IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY, *et al.*	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-12-3009
ALEX AZAR,	§	
Defendant.	§	

ORDER

This case is one of many challenging the Affordable Care Act's (ACA) 2010 mandate that "group health plan[s]" provide "preventative care" without "any cost sharing." 42 U.S.C. § 300gg-13(a)(4). Congress delegated the authority to define "preventative care" to the Health Resources and Services Administration (HRSA), an arm of the Department of Health and Human Services (HHS). *Id.* HRSA determined that "preventative care" for women included contraceptive methods the Food and Drug Administration had approved, putting in its place the "contraceptive mandate" that has been litigated across the country. *See* 77 Fed. Reg. 8,725. This case presents issues relating to the substantive legal challenges to the ACA, and issues relating to the effect of nationwide injunctions issued by other federal courts. (Docket Entry No. 158).

The "contraceptive mandate" does not apply to certain healthcare plans and "religious employers," which the government has defined as institutional churches and their dependent organizations. *See* 78 Fed. Reg. 39,870, 39,874. This case raised the mandate's effect on religious nonprofit educational institutions like the plaintiffs. *See* 42 U.S.C. § 18011; 76 Fed. Reg. 46,621, 46,623. To accommodate religious objectors, the government issued a rule allowing them "to send a self-certification form to its insurance issuer, which then excludes contraceptive coverage, either

in full or in part, from [the nonprofit's] group health plan." *Pennsylvania v. Trump*, No. 19-1189, 2019 WL 3057657, at *2 (3d Cir. 2019) (published). The insurer could exclude the contraceptive coverage and "provide payments for contraceptive services for plan participants and beneficiaries, separate from the group health plan, without . . . charg[ing] plan participants or beneficiaries." *Id.* (quotation omitted). The plaintiffs and many other religious objectors argued that complying with this accommodation, as the mandate requires, implicates them in providing contraceptives and violates their religious beliefs. (*See* Docket Entry No. 158 at 8).

Extensive litigation followed, culminating in three Supreme Court decisions, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Wheaton College v. Burwell*, 573 U.S. 958 (2014); and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). In *Hobby Lobby*, the Court held that for-profit closely held corporations with sincere religious objections to giving covered employees contraceptives could invoke the accommodation reserved for religious nonprofits. *Hobby Lobby*, 573 U.S at 724–26. In *Wheaton College*, the Court ruled that Wheaton College, instead of sending the self-certification form to its insurance issuer, could "instead rely on its notification to HHS to satisfy the Accommodation's prerequisites." *Pennsylvania*, 2019 WL 3057657, at *2 (explaining *Wheaton College*). And in *Zubik*, which addressed the appeal from the final judgment in this case, the Supreme Court granted *certiorari* as to whether requiring objectors to submit the accommodation self-certification form violated the Religious Freedom Restoration Act (RFRA). *Zubik*, 136 S. Ct. at 1559. The Court remanded the case without reaching the merits of that question. *Id.* at 1660.

In 2017, the government issued a preliminary rule expanding the contraceptive mandate's "religious employer" exemption to "all bona fide religious objectors." 82 Fed. Reg. 47,806. The preliminary rule would have exempted the plaintiffs from complying with the accommodation and

mooted the issues in this case. The Eastern District of Pennsylvania and the Northern District of California enjoined the enforcement or implementation of the preliminary rule, however, based on the government's failure to follow the Administrative Procedure Act. *See Pennsylvania v. Trump*, No. 17-4540, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017); *California v. HHS*, No. 17-CV-5783-HSG, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017).

The government issued the final rule in November 2018 and set it to become effective on January 14, 2019. 83 Fed. Reg. 57,536. In January 2019, the Eastern District of Pennsylvania and the Northern District of California enjoined the enforcement or implementation of the final rule. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019); *California v. HHS*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019).

The government appealed both court orders. The Third Circuit affirmed on the grounds that the government had failed to follow the Administrative Procedure Act, and that neither the ACA nor RFRA "authorize or require" the final rule. *Pennsylvania*, 2019 WL 3057657, at *13. The Ninth Circuit has heard oral argument but has not yet issued a ruling.

A recent ruling in this circuit has further complicated matters. In June 2019, the Northern District of Texas enjoined the contraceptive mandate itself, holding that 42 U.S.C. § 300gg-13(a)(4) violates RFRA as applied to "[e]very employer . . . that objects, based on its sincerely held religious beliefs, to . . . arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan, issuer, or third-party administrator that provides or arranges for such coverage or payments." *Deotte v. Azar*, No. 4:18-CV-825-O, at *31 (N.D. Tex. June 5, 2019). The State of Nevada filed a protective notice of appeal with the Fifth Circuit in July 2019.

On January 10, 2019, before these decisions, the plaintiffs in this case moved to lift the stay and modify this court's December 2013 injunction order "to embrace the language specified

in the parties' [settlement] agreements." (Docket Entry No. 158 at 1). As the plaintiffs observe, in "the almost five years since" the court entered partial final judgment on their RFRA claims, "this case has been on appeal to the Fifth Circuit and to the Supreme Court," and "the regulations at issue have been amended multiple times"—"and continue to be subject to change." (*Id.*). The plaintiffs move to modify the December 2013 order based on these changes. They ask this court to "clarify that the injunction applies to the current and ensuing versions of the regulations at issue and that it applies only to the extent that such regulations would require [them] to violate their beliefs." (*Id.* at 1–2).

On January 15, 2019, the court deferred ruling on the plaintiffs' motion to modify pending developments in the Eastern District of Pennsylvania and the Northern District of California.

Under *Zubik* and the Third Circuit's ruling in *Pennsylvania v. Trump*, the contraceptive mandate *and* the accommodation remain in effect, requiring the plaintiffs to comply with the accommodation. The recent caselaw, particularly the nationwide injunctions, leaves it unclear whether this court has the authority to modify its December 2013 order.

The plaintiffs' motion to modify the 2013 injunction is denied, without prejudice. (Docket Entry No. 158). The Fifth Circuit will soon address whether the contraceptive mandate itself violates RFRA. And the two injunctions enjoining enforcement of the new rule, with the Third Circuit's recent decision, counsel against modifying the 2013 order or lifting the stay on this record.

The plaintiffs may renew their motion but must explain the impact, if any, of:

- the Third Circuit's opinion in *Pennsylvania v. Trump*, No. 19-1189, 2019 WL 3057657 (3d Cir. 2019) (published);
- the Eastern District of Pennsylvania's injunction, *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019);

- the Northern District of California's injunction, *California v. HHS*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019)

- the Northern District of Texas's injunction, *Deotte v. Azar*, No. 4:18-CV-825-O, at *33–*35 (N.D. Tex. June 5, 2019); and

- the appeal of the Northern District of Texas's injunction, *Deotte v. Azar*, No. 4:18-CV-825-O, at *33–*35 (N.D. Tex. June 5, 2019), *appeal docketed*, No. 19-10754 (5th Cir. July 5, 2019).

SIGNED on August 2, 2019, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge