UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY,

Plaintiff,

v.

DONALD J. TRUMP, et al.

Defendants,

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Defendant-Intervenors.

Civil No. 2:17-CV-04540-WB

DEFENDANT-INTERVENOR THE LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME STATEMENT OF UNDISPUTED MATERIAL FACTS

In support of its motion for summary judgment, the Little Sisters of the Poor Saints Peter and Paul Home submit the following statement of facts:

I. The Federal Mandate and Its Regulatory History

1. Congress has never enacted a federal statute listing contraceptives as part of required health insurance. J.A. 99.
2. Congress does not require that cost-free access to all FDA-approved contraceptives be provided by small employers. 26 U.S.C. § 4980H(c)(2)(A).
3. Congress does not require that cost-free access to all FDA-approved contraceptives be provided in grandfathered health plans. J.A. 306, 2176.
4. Congress does not require cost-free access to all FDA-approved contraceptives in public-sector plans such as Medicare, Medicaid, and Tricare. J.A. 383 ("preventive services requirements . . . affect only private plans").
5. The Affordable Care Act requires certain employers to offer "health insurance coverage" that includes "preventive care and screenings" for women without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4); 26 U.S.C. § 9815; 29 U.S.C. § 1185d.
6. Under the Affordable Care Act, the penalty for offering a plan that excludes coverage for even one of the FDA-approved contraceptive methods is $100 per day for each affected individual. 26 U.S.C. § 4980D(a)-(b).
7. If an employer larger than 50 employees fails to offer a plan at all, the employer owes $2,000 per year for each of its full-time employees. 26 U.S.C. § 4980H(a), (c)(1).
8. "Family planning" was mentioned only in passing during Senate floor debates concerning the Women's Health Amendment, while many senators went into considerable detail about

cost and access to mammograms, pap smears, post-partum depression, domestic violence, heart disease, and diabetes. J.A. 2377-79, 2422-26, 2435-38.

9. The preventive services mandate was first implemented in an interim-final rule on July 19, 2010 ("First IFR"), which stated that the Health Resources and Services Administration ("HRSA") would produce "comprehensive guidelines" for women's preventive services. J.A. 564.

10. Nothing in the Affordable Care Act requires HRSA to include contraceptives in its comprehensive guidelines. J.A. 306.

11. This First IFR was enacted without prior notice of rulemaking or opportunity for prior comment as it came into effect on the day that comments were due. J.A. 562, 566.

12. The First IFR did not mention family planning as a "preventive service," instead listing "immunizations . . . blood pressure and cholesterol screening, diabetes screening for hypertensive patients, various cancer and sexually transmitted infection screenings, genetic testing for the BRCA gene, adolescent depression screening, lead testing, autism testing, and oral health screening and counseling related to aspirin use, tobacco cessation, and obesity." J.A. 567.

13. HRSA commissioned the Institute of Medicine ("IOM") to "review what preventive services are necessary for women's health and well-being and should be considered in the development of comprehensive guidelines for preventive services for women." The charge to the IOM does not include any discussion of coverage issues. J.A. 326-27.

14. The IOM Report argues that greater *use* of contraception will lower rates of unintended pregnancy, but the Mandate is about increasing *access* to contraception. Studies have

shown that there are "many and varied reasons why women choose not to use contraception, most of which have nothing to do with cost." J.A. 2220, 2249-51.

15. In reports by the CDC, Guttmacher, and other organizations, the cost of birth control did not appear as an explanation for low rates of contraceptive use. Instead, the studies found that factors such as mistaken assumptions about infertility, worries about the side effects of birth control, and indifference or ambivalence to pregnancy were the main drivers behind women not using contraceptives. J.A. 2249.
16. Some studies show that the overall proportion of unintended pregnancies does not correlate to changes in contraceptive use. J.A. 2227.
17. The CDC reports that 12% of women using contraception will become pregnant in a given year. This figure essentially stayed the same between 1995 and 2010. J.A. 2220.
18. Other studies have shown that the increase in contraception access and use is possibly connected to increasing rates of STIs, as access to contraception generally leads to more sex with more partners. J.A. 2236-38.
19. Studies have shown that there are a variety of potential harms to women's health from the use of contraceptives, including ties to cancer. J.A. 2238-40.
20. The World Health Organization has classified oral contraceptives as carcinogens. JA 17-18, 2240.
21. FDA-approved contraceptive methods required by the Mandate include "emergency contraception." The FDA's Birth Control Guide notes that some emergency contraceptives may work by preventing implantation of a fertilized egg in the uterus. J.A. 2361-63.
22. The list of FDA-approved contraceptive methods endorsed by the IOM Report includes methods that can interfere with a human embryo before implantation. J.A. 2362-63.

23. According to the FDA's own publication, each of the 18 methods it has approved can have side effects and other health risks. At least forty potential side effects are mentioned throughout the document, ranging from irritation and tiredness all the way to "severe infection[s]" or ectopic pregnancies, as well as some "Less Common Risks" such as heart attack or stroke. J.A. Ex. 147.
    a. 16 of the 18 approved methods provide no protection against STIs. Two provide a "reduced risk" of STIs. J.A. Ex. 147.
    b. The FDA's publication claims that one method of emergency contraception it has approved has an 87.5% chance of preventing a pregnancy but admits that "other studies have resulted in lower pregnancy prevention rates." J.A. 2362.
    c. The FDA states the other method of emergency contraception it has approved has only a 60-66% chance of preventing a pregnancy. J.A. 2363.
24. Thirteen days after the IOM recommendations were issued, the HRSA issued guidelines on its website. The HRSA guidelines included "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures." J.A. 310-11.
25. HRSA's inclusion of contraceptive coverage in the preventive services guidelines is posted on its website and has never been subject to notice-and-comment rulemaking. J.A. 101.
26. The same day that the HRSA guidelines were posted on its website, HHS promulgated its Second IFR, effective immediately, once again without prior notice or opportunity for public comment. J.A. 304.
27. The Second IFR stated that it "contain[ed] amendments" to the First IFR, in particular recognizing that Congress's grant of authority to HRSA to develop "guidelines" included the authority to consider the impact of the Mandate on religious objectors. J.A. 304, 306.

28. The Mandate has many gaps, including that employers with fewer than 50 employees need not provide insurance coverage at all. 26 U.S.C. § 4980H(c)(2)(A).

29. Approximately a fifth of large employers are exempt through ACA's exception for "grandfathered health plans." J.A. 306, 2176.

30. The Second IFR acknowledged HRSA's discretion to exempt certain religious employers from the guidelines, but it defined religious employer narrowly, ultimately excluding non-profits like the Little Sisters of the Poor, who serve people of all faiths. J.A. 306.

31. The Agencies received "over 200,000" comments, including many comments that explained the need for broader religious exemptions, but the Second IFR was finalized "without change." J.A. 299-300, 298.

32. The Agencies then published an Advance Notice of Proposed Rulemaking and a Notice of Proposed Rulemaking, which were later adopted into a final rule making further changes to the Mandate. J.A. 290, 269-70, 239.

33. The Agencies received over 600,000 comments in response to the ANPRM and NPRM. J.A. 240, 272.

34. The Agencies amended the definition of a religious employer, but continued to limit that definition to churches and the "exclusively religious" activities of religious orders. J.A. 243.

35. The Agencies also adopted a mechanism—termed an "accommodation"—by which religious employers could offer the objected-to coverage on their health plans by executing a self-certification and delivering it to the organization's insurer or third-party administrator (TPA). Self-certification would trigger the insurer's or TPA's obligation to provide payments for contraceptive services. J.A. 243.

36. The regulations stated that: "plan participants and beneficiaries (and their health care providers) do not have to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)." J.A. 245.

37. On EBSA Form 700, the self-certification form, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." J.A. 1971. It is these regulations that require that "the third party administrator will provide or arrange payments for" the abortifacient drugs and devices. 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A. J.A. 1971-72.

38. The first two IFRs did not address the concerns of many religious organizations and many filed lawsuits under the Religious Freedom Restoration Act seeking relief. J.A. Ex. 138.

39. In July 2013, one of the organizations that had sued for relief, Wheaton College, received an emergency injunction from the Supreme Court that protected it from the penalties in the Mandate. J.A. 221; *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

40. Following that injunction and "in light of the Supreme Court's interim order" in the Wheaton case, the agencies published a third IFR, again without preceding notice or comment. J.A. 228.

41. The agencies issued the IFR despite the fact that the Supreme Court in *Wheaton* stated that its order "'should not be construed as an expression of the Court's views on the merits' of Wheaton College's challenge to the accommodations." J.A. 221.

42. The Third IFR amended the Mandate to allow a religious objector to "notify HHS in writing of its religious objection" rather than notifying its insurer or third-party administrator. J.A. 230.

43. The Third IFR was ultimately finalized on July 14, 2015. J.A. 188-89.

44. The final rule implementing the Third IFR stated: "the third party administrators and health insurance issuers already paying for other medical and pharmacy services on behalf of the women seeking the contraceptive services are better placed to provide seamless coverage of the contraceptive services, than are other providers that may not be in the insurance coverage network, and that lack the coverage administration infrastructure to verify the identity of women in accommodated health plans and provide formatted claims data for government reimbursement." J.A. 198-99.

45. The Third IFR did not accommodate the religious beliefs of the Little Sisters and other religious objectors, leading to more litigation. J.A. 1951.

II. The Challenges to the Mandate and the Resulting Injunctions

46. The Little Sisters of the Poor is an international Roman Catholic organization of nuns that has provided care to the elderly poor—of any race, sex, or religion—for over 175 years. J.A. 2285.

47. The Saints Peter and Paul Home of the Little Sisters of the Poor in Pittsburgh is a Pennsylvania non-profit corporation that qualifies as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986. The Pittsburgh home is under the direct authority of Mother Superior Marie Vincente. J.A. 2286.

48. The Little Sisters home in Pittsburgh employs around 67 full-time employees. J.A. 2286.

49. The Little Sisters Pittsburgh have adopted the Christian Brothers Employee Benefit Trust to provide medical benefits coverage for their employees. Christian Brothers Trust is a Catholic entity designed to serve the Catholic Church and related faith-based entities. The Little Sisters chose to use the Christian Brothers Trust for their health benefits because it shares and is administered in accordance with the Little Sisters' religious beliefs and provides benefits accordingly. J.A. 2286-87.

50. As an employer participating in the Christian Brothers Employee Benefit Trust Plan, the Little Sisters Pittsburgh Home is currently protected by an injunction from enforcement of the Mandate. Order, *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), Dkt. 82.

51. The Little Sisters homes are not under the civil legal ownership and control of the dioceses in which they are located. Instead, the Little Sisters of the Poor own and control the homes themselves, through local corporations. J.A. 2286.

52. The Little Sisters' homes are not directly funded by the dioceses in which they are located. They take responsibility for funding their own operations. J.A. 2286.

53. The Little Sisters follow all the teachings of the Catholic Church, including its teachings that abortion, contraception, sterilization, and cooperation with such acts are intrinsically immoral. J.A. 2288-89.

54. Catholic teachings also instruct the Little Sisters to provide their employees and their employees' families with adequate healthcare benefits. J.A. 2290-91.

55. The agencies' contraceptive mandate, as it existed before the Final Rules, requires the Little Sisters to participate in the provision of contraception, abortion, and sterilization to their

employees via the use of their health plans, health plan information, and health plan infrastructure. J.A. 2291.

56. Because of their religious beliefs, the Little Sisters sincerely believe that they cannot:

a. participate in the Mandate's program to promote and facilitate access to the use of sterilization, contraceptives, and abortion-inducing drugs and devices. J.A. 2291.

b. provide health benefits to their employees and plan beneficiaries that will include or facilitate access to sterilization, contraceptives, and abortion-inducing drugs and devices. J.A. 2292.

c. designate, authorize, or incentivize any third party to provide their employees or plan beneficiaries with access to sterilization, contraception, and abortion-inducing drugs and devices. J.A. 2292.

d. sign, execute, deliver, or otherwise file documents with a third party or the government which could then be used to require, authorize, or incentivize a third party to provide their employees with access to sterilization, contraception, or abortion-inducing drugs. J.A. 2292.

e. agree to refrain from speaking with a third party to ask or instruct it not to deliver contraceptives, sterilization, and abortifacients to their employees and plan beneficiaries in connection with the Little Sisters' health plan. J.A. 2292.

f. create or facilitate a provider-insured relationship, the sole purpose of which would be to provide contraceptives, sterilization, and abortifacients in connection with the Little Sisters' health plans. J.A. 2292.

g. create, maintain, support, or facilitate health insurance plans, information, and infrastructure that would be used to provide contraceptives, sterilization, and abortifacients to their employees and plan beneficiaries. J.A. 2292-93.

h. take any action that would require, authorize, or incentivize Christian Brothers Trust or Christian Brothers Services to violate their own Catholic religious beliefs. J.A. 2293.

i. Provide employee health benefits that include access to contraception. J.A. 2292.

j. Execute Form 700 to use the "accommodation." J.A. 2292.

k. Provide the notice to HHS to use the "accommodation." J.A. 2291.

57. The "accommodation" cannot result in the Little Sisters' employees receiving contraceptive coverage "seamlessly" with the Little Sisters' plan unless the Little Sisters take actions that violate their sincerely held religious beliefs. J.A. 2295, 2297.

58. Even the so-called accommodation would require the Little Sisters to act as a necessary link in the government's plan to provide contraceptive measures to their employees, in violation of their beliefs. J.A. 2295.

59. Without an exemption, the Mandate would require the Little Sisters Pittsburgh home to pay millions of dollars in fines each year for not providing contraceptive coverage. J.A. 2294.

60. The Little Sisters cannot in good conscience avoid the fines by choosing not to provide health benefits at all, but even if they did, they would face annual fines of approximately $134,000 for dropping benefits altogether. J.A. 2294-95.

61. The Mandate imposes enormous pressure on the Little Sisters to participate in activities prohibited by their sincerely held religious beliefs. J.A. 2295.

62. Lawsuits by the Little Sisters and others have resulted in injunctions from federal courts across the country. J.A. 15, 103-04, 2593.

63. After the Supreme Court issued an order in *Zubik v. Burwell*, the agencies issued a "Request for Information" in July 2016, to seek input on "whether there are modifications to the accommodation that would be available under current law and that could resolve the RFRA claims raised by organizations that object to the existing accommodation on religious grounds." J.A. 183.

64. The Request for Information received over 54,000 public comments. J.A. 1806, 1844.

65. Included in those comments were suggestions for how to provide access to contraceptives for employees of religious and moral objectors that would not require the use of the employers' plans, including through willing doctors, pharmacies, or contraceptive-only plan. *See, e.g.*, J.A. 3645-67.

66. At least one of those comments explained a Missouri law that accomplished such an arrangement in 2001 with an available contraceptive-only plan. J.A. 3650-67.

67. Another comment suggested ways that pharmacies could be used to seamlessly provide contraceptives to women without the use of an employer's plan. J.A. 3645-49.

68. The agencies concluded, in a set of FAQs published only on the Department of Labor's website 11 days before inauguration day, that they were unable to modify the accommodation because "no feasible approach has been identified at this time" that would allow them to do so in a way that respected both the agencies' goals and the religious objectors' concerns. J.A. 169, 172.

69. The agencies never explained why using pharmacies, willing doctors, or contraceptive-only plans would not be feasible solutions. J.A. 172.

70. On October 13, 2017, the agencies issued the Fourth IFR. J.A. 98.

71. The Fourth IFR stated the following: "Consistent with . . . the Government's desire to resolve the pending litigation and prevent future litigation from similar plaintiffs, the Departments have concluded that it is appropriate to reexamine the exemption and accommodation scheme currently in place for the Mandate." J.A. 105.

72. The Fourth IFR stated that: "we have concluded that requiring such compliance through the Mandate or accommodation has constituted a substantial burden on the religious exercise of many . . . and . . . we conclude requiring such compliance did not serve a compelling interest and was not the least restrictive means of serving a compelling interest . . . ." J.A. 112.

73. The Fourth IFR stated that: "Good cause exists to issue the expanded exemption in these interim final rules in order to cure such violations [of RFRA] (whether among litigants or among similarly situated parties that have not litigated), to help settle or resolve cases, and to ensure, moving forward, that our regulations are consistent with any approach we have taken in resolving certain litigation matters." J.A. 120.

74. The Fourth IFR provided that the Mandate would not be enforced against "employers that object to coverage of all or a subset of contraceptives or sterilization and related patient education and counseling based on sincerely held religious beliefs." J.A. 114.

75. The IFRs left the Mandate and the accommodation in place as they applied to other employers who do not have religious or moral objections. J.A. 98.

76. There was a 60-day comment period for the IFRs. J.A. 98.

77. Pennsylvania did not provide comments to the federal government during any of the comment periods related to the contraceptive mandate from 2010-2016.

78. New Jersey did not provide comments to the federal government during any of the comment periods related to the contraceptive mandate from 2010-2016.

79. Pennsylvania, for the first time in six notice and comment periods, filed comments on the Fourth IFR on December 5, 2017. J.A. 1384-1392.

80. New Jersey did not join that comment. J.A. 1384-1392.

81. After receiving comments and reviewing them over a period of several months, the agencies finalized the IFRs in final rules that took effect on January 14, 2019, 60 days after they were published in the Federal Register. J.A. 1, 5.

82. The Commonwealth of Pennsylvania does not have a contraceptive mandate of its own. J.A. 3565.

83. New Jersey's state contraceptive mandate has a religious exemption that is broader than the agencies' initial religious exemption. J.A. 3569.

84. Between 1995 and 2010, 28 states instituted mandates similar to the HHS Mandate, requiring private health insurance plans to cover various forms of contraception. J.A. 2261.

85. At least one study has shown that those contraception mandates had little impact on unintended pregnancy rates or abortion rates. J.A. 2282-83.

86. The States have not provided evidence of a single individual who would lose coverage as a result of the Final Rules. J.A. 1801, 1851.

87. Pennsylvania has never enacted a statute or issued a regulation to ensure that all of its female citizens of reproductive age receive seamless access to cost-free contraceptive coverage.

88. New Jersey has never enacted a statute or issued a regulation to ensure that all of its female citizens of reproductive age receive seamless access to cost-free contraceptive coverage.

Dated: June 14, 2019

Respectfully submitted,

/s/ Mark Rienzi
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: June 14, 2019

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