# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 13-5368** **September Term, 2013**

**1:13-cv-01261-EGS**

**Filed On:** December 31, 2013

Priests For Life, et al.,
Appellants

v.

United States Department of Health and Human Services, et al.,
Appellees

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**No. 13-5371**

**1:13-cv-01441-ABJ**

Roman Catholic Archbishop of Washington, et al.,
Appellants

Thomas Aquinas College,
Appellee

v.

Kathleen Sebelius, et al.,
Appellees

**BEFORE:** Henderson, Tatel*, and Brown, Circuit Judges

## O R D E R

Upon consideration of the emergency motion for injunction pending appeal in No. 13-5368, the response, the reply, and the Rule 28(j) letters; the emergency motion for injunction pending appeal in No. 13-5371, the response, the reply, and the Rule 28(j) letters, it is

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**ORDERED** that the motions for injunction pending appeal be granted. Appellants have satisfied the requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2013). Appellees are enjoined from enforcing against appellants the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court. It is

**FURTHER ORDERED**, on the court's own motion, that these cases be consolidated. It is

**FURTHER ORDERED** that appellants in these consolidated cases show cause by January 14, 2014, why they should not be required to file one joint opening brief limited to 14,000 words and one joint reply brief limited to 7,000 words. The parties are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. Whether the parties are aligned or have disparate interests, they must provide *detailed* justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

*Judge Tatel would deny the emergency motions for injunction pending appeal for the reasons in the attached statement.

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TATEL, *Circuit Judge*: Appellants challenge a section of the Affordable Care Act that requires certain religious organizations to "self certify" their religious objections to the provision of contraceptive services in order to escape the Act's requirement that they provide such services to their employees. Because I believe that Appellants are unlikely to prevail on their claim that the challenged provision imposes a "substantial burden" under the Religious Freedom Restoration Act (RFRA), I would deny their application for an injunction pending appeal. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (denying injunction pending appeal); *University of Notre Dame v. Sebelius*, No. 13-1540 (7th Cir. Dec. 30, 2013) (same). Simply put, far from imposing a "substantial burden" on Appellants' religious freedom, the challenged provision allows Appellants to avoid having to do something that would substantially burden their religious freedom.

Of course, if Appellants were correct that the challenged provision requires them to engage in acts that "affirmatively authorize" and "trigger[]" contraceptive coverage, PFL Mot. 2, 7, then I would agree that we should grant an injunction pending appeal. 42 U.S.C § 2000bb-1(a)-(b); *Gilardi v. Department of Health and Human Services*, No. 13-5069, slip op. at 21–23 (D.C. Cir. Nov. 1, 2013). But that is not how the challenged provision operates. As the government points out, the Affordable Care Act requires employers and insurers to provide health plans that include contraceptive coverage. *See* 29 C.F.R. 2590.715–2713(a)(1)(iv); PFL Opp. 3–5. Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not *because* Appellants self-certify. Insofar as Appellants argue that they are burdened by authorizing their third-party administrator to provide contraceptive coverage, the government has conceded that the contraceptive mandate cannot be enforced against third-party administrators of church plans, and Appellants have provided no reason for us to believe that the Catholic Archdiocese of Washington's plan, Appellants' third-party administrator, will provide such coverage. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441, slip op. at 46–51 (D.D.C. Dec. 20, 2013); *see also Little Sisters of the Poor Home for the Aged* at 2–3. In other words, it was Congress that "authorized" insurers to provide contraceptive coverage to Appellants' employees—services those employees will receive regardless of whether Appellants self-certify.

Appellants also argue that they are burdened simply by participating in a "scheme" in which contraceptive services are provided. *See* PFL Reply 4; Archbishop

Reply 6. Although we must accept Appellants' assertion that the scheme itself violates their religious beliefs, we need not accept their legal conclusion that their purported involvement in that scheme qualifies as a substantial burden under RFRA. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise."). Appellants' participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive. *See id.* at 678 ("An inconsequential or de minimis burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme."). At bottom, then, Appellants' religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required Appellants themselves to take. But Appellants have no right to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious organizations are required to file many forms with the government, such as applications for tax exemptions, even though they may have religious objections to a whole host of government policies and programs. Nothing in RFRA empowers such organizations to leverage their own minimal interaction with the government to force the government to act in conformance with their religious beliefs—however sincerely held.