No. 13-6640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CATHOLIC DIOCESE OF NASHVILLE; CATHOLIC CHARITIES OF TENNESSEE, INC.; CAMP MARYMOUNT, INC.; MARY QUEEN OF ANGELS, INC.; ST. MARY VILLA, INC.; DOMINICAN SISTERS OF ST. CECILIA CONGREGATION; AQUINAS COLLEGE,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF TREASURY,

Defendants-Appellees.

O R D E R

Before: BATCHELDER, Chief Judge; SILER and STRANCH, Circuit Judges.

The plaintiffs appeal the denial of their motion to preliminarily enjoin the defendants from enforcing requirements under the Affordable Care Act that result in the provision of cost-free coverage for contraceptive services to their employees. The plaintiffs move for an injunction pending appeal, alleging that the provision violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq*. The defendants oppose an injunction, and the plaintiffs reply.

In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111–152, 124 Stat. 1029 (2010), which combined, make up the Affordable Care Act ("ACA"). *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 627–28 (6th Cir. 2013), *pet. for cert. filed*, 82 U.S.L.W. 3318 (Nov. 12, 2013) (No. 13-591). The ACA requires employers with fifty or more full-time employees to provide their employees with a health insurance plan that provides certain essential minimum coverage. *See* 26 U.S.C. § 4980H. Failure to comply with this provision results in substantial financial penalties for the employer. *See* 26 U.S.C. § 4980H(a). Pertinent here, "essential minimum coverage" includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" ("the contraceptive mandate"). *See* 42 U.S.C. § 300gg-13(a)(1), (4); *Eden Foods*, 733 F.3d at 628–29.

Religious employers—organizations that are organized and operated as nonprofit entities and referred to in I.R.C. § 6033(a)(3)(A)(i) or (iii) (1986)—are exempt from the contraceptive mandate. 45 C.F.R. § 147.131(a). Also exempt are companies with less than fifty employees, *see* 26 U.S.C. § 4980H(a), (c)(2)(A), and companies with health insurance plans in existence on March 23, 2010 that remained unchanged after that date (the "grandfathered" plans). *See* 45 C.F.R. § 147.140.

Following objections from religious organizations that did not qualify as religious employers, the government established a temporary "safe harbor" from enforcement of the contraceptive mandate for non-profit religiously-affiliated organizations. *Korte v. Sebelius*, 735 F.3d 654, 661–62 (7th Cir. 2013). On July 2, 2013, during this safe-harbor period, a regulatory scheme was adopted, known as the "accommodation," wherein "eligible organizations" may be exempted from the contraceptive mandate. 29 C.F.R. § 2590.715-2713A. An entity is an "eligible organization" if it

satisfies four requirements: (1) it opposes providing coverage for some or all of the contraceptive services covered under the contraceptive mandate on religious grounds; (2) it is organized and operated as a non-profit entity; (3) it holds itself out as a religious organization or entity; and (4) it "self certifies, in a form and manner specified by the Secretary, that it satisfies the [first three criteria], and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation . . . applies." 29 C.F.R. § 2590.715-2713A(a)(1)–(4).

The plaintiffs, religious employers subject to the exemption for non-profit entities eligible for the accommodation, filed an action for declaratory and injunctive relief against the defendants, alleging violations of the RFRA, the First Amendment, and the Administrative Procedures Act. They also moved for a preliminary injunction to prohibit the enforcement of the contraceptive mandate, scheduled to take effect on January 1, 2014, based on their allegations that the accommodation violated the RFRA and the First Amendment. After conducting a hearing on the motion, the district court denied the motion for a preliminary injunction in a lengthy and reasoned decision. The plaintiffs appealed the denial of their motion for a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). They also contemporaneously moved the district court for an injunction pending appeal. The district court denied the motion, for the reasons stated in its memorandum denying their motion for a preliminary injunction. This motion followed.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the

movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573; *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

To demonstrate a likelihood of success on appeal, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks and citation omitted). The Supreme Court has never considered similar RFRA claims. No circuit court has considered these claims on the merits. The district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. *Compare, e.g.*, *Mich. Catholic Conference v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400, at *5–10 (D.D.C. Dec. 19, 2013), *with S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265, at *8–9 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of NY v. Sebelius*, No. 12 CIV. 2542 BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, Nos. 13cv1459/0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). The divergence of opinion by the district courts establishes more than a mere possibility of success on the merits.

Congress passed the RFRA "to restore the compelling interest test for free-exercise cases . . . and to provide a claim or defense to persons whose religious exercise is substantially burdened by

government." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013) (internal quotations omitted), *pet. for cert. filed*, 82 U.S.L.W. 3245 (Oct. 15, 2013) (No. 13-482). The denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet*, 305 F.3d at 578; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *cf. McNeilly v. Land*, 684 F.3d 611, 620–21 (6th Cir. 2012) ("Once a probability of success on the merits was shown, irreparable harm followed . . . . [b]ecause [the plaintiff] 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."). Given the divergence of opinions and the arguable merit of both the plaintiffs' and the government's position, it is not clear that the accommodation violates the RFRA. But the possibility that the plaintiffs' constitutional rights may be violated weighs heavily in our decision, particularly given that there does not appear to be a substantial harm to others. The entities here presently have insurance plans that do not provide contraceptive services to their employees. The contraceptive mandate itself does not apply to three groups, all of which are large in number—employers with less than fifty employees, religious employers, and employees subject to grandfathered plans. Moreover, the government has already delayed implementation of the contraceptive mandate to the plaintiffs, and other entities similarly situated, during the safe harbor. Therefore, at this juncture, we believe that the factors weigh in support of an injunction pending appeal.

Finally, this appeal focuses on legal issues that have already been briefed below. The district court's decision on appeal, as well as the district court's decision in *Michigan Catholic Conference v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 20, 2013), conflict with another district court's decision in this circuit. *See Legatus v. Sebelius*, No. 12-12061, 2013 WL

6768607 (E.D. Mich. Dec. 20, 2013). Therefore, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **GRANTED**. The government is hereby **ENJOINED** from enforcing the provision in question against the plaintiffs pending the disposition of this appeal. The appeal shall be expedited for briefing and submission, and no extensions of time of the briefing schedule will be granted absent extraordinary circumstances.

Stranch, Circuit Judge, Dissents. The reasons for my dissent will be submitted in a separate writing at a future time.

ENTERED BY ORDER OF THE COURT

Clerk