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,** **v.** **SYLVIA M. BURWELL, *et al.*,** **Defendants.**	:	**CIVIL ACTION NO. 2:14-cv-681** **ELECTRONICALLY FILED**

PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION FOR EXPEDITED PRELIMINARY INJUNCTION

Plaintiffs agree: "Obviously this case screams out for some consistency with the prior two cases." June 3, 2014 Status Conf. Tr. at 3:9-10. This case is materially identical to *Zubik v. Sebelius*, 13-cv-1459, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013).[1] Factually, Plaintiffs share the same Roman Catholic core religious beliefs with the plaintiffs in *Zubik*, are in the same Benefits Trust, and, as in *Zubik*, the Bishop is Trustee of the relevant series of the Benefits Trust providing health care coverage to Plaintiffs. Legally, the claims and issues are the same—Plaintiffs are subject to the same Mandate that applies in the same way, creating the same substantial burden, with the same inadequate justification. The Government's arguments are a re-hash of what this Court has previously considered and rejected. The Government admits as much when it (i) incorporates by reference its legal arguments from the *Zubik* case, *see* ECF No. 23, Gov't Resp. at 2; (ii) stipulates that "[t]his case is factually identical in all material respects to *Zubik*," ECF No. 22, Stip. ¶ 5; and (iii) offers the same proofs here as it did in *Zubik*, *id.* ¶ 4. Accordingly, for the reasons set forth in *Zubik* and prior briefing in this case, every element for a preliminary injunction has been met.

Despite the above, the Government now asserts that Plaintiffs lack Article III standing because the Diocesan health plan may be a self-insured church plan.[2] According to the

[1] The Court asked the parties to stipulate to any undisputed facts including those found at pages 37 and 38 of the *Zubik* opinion. June 3, 2014 Status Conf. Tr. at 10:10-19. Plaintiffs tried to file joint stipulations here, as in *Zubik*, but the Government refuses. Nevertheless, this Court may take judicial notice of the parties' joint stipulations in *Zubik*. *See Leggett v. Bates*, 533 F. App'x 57, 58 n.2 (3d Cir. 2013) (taking judicial notice of a "nearly identical" complaint filed in a prior case) (quoting Fed. R. Evid. 201(b)(2)); *see also United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("[A] court may take judicial notice of its own records in other cases."). The parties have also stipulated to the Plaintiff-specifics facts in Plaintiffs' Complaint, Declarations, and preliminary injunction papers, including Plaintiffs' "undisputed" facts about operation of the Mandate as to Bishop Brandt and the Diocese, making them proper plaintiffs. ECF 22, Stip. ¶ 1.

[2] Contrary to the Government's suggestion, counsel in *Roman Catholic Archdiocese of St. Louis v. Sebelius*, No. 4:13-cv-02300 (E.D. Mo.) did not use the word "all" when it stated that "Catholic entities like the Archdiocese participate in 'church plans.'" Gov't Br. at 2. The

Government, "[P]laintiffs have not established an injury in fact" because, under ERISA, the Government "lack[s] regulatory authority to require the [TPA] of self-insured church plans to make the separate payments for contraceptive services . . . ." ECF No. 23, Gov't Resp. at 3. This argument flies in the face of stipulated facts in Plaintiffs' Complaint and Declarations and the plain text of the Mandate. As explained below, the Mandate explicitly *requires* Plaintiffs to sign the self-certification form or face crippling fines. It *requires* their TPA to provide the objectionable coverage upon receipt of a self-certification form or pay penalties. The Mandate also *requires* Plaintiffs to contract with a TPA that will provide the objectionable coverage. The Government did not qualify the Mandate with any "church plan" exceptions. The Supreme Court and several district courts have granted injunctions over similar arguments made by the Government. *See LSOP v. Sebelius*, No. 13A691 (U.S. Jan. 24, 2014).

First, the Government's new argument does not change the fact that *Plaintiffs are required* to comply with the Mandate by (1) signing the self-certification form, (2) dropping health care coverage, or (3) paying crippling fines. The Government has every intention and plan to enforce the Mandate against Plaintiffs, to the letter.[3] This establishes injury-in-fact for Article III standing. *See, e.g.*, *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489, 2014 WL 1256373, at *22 (N.D. Ga. Mar. 26, 2014) (noting that the Government "ignores" the fact that plaintiffs are "required to execute, and deliver to a TPA, a self-certification form that they believe violates their sincerely held religious beliefs, and if they do

(continued…)

Government added the word "all" to the quote. Plaintiffs are analyzing ERISA to determine whether the Diocesan health plan is a church plan. The ERISA church plan analysis is one that must be done on a case-by-case basis.

[3] The Government's failure to extend the injunction in *Zubik* to these Plaintiffs—in an identical case, forcing the Court and the parties needlessly to expend resources—evidences the Government's intent.

not provide the certification form to their TPA, oppressive penalties will be imposed on them by the Government," and finding that "[t]hese undisputed facts alone are sufficient to confer standing under federal law."); *Roman Catholic Archdiocese of New York*, 2013 WL 6579764, at *7 (E.D.N.Y. Dec. 16, 2013) (finding standing despite church plan allegations).

Second, the Final Rule, on its face, clearly *requires* church plan TPAs to provide or arrange separate payments for contraceptive services. There is no exception supporting the Government's latest manufactured argument. The Final Rule plainly states, "if a [TPA] receives a copy of the [self] certification . . . the [TPA] *shall provide* or arrange payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(b)(2) (emphasis added); 26 C.F.R. § 54.9815-2713A(b)(2). Indeed, "[a TPA] that receives a copy of the self-certification . . . *must provide* or arrange separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. 39,870, 39,880 (July 2, 2013) (emphasis added). The Mandate applies to *all* TPAs, there is no carve-out for church plan TPAs, and the Mandate—not the Government's self-serving verbiage here—applies without exception to Plaintiffs and their TPA. *See Roman Catholic Archdiocese of Atlanta*, No. 1:12-cv-03489, ECF No. 116 at *21 ("[T]he Final Rules by their terms apply equally to all TPAs, and irrespective of whether they are 'church plans.'").

Moreover, the Government provides no basis to conclude that Plaintiffs' TPA will violate the law and will not provide the objectionable coverage. As one district court explained:

> It is, at the core, irrelevant whether the Government has the authority to enforce the contraceptive mandate against a TPA which undertakes to provide coverage for preventive care, and there is no legitimate basis to speculate that the TPA will not provide coverage offensive to the Plaintiffs here. That a TPA of a church plan may voluntarily comply with the contraceptive mandate and ultimately provide contraceptive services underscores the legitimacy and reality of Plaintiffs' concern that the self-

> certification form causes them to be complicit in a scheme to provide contraceptive services, devices and products that violation their longstanding and deeply-held religious beliefs.

Roman Catholic Archdiocese of Atlanta, 2014 WL 1256373, at *23. The Government's argument also fails because Plaintiffs are *required* to contract with a TPA that is willing and able to provide the objectionable coverage. The Government admitted this in *Roman Catholic Archbishop of Washington v. Sebelius*, when it confirmed that the Mandate imposes a burden on self-insured plans to find a TPA that will provide the objectionable coverage if their current TPA refuses to do so. 2013 WL 6729515, at *21 n.19 (D.D.C. Dec. 20, 2013) ("The regulations do not spell this out explicitly, but both parties agree that this is what they will entail.").

Accordingly, whether the Diocesan health plan is a self-insured "church plan" is irrelevant. Plaintiffs' claims are based on the plain, stark requirements of the Final Rule and their interference with Plaintiffs' exercise of their religion. The self-certification form pressures Plaintiffs directly to facilitate coverage of a moral evil that violates their sincerely-held religious beliefs. ECF No. 22, Stip. ¶¶ 2-3. This is a substantial burden in violation of RFRA.

The Government's efforts to confuse this Court's precedent in *Zubik* with the split decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), also fail.[4] As an initial matter, *Notre Dame* is factually and procedurally distinct. In *Zubik*, the parties and this Court tested the veracity of live witnesses as to the sincerity of their religious beliefs and the substantial burden that flows from being forced to comply with the Mandate—this Court's ruling was based on a fully-developed, closed factual record. The Bishops testified that they cannot and will not sign the self-certification form because doing so would facilitate a grave moral evil

[4] The court in *Diocese of Cheyenne v. Sebelius*, __ F. Supp. 2d __, 2014 WL 1911873 (D. Wyo. May 13, 2014) erroneously followed *Notre Dame*, in contrast to the approximately sixteen other district courts that, like *Zubik*, have granted injunctions against enforcement of the Mandate.

in violation of the plaintiffs' sincerely-held religious beliefs—a belief that Bishop Brandt declared here. *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *49; ECF No. 17-7, Bishop Brandt Decl. ¶ 17 ("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."). This stands in contrast to *Notre Dame* where the court concluded those concerns were not present because Notre Dame had signed the self-certification form and its TPAs were already providing the objectionable coverage. Under these circumstances, the *Notre Dame* court concluded that it could not enjoin Notre Dame's TPAs, which were not parties and which had already been authorized to provide the objectionable coverage, from continuing to provide such coverage and that Notre Dame could not meet its burden of demonstrating that the district court abused its discretion in denying a preliminary injunction. *Notre Dame*, 743 F.3d at 551-59. Indeed, the *Notre Dame* court made clear "the question before [it was] not whether Notre Dame's rights ha[d] been violated but whether the district court judge abused its discretion in refusing to grant a preliminary injunction." *Id.* at 551. The *Notre Dame* court thus stressed—in contrast to the fully-developed, closed factual record in *Zubik*—that because the record was "virtually a blank, everything [it says] . . . is necessarily tentative and should not be considered a forecast of the ultimate resolution of this still so young litigation." *Id.*

Moreover, the Government has not provided any reason that the nonbinding *Notre Dame* decision would alter this Court's analysis from *Zubik*. Instead, the Government again asserts that a TPA has no "legal obligation" to provide the objectionable coverage in a self-insured church plan. Gov't Resp. at 6. For the reasons discussed above, this argument is irrelevant and wrong.

* * *

This Court should grant Plaintiffs' request for expedited preliminary injunction.

Respectfully submitted, this the 13th day of June, 2014.

By: */s/ John D. Goetz*
Paul M. Pohl (PA ID No. 21625)
John D. Goetz (PA ID No. 47759)
Leon F. DeJulius, Jr. (PA ID No. 90383)
Ira M. Karoll (PA ID No. 310762)
Mary Pat Stahler (PA ID No. 309772)
JONES DAY
500 Grant Street – Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
(412) 394-7959 (fax)
Counsel for Plaintiffs Most Reverend Lawrence E. Brandt, The Roman Catholic Diocese of Greensburg, Catholic Charities of the Diocese of Greensburg, and St. John the Evangelist Regional Catholic School