IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOST REVEREND LAWRENCE E. BRANDT, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF GREENSBURG, *et al.*,	:	
Plaintiffs,	:	**CIVIL ACTION NO. 2:14-cv-681**
v.	:	**ELECTRONICALLY FILED**
KATHLEEN SEBELIUS, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR EXPEDITED PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs seek a preliminary injunction to protect their religious liberty. The factual and legal issues in this case are identical in all material respects to the issues that this Court resolved in *Zubik v. Sebelius*, 13-CV-1459, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013). Plaintiffs share the same Roman Catholic religious beliefs as the plaintiffs in *Zubik*, including that life begins at conception, artificial interference with life and conception is immoral, and the facilitation of evil is as immoral as the proliferation of evil. Plaintiffs believe they may not provide, pay for, or facilitate access to abortion, sterilization, or artificial contraception. Their employee health coverage also is provided under the same benefits trust as in *Zubik*.

Plaintiffs also face the same Government coercion to violate those sincerely-held religious beliefs as the *Zubik* plaintiffs. Plaintiffs are subject to the same regulations that require Plaintiffs, under threat of punitive fines, to directly facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. *See* 45 C.F.R. § 147.130(a)(1)(iv) ("Mandate"). Despite repeated pleas from the religious community, the Government continues granting an exemption only to "religious employers," narrowly defined as "houses of worship and religious orders." This definition excludes Catholic charitable and educational organizations such as Plaintiffs Catholic Charities of the Diocese of Greensburg ("Catholic Charities") and St. John the Evangelist Regional Catholic School ("St. John School").

Just as in *Zubik*, this oppressive Mandate is irreconcilable with the Religious Freedom Restoration Act ("RFRA"). As this Court already held, Plaintiffs' sincerely-held Roman Catholic beliefs are substantially burdened by the Mandate. Moreover, the Court already held that the Mandate is not the least restrictive means of achieving a compelling government interest.

Plaintiffs will likely succeed on the merits because this Court already decided the same issues, applying the same legal tests to the same facts—including the same religious tenets and

the same health benefits trust—by the same counsel advancing the same claims against the same defendants. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *5-7. Accordingly, Plaintiffs respectfully request a preliminary injunction to preserve the status quo and protect their religious liberty.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

As the Court knows from *Zubik*, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act") requires employer "group health plan[s]" to include insurance coverage for women's "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), which the Department of Health and Human Services ("HHS") defines to include "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* Ex. 1, Women's Preventive Services Guidelines. These "methods" include the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce an abortion. Failure to provide these services exposes nonexempt entities to fines of $100/day per affected beneficiary. 26 U.S.C. § 4980D(b).

From the start, the Government would only exempt entities satisfying its new, narrow definition of "religious employer"—intended to respect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Under the Final Rule, "religious employer" is defined as "an organization that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code." 78 Fed. Reg. 39,896 (codified at 45 C.F.R. § 147.131(a)). Thus, the exemption is still "restrict[ed] . . . primarily to . . . churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013).

Throughout the regulatory process, the Government received comments from religious entities, detailing how the Mandate violated their religious freedom. Nevertheless, the Final

Rule established an illusory "accommodation" for nonexempt objecting religious entities that qualify as "eligible organizations." An "eligible" religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria and provide a copy of the self-certification either to its insurance company or, if self-insured, to its third-party administrator ("TPA"). 26 C.F.R. § 54.9815-2713A(a). An eligible organization's self-certification requires the insurer or TPA to provide "payments for contraceptive services" for the objecting organization's employees. 78 Fed. Reg. at 39,893 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). For self-insured entities, the self-certification constitutes the entity's "*designation* of the [TPA] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879 (emphasis added), and the entity is then flatly prohibited from, "directly or indirectly, seek[ing] to influence" their TPA's decision to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii).

This "accommodation" requires Plaintiffs to violate their sincerely-held religious beliefs:

- Plaintiffs' provision of group health plans directly triggers the provision of "free" objectionable services to their employees in violation of their beliefs. Ex. 2, Declaration of Msgr. Larry J. Kulick ("Kulick Decl."), ¶¶ 18-20.

- Plaintiffs must designate their third-party administrator ("TPA") to provide the coverage. Ex. 2, Kulick Decl., ¶ 20; Ex. 3, Declaration of Msgr. Raymond E. Riffle ("Riffle Decl."), ¶ 14; Ex. 4, Declaration of Christine Roskovensky ("Roskovensky Decl."), ¶ 20.

- The Bishop and the Diocese will be forced to directly facilitate provision of the objectionable services because nonexempt entities such as Plaintiffs Catholic Charities and St. John School are currently insured through the Diocese, which has power to manage, oversee, and direct the plans offered by the Diocese. Ex. 2, Kulick Decl., ¶¶ 29, 32.

- The Bishop is in charge of all religious matters at Catholic Charities and St. John School, with reserved powers. Ex. 2, Kulick Decl., ¶¶ 3-8.

- The Diocese would have to provide the TPA with the names of the employees and

> dependents who would receive the free objectionable services. Ex. 2, Kulick Decl., ¶ 34; Ex. 5, Declaration of Charles Quiggle ("Quiggle Decl."), ¶ 20.

Although the self-certification form may take only a few moments to sign, its ramifications are eternal because it constitutes direct facilitation of moral evil. Ex. 6, Declaration of Bishop Lawrence E. Brandt ("Bishop Decl."), ¶ 17; Ex. 2, Kulick Decl., ¶ 28.

II. PLAINTIFFS' BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe that they have a religious duty to provide educational, spiritual, and charitable services to individuals of all faiths. Ex. 2, Kulick Decl., ¶ 38; Ex. 3, Riffle Decl., ¶ 24; Ex. 4, Roskovensky Decl., ¶ 5. Under the internal structure and doctrine of the Catholic Church, charitable and educational organizations, including Catholic Charities and St. John School, are the heart of the Church and are just as religiously significant as entities engaged in worship. *Id.* The Diocese controls and oversees its close affiliates, including Catholic Charities and St. John School. Ex. 2, Kulick Decl., ¶¶ 7-8; Ex. 4, Roskovensky Decl., ¶ 7. To ensure that its affiliates comply with the dictates of the Catholic Church, and to honor its obligation to its employees' well-being, the Diocese offers its affiliates' employees health insurance that complies with Catholic doctrine. Ex. 2, Kulick Decl., ¶ 11. The Diocese offers this coverage on plans that are self-insured through the same Catholic Benefits Trust (the "Trust") as in *Zubik*. Ex. 2, Kulick Decl., ¶¶ 9-10; Ex. 5, Quiggle Decl., ¶¶ 5-7. Forcing the Diocese to expel these affiliates from its Trust would violate the Diocese's religious obligation to provide its employees with health coverage, and it would interfere with the Diocese's mission, structure, doctrine, and good works. Ex. 2, Kulick Decl., ¶¶ 35, 38.

Just as sincerely, Plaintiffs believe in the sanctity of human life, that life begins at the moment of conception, and that certain "preventive" services covered by the Mandate that interfere with life and conception are immoral. *Id.* at ¶¶ 14-15. Plaintiffs believe that abortion

and direct sterilization are prohibited and that contraceptives for the purpose of contraception are immoral. *Id.*

Plaintiffs are prohibited from providing this coverage and are equally prohibited from designating their TPA to provide this coverage. *Id.* at ¶ 20; *see Zubik*, 2013 U.S. Dist. LEXIS 165922, at *82 ("'shifting responsibility' does not absolve or exonerate [plaintiffs] from the moral turpitude created by the 'accommodation.'"). Additionally, Plaintiffs believe that they must bear witness, in their words as well as in their deeds, to the beliefs of the Catholic Church, and that it would be scandal to act inconsistently with those beliefs. Ex. 2, Kulick Decl., ¶ 36; Ex. 4, Roskovensky Decl., ¶ 24. In previous years Plaintiffs gave their TPA notice of these beliefs without violating them because that notice did not trigger the provision of, nor designate the TPA to provide, the objectionable services. Ex. 2, Kulick Decl., ¶ 20; *see Zubik*, 2013 U.S. Dist. LEXIS 165922, at *80-81.

Accordingly, the Mandate imposes on Plaintiffs the impossible choice between either abandoning their religious principles or violating the law and facing crippling financial penalties. Ex. 6, Bishop Decl., ¶ 21.

ARGUMENT

An injunction is determined based on four factors: "(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 301-02 (3d Cir. 2013). "One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (citation and marks omitted).

In *Zubik v. Sebelius*, this Court decided that this standard was met on legal and factual issues identical in all material respects. *See* 2013 U.S. Dist. LEXIS 165922. Here, just as in *Zubik*, Plaintiffs meet all four factors for preliminary injunctive relief. Moreover, a preliminary injunction would preserve the status quo, because the Diocesan health plan does not currently cover the objectionable services, and its TPA does not provide the objectionable services for free. Ex. 5, Quiggle Decl., ¶ 9; *see also* Ex. 3, Riffle Decl., ¶ 9.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are likely to succeed on the merits of their claims that the Mandate: (1) violates RFRA because it substantially burdens Plaintiffs' exercise of religion without being the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 195-205), and (2) violates the First Amendment freedom of speech by imposing a gag order that prohibits Plaintiffs from attempting to "influence" a TPA's decision to provide or procure contraceptive services (Compl. Count IV, ¶¶ 233-37).

A. The Mandate Violates RFRA.

RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion," unless it "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b); *Gonzales v. O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418, 423 (2006). Once Plaintiffs demonstrate a substantial burden, the Government bears the burden of proving that application of the Mandate *to Plaintiffs* furthers "a compelling governmental interest" and is "the least restrictive means." 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 428.

This Court has already ruled that the Mandate violates, or will likely be shown to violate, RFRA. *Persico v. Sebelius*, 13-303, 2013 U.S. Dist. LEXIS 183344 (W.D. Pa. Dec. 20, 2013);

Zubik, 2013 U.S. Dist. LEXIS 165922; *see also Geneva Coll. v. Sebelius*, 12-207, 2013 U.S. Dist. LEXIS 179476 (W.D. Pa. Dec. 23, 2013).

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. This initial inquiry requires courts to (1) identify the particular sincerely-held religious practice at issue, and (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc). This Court has already concluded that the Mandate imposes a substantial burden on Plaintiffs' religious exercise by (1) forcing them to do what their religion forbids: facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services, *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *12-18; *see also Geneva Coll.*, 2013 U.S. Dist. LEXIS 179476, at *18; and (2) preventing Plaintiffs from bearing witness to their religious beliefs, thereby causing scandal. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *48-49 & *37 n.15.

(i) "Exercise of Religion"

Plaintiffs' refusal to comply with the Mandate is a protected exercise of religion under RFRA. It is undisputed that Plaintiffs have a sincerely-held religious belief that they may not provide, pay for, or facilitate access to abortion-inducing drugs, sterilization, contraceptives, and related counseling services, including by contracting with an insurance company or TPA that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees. *See* Ex. 2, Kulick Decl., ¶ 20; Ex. 3, Riffle Decl., ¶ 14. This Court specifically recognized Catholic organizations' sincerely-held religious belief that they are obligated to avoid complicity in this grave moral evil. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *81-82. Plaintiffs' belief regarding facilitation "necessarily prohibits providing, subsidizing, initiating, or

facilitating insurance coverage for abortion-inducing drugs, sterilization services, contraceptives, and related educational and counseling services." *Id.* at *37-38.

This Court already found that participating in the "accommodation" process violates this sincerely-held religious belief. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *48 ("Completing the self-certification form required by the contraceptive mandate's 'accommodation' also violates that tenet."); *see* Ex. 6, Bishop Decl., ¶ 18. The Mandate requires Catholic Charities and St. John School to sign—in violation of Catholic teaching—the self-certification form that directly *triggers* provisions of the objectionable products and services and that constitutes specific "*designation* of the [TPA] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. 39,879 (emphasis added); *see also* Ex. 2, Kulick Decl., ¶ 28; Ex. 3, Riffle Decl., ¶ 14. The "accommodation" also compels Plaintiffs to contract with a TPA knowing that TPA will, as a result of that contract, provide or procure the objectionable products and services for Catholic Charities' and St. John School's employees. Ex. 2, Kulick Decl., ¶ 20. Indeed, the TPA's obligation exists *only so long as* Catholic Charities' and St. John School's employees remain on their employers' respective health plans.[1] Ex. 3, Riffle Decl., ¶ 14. The accommodation also forces further facilitation because the Diocese must provide the names of the individuals whose insurance is through accommodated entities like Catholic Charities and St. John School. Ex. 2, Kulick Decl., ¶ 34; Ex. 5, Quiggle Decl., ¶ 20.

In previous years, Plaintiffs communicated their beliefs to their TPA without violating their consciences because those communications did not trigger the provision of the objectionable services and did not designate the TPA to provide the objectionable coverage. Ex.

[1] 29 C.F.R. § 2590.715-2713A(d) (TPA obligations "for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (insurer obligations "for plan participants and beneficiaries for so long as they remain enrolled in the plan[]").

2, Kulick Decl., ¶ 20; *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *80-81. But now, they are being forced to use a specific form that will "facilitate/initiate the provision of contraceptive products, services, or counseling [] in direct contravention to [Plaintiffs'] religious tenets." *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *80-81; Ex. 2, Kulick Decl., ¶ 20; Ex. 5, Quiggle Decl., ¶ 20; *see also Geneva Coll.*, 2013 U.S. Dist. LEXIS 179476, at *39-40.

Because Plaintiffs object to directly *facilitating* the objectionable products and services in the manner required by the Mandate, it is irrelevant whether the Mandate also forces them to *subsidize* these products and services. Ex. 2, Kulick Decl., ¶ 29. For example, it matters not that insurers are required to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 26 C.F.R. § 54.9815-2713A(c)(2)(ii). Moreover, payments for objectionable products and services cannot be truly "cost neutral" to Plaintiffs because Plaintiffs will pay "the incalculable cost of the loss of their rights to freely exercise their religion." *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *99.

Additionally, being forced to participate in the accommodation process prevents Plaintiffs from bearing witness to the Church's teachings and, thereby, causes scandal. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *48; Ex. 6, Bishop Decl., ¶ 14; Ex. 2, Kulick Decl., ¶ 36. This is especially acute for St. John School, which has the religious obligation to educate children in the doctrine of the Catholic Church and the Diocese. Ex. 4, Roskovensky Decl., ¶ 23. Without an injunction here, St. John School "would be forced to act in a way inconsistent with the very teachings of the Roman Catholic Church that St. John School undertakes to instill in its students." *Id.*

(ii) "Substantial Burden"

This Court has already concluded that the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to directly facilitate access to abortion-inducing

drugs, sterilization services, contraceptives, and related counseling services. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *12-18. Dropping coverage is also a substantial burden because it results in ruinous "fines, harm to [their] employees' well-being, and competitive disadvantages," as well as the substantial "burdens [to their] religious duty to care for the well-being of [their] employees." *Geneva Coll.*, 2013 U.S. Dist. LEXIS 179476, at *42-44 & *41 n.12.

The Mandate imposes upon Plaintiffs the impossible choice between violating their religious beliefs or facing debilitating fines, harm to their employees, and competitive disadvantages. If Plaintiffs Catholic Charities and St. John School refuse to directly facilitate the objectionable products and services through their health plans, they could be subject to fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). Moreover, "because they believe that health care is a basic human right," Plaintiffs will not terminate their employees' existing health care coverage. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *103; *see* Ex. 3, Riffle Decl., ¶ 19; *Geneva Coll.*, 2013 U.S. Dist. LEXIS 179476, at *18-19.

Thus, the Mandate forces Plaintiffs to either (1) abandon their beliefs by directly facilitating access to objectionable products and services or by forsaking the care of their own employees, or (2) violate the law and face "ruinous" fines and penalties that would amount to millions of dollars and inflict significant competitive disadvantages. *See* Ex. 2, Kulick Decl., ¶ 40; Ex. 3, Riffle Decl., ¶¶ 20, 25; Ex. 5, Quiggle Decl., ¶¶ 16-19. Imposing this impossible dilemma constitutes a substantial burden on Plaintiffs' religious exercise. *Geneva Coll.*, 2013 U.S. Dist. 179476, at *43-44; *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *18 ("Any of these courses of action would harm the Dioceses and their nonprofit, religious affiliated/related charitable and educational organizations."); *see also Korte v. Sebelius*, 735 F.3d 654, 683-84 (7th Cir. 2013) (holding that parallel fines to force for-profit employers "to choose between saving

their companies and following the moral teachings of their faith" constitute a substantial burden).

Finally, the Mandate creates a substantial burden by arbitrarily splitting the Catholic Church in two and preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. *See, e.g.*, Ex. 6, Bishop Decl., ¶ 20; Ex. 2, Kulick Decl., ¶ 38; Ex. 3, Riffle Decl., ¶ 24. As this Court held, the exemption "has the effect of dividing the Catholic Church into two separate entities[,]" which creates "a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *87-88 (alteration in original). It is "enigmatic" that even though the various organizations within a Catholic diocese "share identical religious beliefs, and even though they share the same persons as the religious heads of their organizations, the heads of [their] service organizations may not fully exercise their right to those specific beliefs, when acting as the heads of the charitable and educational arms of the Church." *Id.* at *86; *see also* Ex. 6, Bishop Decl., ¶¶ 2-7, 20.

2. The Government Cannot Demonstrate that the Mandate Furthers a Compelling Government Interest.

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

This Court has already ruled that the Mandate does not serve a sufficiently compelling governmental interest to "overbalance the [ ] legitimate claims to the free exercise of religion" raised by entities affiliated with the Catholic Church. *Zubik*, 2013 U.S. Dist. LEXIS at *93. Given that "[t]he 'myriad exemptions' to the Mandate's requirements still exist and demonstrate

that the requirement is 'woefully underinclusive,'" the Government cannot meet this standard. *Geneva Coll.*, 2013 U.S. Dist. LEXIS 179476, at *45-46; *Zubik*, 2013 U.S. Dist. LEXIS at *89-96. The Government cannot plausibly maintain that Plaintiffs' employees must be covered by the Mandate when it already exempts millions of women on grandfathered plans simply to fulfill the President's "promise" that "Americans who like their health plan can keep it." *See* Ex. 7, HHS.gov, U.S. Depts. of Health and Human Servs., Labor, and Treasury Issue Reg. on 'Grandfathered' Health Plans [U]nder the Affordable Care Act (June 14, 2010).[2]

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." As this Court held in *Zubik*, "[i]f there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply . . . the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities." 2013 U.S. Dist. LEXIS 165922, at *92-94.

3. The Government Cannot Demonstrate that the Mandate is the Least Restrictive Means to Achieve Its Asserted Interests.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that test, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (internal quotation marks omitted).

In *Zubik*, this Court held that the Government failed to prove that the Mandate was the

[2] *See also Hobby Lobby*, 723 F.3d at 1143-44; *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 432-34 (W.D. Pa. 2013), *injunction granted*, 960 F. Supp. 2d 588 (W.D. Pa. 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 128 (D.D.C. 2012).

least restrictive means to advance its interests. 2013 U.S. Dist. LEXIS 165922, at *101. The Government's only evidence on this element, for which it admitted bearing the burden of persuasion, "clearly announces that the alternatives to the current regulations—including the contraceptive mandate—would not advance the Government's interests 'as *effectively* as' the contraceptive mandate and the 'accommodation.'" *Id.* at *100-101 (quoting 78 Fed. Reg. 39888 (July 2, 2013)). However, "[g]reater efficacy does not equate to the least restrictive means." *Id.* at 101. The same is true here, and the Government will not likely have any additional evidence in light of its repeated representations to the Court in *Zubik*.

B. The Mandate's Gag Order Violates First Amendment Freedom of Speech.

At its very core, the First Amendment protects the right to speak on moral, religious, and political matters. Imposing "content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The Mandate violates this basic principle by prohibiting Plaintiffs from, "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815-2713A(b)(iii). This sweeping gag order cannot withstand First Amendment scrutiny. Plaintiffs believe that contraception is immoral, and by expressing that conviction, they routinely seek to "influence" or persuade their fellow citizens of that view. *See* Ex. 2, Kulick Decl., ¶ 15; Ex. 3, Riffle Decl., ¶ 22.

II. PLAINTIFFS WILL SUFFER ONGOING IRREPARABLE HARM

The Mandate will cause Plaintiffs substantial irreparable harm. As this Court has already held in *Zubik*, the Mandate forces Plaintiffs to violate central tenets of their religious beliefs by facilitating grave moral evil by triggering objectionable services to their employees. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *47-48; Ex. 2, Kulick Decl., ¶ 20; Ex. 3, Riffle Decl., ¶ 14; *see also*

Geneva Coll., 2013 U.S. Dist. LEXIS 179476, at *46-47. Absent an injunction, the Government can begin enforcing the Mandate against Plaintiffs before the final resolution of this case. Plaintiffs are thus confronted with the impossible choice of violating their religious beliefs or violating the law. *See Zubik*, 2013 U.S. Dist. LEXIS 165922, at *103-04. Plaintiffs need to resolve these outstanding issues before their plans go into effect on July 1, 2014. Ex. 5; Quiggle Decl. ¶ 11; Ex. 3, Riffle Decl. ¶ 11.

The harms of non-compliance extend far beyond monetary loss. For example, fines on Catholic Charities may cause it to cut community services or close its doors. Ex. 3, Riffle Decl., ¶ 16. In *Zubik*, this Court concluded "that the harm to [the Dioceses of Pittsburgh and Erie], and the ripple effect of that harm impacting members of the public who depend upon Plaintiffs for food, shelter, educational, and other basic services, is such that Plaintiffs could never be adequately compensated at a later date." 2013 U.S. Dist. LEXIS 165922, at *105.

III. THE GOVERNMENT WILL SUFFER NO SUBSTANTIAL HARM

To grant injunctive relief, the Court must find "that the party seeking the injunction would suffer more harm without the injunction than would the enjoined party if it were granted." *Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. Pittsburgh Press Co.*, 479 F.2d 607, 609 -610 (3d Cir. 1973); *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *70.

This Court has already concluded that the Mandate's gross underinclusiveness "demonstrates that the Government will not be harmed in any significant way by the exclusion of these few Plaintiffs." *Id.* at *106-07. As stipulated in *Zubik*, the Mandate already exempts approximately "100 million individuals [who] are on 'grandfathered' health plans." *Id.*

IV. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

In *Zubik*, preliminary relief also served the public interest. 2013 U.S. Dist. LEXIS 165922, at *107-08. Here, the public interest in a preliminary injunction is especially high

because enforcement of the Mandate would threaten Plaintiffs' charitable and educational service to the needy, the underserved, and the underprivileged. *See, e.g.*, Ex. 3, Riffle Decl., ¶¶ 32-36. Government enforcement of the Mandate would directly harm the thousands of children who attend Diocesan schools and the people in need who receive shelter, food, prescription medicine, and other basic assistance from Plaintiffs' critical social services. *Id.* This Court has recognized, at length, both the charitable service performed by Catholic organizations in Western Pennsylvania and the immense burden that the public would face if the Mandate forced those organizations to close. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *27-36, *105, *108-09. By contrast, no public harm would come from simply preserving the *status quo* pending further litigation.

CONCLUSION

Applying the four-factor test and balancing the equities involved, this Court should grant Plaintiffs' request for preliminary injunction. This Court has already applied the same law to facts that are identical in all material respects, and the same result should apply here.

Respectfully submitted, this the 30th day of May, 2014.

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