv-1276-PPS-CAN, ECF No. 49 (N.D. Ind. Dec. 23, 2013) (denying motion for preliminary injunction pending appeal because plaintiff's motion "offer[ed] no new arguments, relying

entirely on its briefing and oral argument in support of its earlier request for a preliminary injunction,” which had already been denied); Memorandum Opinion and Order, *Archbishop of Washington v. Sebelius*, 1:13-cv-1441-ABJ, ECF No. 52 (D.D.C. Dec. 23, 2013) (same); Order, *Catholic Diocese of Nashville v. Sebelius*, 3:13-cv-1303, ECF No. 70 (M.D. Tenn. Dec. 27, 2013) (same); *see also Univ. of Notre Dame v. Sebelius*, No. 13-3853, ECF No. 11 (7th Cir. Dec. 30, 2013) (denying emergency motion for injunction pending appeal).

Furthermore, this Court lacks jurisdiction to grant the relief plaintiffs request because plaintiffs filed a notice of appeal in the Tenth Circuit on December 27, 2013 (ECF No. 53), seeking review of this Court’s order denying preliminary injunctive relief (ECF No. 52). Federal Rule of Civil Procedure 62(c) provides that “[w]hen an appeal is taken from an interlocutory [order] denying an injunction, the district court in its discretion may . . . grant an injunction during the pendency of the appeal . . . .” Although this language appears to afford district courts unlimited authority to grant injunctive relief pending appeal, courts have construed the rule more narrowly. *See generally United States v. Power Eng’g Co.*, 10 F. Supp. 2d 1165, 1169-72 (D. Colo. 1998); *Ides, The Authority Of A Federal District Court To Proceed After A Notice Of Appeal Has Been Filed*, 143 F.R.D. 307, 320-22 (1992). The majority of circuit courts that have addressed the issue have held that the rule allows district courts “to grant only such relief as may be necessary to preserve the status quo pending an appeal.” *Int’l Ass’n of Machinists v. E. Airlines*, 847 F.2d 1014, 1018 (2d Cir. 1988); *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 819-20 (5th Cir. 1989) (“The powers of the district court over an injunction pending appeal should be limited to maintaining the status quo and ought not to extend to the point that the district court can divest the court of appeals from jurisdiction while the issue is before us on appeal.”); *see also Power Eng’g*, 10 F. Supp. 2d at 1170 (citing cases). The status quo is determined “as of the time of appeal.” *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962); *see also, e.g., Town of Superior*, 2012 WL 6737183, at \*1; *Lin v. Chertoff*, 2007 WL 4459200, at \*1 (D. Colo. Dec. 14, 2007).

Although it does not appear that the Tenth Circuit has addressed this precise issue, several courts in this district have adopted this narrow reading of Rule 62(c). *See Town of Superior*, 2012 WL 6737183, at \*1 (refusing to grant preliminary injunctive relief while appeal was pending because doing so “would alter the status quo, which Rule 62(c) does not permit”); *Lin*, 2007 WL 4459200, at \*1 (observing that a district court is “without power to modify an existing injunction in a manner that alters the status quo”); *Power Eng’g*, 10 F. Supp. at 1171 (“Regardless of the precise formula used, it is clear that any injunctive action taken pursuant to Rule 62(c) must be designed to aid the appeal and, accordingly, may not materially alter the status of the case on appeal.” (quotation omitted)); *see also Garcia v. Burlington N. R.R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987) (“[W]hen an interlocutory appeal is taken, the district court retains jurisdiction to proceed with *matters not involved in that appeal*.” (emphasis added)).

Here, the Court lacks jurisdiction to grant plaintiffs’ motion for an injunction pending appeal because doing so would alter the status quo as of the time of appeal and would effectively divest the Tenth Circuit of jurisdiction over plaintiffs’ appeal. When plaintiffs appealed this Court’s December 27, 2013 order denying preliminary injunctive relief, the status quo was that the challenged regulations apply to plaintiffs. Granting plaintiffs’ instant motion would alter the status quo by enjoining defendants from enforcing the regulations, including the accommodations for eligible organizations. *See Int’l Ass’n of Machinists*, 847 F.2d at 1018 (concluding district court lacked jurisdiction to grant preliminary injunction after plaintiff had appealed district court’s earlier denial of preliminary injunctive relief because “relief granted did more than maintain the status quo pending th[e] appeal”); *Town of Superior*, 2012 WL 6737183, \*1 (refusing to grant preliminary injunctive relief while prior denial of such relief was pending on appeal because doing so “would alter the status quo”). It would also “materially alter the status of the appeal” by mooting plaintiffs’ appeal and thus “depriv[ing] or otherwise affect[ing]

the jurisdiction of the Tenth Circuit over the appeal.”<sup>1</sup> *Power Eng’g*, 10 F. Supp. 2d at 1172.

Accordingly, this Court lacks jurisdiction to provide the relief plaintiffs request.<sup>2</sup>

Dated: December 31, 2013

Respectfully submitted,

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<sup>1</sup> Plaintiffs also have sought an injunction pending appeal in the Tenth Circuit. *See* Appellants’ Emergency Motion for Injunction Pending Appeal, *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (Dec. 28, 2013). Defendants filed an opposition to that motion pursuant to an expedited briefing schedule set by the court of appeals.

<sup>2</sup> The Court does have authority to deny plaintiffs’ motion pursuant to Rule 62.1(a)(2), which provides that, “[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . deny the motion[.]”

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on December 31, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non-CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by nonparticipant's name:

None.

/s/ Michelle R. Bennett  
MICHELLE R. BENNETT  
Trial Attorney