UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	)	Case No. 2:12-cv-00092-DDN

REPLY BRIEF IN SUPPORT OF MOTION OF CNS INTERNATIONAL MINISTRIES, INC. AND HEARTLAND CHRISTIAN COLLEGE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Absent the requested injunctive relief, CNS International Ministries, Inc. ("CNS Ministries") and Heartland Christian College ("HCC") (collectively, "these Plaintiffs") will begin accruing ruinous fines of thousands of dollars per day on January 1, 2014. The fine assessed against employers providing health coverage that does not include the full range of products and services required by the so-called "contraceptive mandate" ("Mandate") is $100 per day per "each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). CNS Ministries has more than 50 full-time employees and HCC has several more.

The Government does not dispute that the sincerely held religious beliefs of these Plaintiffs bar them from participating in a scheme to provide their employees with access to abortion-inducing products and related education and counseling. Nor does the Government dispute that the regulations at issue here (the "Mandate" and the so-called "accommodation") require these Plaintiffs to participate in such a scheme on pain of substantial financial penalties.

Rather, the Government contends that if these Plaintiffs participated in this scheme, their involvement would be "*de minimis*" and "require[s] virtually nothing" of them. This is incorrect and also inconsequential, as such questions of religious doctrine lie beyond judicial competence. *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). The Government attempts to minimize the burden by myopically focusing on the ease of signing the self-certification form, while ignoring "the incalculable cost of the loss of [these Plaintiffs'] rights to freely exercise their religion." *Zubik v. Sebelius*, 2013 WL 6118696, at *31 (W.D. Pa. Nov. 21, 2013).

The Mandate compels these Plaintiffs to do precisely what they believe to be wrong: to collaborate in and/or facilitate provision of abortion-inducing products and related education and

counseling to their employees and dependents. Specifically, if these Plaintiffs are to continue providing health coverage to their employees,[1] they must 1) trigger the provision of abortifacient products by executing a "self-certification" that authorizes a TPA to provide abortifacient products to employees and their dependents; 2) locate a TPA that is willing to provide the abortifacient products to these Plaintiffs' employees and dependents; 3) contract with a willing TPA to provide the abortifacient products to the employees and dependents; and 4) identify to the TPA the employees and dependents who are eligible for coverage for abortifacient products.

Beyond these explicit mandates by which the Government conscripts the service of these Plaintiffs in its abortifacient provision scheme, there are other ways in which the Government is now coercing these Plaintiffs into violating their religious consciences. Even with the "accommodation," these Plaintiffs would initiate the objectionable coverage for employees *simply by maintaining health coverage plans and hiring or retaining employees*. The compelled provision of the abortifacients, moreover, would be offered to these Plaintiffs' employees and dependents only so long as they remain on these Plaintiffs' health plans. The Mandate writes abortifacient coverage into these Plaintiffs' plans in invisible ink.

ARGUMENT

I. The Mandate Substantially Burdens These Plaintiffs' Exercise of Religion.

These Plaintiffs' arguments under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"), are bolstered by the opinion in *Zubik* and several other recent decisions

[1] Although both of these Plaintiffs have provided comprehensive health care coverage to their employees and intend to continue doing so as part of their Christian mission and pursuant to their Christian beliefs, neither is required by the ACA to do so at this time. HCC does not have 50 employees, and CNS Ministries, like all employers, is not subject to the employer mandate until January 1, 2015, at which time it will be required to provide coverage, including the contraceptive mandate as tweaked by the so-called "accommodation." No employer, for-profit or non-profit, that has obtained an injunction is required to provide health coverage to its employees until January 1, 2015. But employers who do provide coverage and are not exempt become subject to the contraceptive mandate at different times, depending on the start of their plan years. These Plaintiffs' plan year begins January 1, 2014, and that is when the contraceptive mandate begins applying to them.

analyzing application of the Mandate to "accommodated" eligible organizations.[2] *Zubik,* a well-reasoned 64-page opinion, explicitly rejected all of the arguments the Government proffers here and has been extensively briefed in the case at bar by these Plaintiffs.

Where plaintiffs' sincerity is not in dispute, RFRA's substantial burden prong involves a straightforward, two-part inquiry. A court must (1) "identify the religious belief" at issue and (2) determine "whether the government [has] place[d] substantial pressure"—*i.e.*, a substantial burden—on the plaintiff to violate that belief. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (*en banc*); *Archdiocese of New York*, at *10 (applying the "substantial pressure" test instead of "independently analyz[ing] the character and nature of the acts required by the challenged law" and noting that "the Seventh and Tenth Circuits have explicitly applied the 'substantial pressure' test").

Under the first step, the court's inquiry is necessarily "limited"; its "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas v. Review Bd.*, 450 U.S. at 716. Courts must therefore accept these Plaintiffs' description of their religious exercise. *Id.* at 714-15. Under the second step, the Court must determine whether the government has substantially burdened that exercise by compelling a RFRA claimant "to

[2] These Plaintiffs know of nine decisions regarding the accommodation, six of which have resulted in injunctive relief or summary judgments for the RFRA claimants: *Zubik*, *supra*; *Archdiocese of New York v. Sebelius*, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Reaching Souls v. Sebelius*, No. 5:13-cv-01092-D (W.D. Okla. Dec. 20, 2013) (class action); *Legatus v. Sebelius*, 2:12-cv-12061-RHC-MJH (Mich. S.D. Dec. 20, 2013); *Geneva College v. Sebelius,* No. 12-0207 (W.D. Pa. Dec. 23, 2013); *Southern Nazarene Univ. v. Sebelius,* No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013). One case in which injunctive relief was denied, *Priests for Life v. U.S. DHHS*, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), is readily distinguishable as the plaintiffs there made no objection to the self-certification itself but instead objected solely to third party contraceptive coverage. *Id*. at *2. The other decisions denying injunctive relief were *Univ. of Notre Dame v. Sebelius,* No. 3:13-cv-01276-PPS (N.D. Ind. Dec. 20, 2013) and *Roman Catholic Archbishop of Washington v. Sebelius,* 2013 WL 6729515 (D.D.C. Dec. 20, 2013). The flawed reasoning in all three cases is discussed at p. 10, *infra.*

perform acts undeniably at odds" with its beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or putting "substantial pressure on [it] to modify [its] behavior and to violate [its] beliefs," *Thomas*, 450 U.S. at 717–18; *Gilardi v. U.S. Dept. of Health & Human Servs.*, 733 F.3d 1208, 1218 (D.C. Cir. Nov. 1, 2013).

Here, it is clear that the Mandate substantially burdens these Plaintiffs' exercise of religion. These Plaintiffs exercise their religion by, *inter alia*, refusing to take certain actions that facilitate or collaborate in providing access to religiously abhorrent coverage for certain products and services. The Mandate, however, requires these Plaintiffs to take precisely those actions that their religious beliefs forbid. Sharpe Decl. ¶ 24; Melton Decl. ¶ 22. This Court is bound to accept these Plaintiffs' representations regarding their beliefs, and thus, the only question is whether the Mandate substantially pressures these Plaintiffs to act contrary to those religious beliefs. As the Mandate forces these Plaintiffs to (1) violate their religious beliefs or (2) pay crippling monetary penalties, "it is difficult to characterize the pressure as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140; *Gilardi*, 733 F.3d at 1218.

The Government attempts to complicate the courts' straightforward analysis, arguing that the Mandate requires "virtually nothing" of these Plaintiffs and that their involvement is "*de minimis*" and "attenuated."[3] Doc. 68, pp. 1, 3-4, 10-11, 14-15, 17-20. The Government essentially attempts to convince this Court that the Mandate is *no big deal*. For these Plaintiffs, however, the Mandate is a profoundly religious and moral issue; it is a very big deal. The

[3] The Government again often cites Judge Jackson's opinion in *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) regarding its attenuation argument. The dismissal in that case was appealed and on appeal the Eighth Circuit issued a preliminary injunction against enforcement of the Mandate, leaving the district court opinion with little if any precedential value. The court in *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) correctly (a) distinguished *O'Brien* in a manner relevant to this case—that the plaintiffs in *Tyndale* (and here) utilize a self-insured plan in which the plaintiffs themselves pay for coverage and (b) challenged the logic of the *O'Brien* district court opinion, specifically the flawed finding that there was no burden because the insureds make the final decision as to whether to use the objectionable drugs. *Tyndale*, at 123-24.

Government's arguments, moreover, rest on a flawed understanding of the substantial burden inquiry that conflates the two steps described above.

The Government is also incorrect in its claim that "[n]ot only do plaintiffs want to be free from contracting, arranging, paying, or referring for contraceptive services for their employees . . . but plaintiffs would also prevent *anyone else* from providing such coverage to their employees." Doc. 68, p. 12 (emphasis in original). These Plaintiffs wish only not to collaborate in and facilitate such coverage, and they in fact *propose* that "anyone else"—the Government in particular—be the entity to provide abortifacient coverage to individuals if it is to be provided.

A. The Mandate Requires These Plaintiffs To Act In Violation Of Their Sincerely Held Religious Beliefs.

The Government argues that the Mandate requires these Plaintiffs to engage in almost no action, and thus, cannot violate RFRA. Nothing could be further from the truth.

The Mandate requires specific actions from these Plaintiffs that violate their religious beliefs. Plaintiffs object not only to using the objectionable products and services, but also to being forced to *facilitate* the provision of such items. Sharpe Decl. ¶¶ 15, 18, 24; Melton Decl. ¶¶ 13, 16, 22. The Mandate forces these Plaintiffs to take concrete steps to that end. Among other things, "accommodated" plaintiffs must:

- Trigger the provision of abortifacient products by executing a "self-certification" that authorizes a TPA to provide abortifacient products to these Plaintiffs' employees and their dependents;
- Locate a TPA that is willing to provide the abortifacient products to these Plaintiffs' employees and their dependents;
- Contract with a willing TPA to provide the abortifacient products to these Plaintiffs' employees and their dependents;
- Identify to the TPA the identities of the employees and dependents who are eligible for coverage for abortifacient products.

Indeed, the participants in these Plaintiffs' health plans will use their religious employers' healthcare cards to obtain the objectionable products and services. These Plaintiffs cannot avoid these requirements without subjecting themselves to ruinous fines and other negative consequences.

The religious beliefs and the Mandate's requirement to act in violation of those beliefs are the same here as in *Zubik*, 2013 WL 6118696, at *18-19. That court held that those plaintiffs' beliefs that "human life is sacred from conception to natural death" and that "the facilitation of evil is as morally odious as the proliferation of evil" would be violated by self-certifying and participating in the accommodation process. *Id.* at *18-19, 24-25. Plaintiffs are also similarly situated to the for-profit companies whose religious beliefs the Seventh, Eighth, Tenth, and D.C. Circuits have held are substantially burdened. *See Korte v. Sebelius*, 735 F.3d 654, 683-84 (7th Cir. Nov. 8, 2013); *O'Brien v. HHS*, No. 12-3357, Order (8th Cir. Nov. 28, 2012); *Annex Medical, Inc. v. Sebelius*, 2013 WL 1276025 (8th Cir. 2013); *Gilardi*, 733 F.3d at 1210, 1218; *Hobby Lobby*, 723 F.3d at 1141. Just like those companies, Plaintiffs' decision to offer a group health plan automatically results in coverage for religiously abhorrent products and services. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the religiously abhorrent benefits are directly tied to the employers' insurance policies: they are available only "so long as [employees] are enrolled in [the organization's] health plan," 29 C.F.R. § 2590.715-2713A, they must be provided "in a manner consistent" with the provision of explicitly covered health benefits, 78 Fed. Reg. 39870, 39876–77 (July 2, 2013), and they will be offered only to individuals the organization identifies as its employees.

Because these Plaintiffs are required to take specific actions that violate their religious beliefs, the Government is wrong to analogize this case to *Kaemmerling v. Lappin*, 553 F.3d 669,

679 (D.C. Cir. 2008). Doc. 68, at 13-14. Kaemmerling objected only "to the government extracting DNA information from specimen[s]" *already in the government's possession*, involving "no action" by Kaemmerling. *Id.* at 678–80. Here, these Plaintiffs object to the requirements the Mandate imposes on *them* to take actions that facilitate access to the objectionable products and services. Moreover, Kaemmerling failed even to identify *a religious exercise*, let alone a *substantial burden*. *Id.* at 679. Here, in contrast, there is no dispute that the exercise of these Plaintiffs' religion includes the refusal to take affirmative steps that facilitate access to the objectionable products and services. *See also Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("exercise of religion" includes abstention from physical acts).[4]

B. The Government's Arguments Rest On A Fundamentally Flawed Understanding Of The Substantial Burden Test.

1. RFRA Protects "Any Exercise Of Religion."

RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). RFRA contains no requirement that the actions required of plaintiffs be "significant" or "substantial." *Id.* Here, because these Plaintiffs' refusal to facilitate access to the objectionable products and

[4] The Government seeks to assure us, and the Court, that these Plaintiffs will not pay anything toward the provision of abortifacients to their employees and dependents under the so-called "accommodation." 78 Fed. Reg. 39870, 39880 (July 2, 2013). These Plaintiffs' legal position is not dependent upon any monetary contributions by them to the objectionable products, but in any case the Government's assurance requires a suspension of disbelief. The TPA "can provide such payments on its own," the Government tells us, "or it can arrange for an issuer or other entity to provide such payments." *Id.* If the TPA chooses to use an issuer (of insurance), the issuer can apply annually for a compensating credit against its FFE (federally facilitated exchange) fee, and if it runs out of credit it can enlist the help of another issuer that still has credit, and so on. This is all explained in 16 pages of exquisite bureaucratic detail at 78 Fed. Reg. 39870, 39870-86, including intricate ten-year recordkeeping requirements for the TPA and the chain of insurance issuers providing credits to one another in order to get this job done.

In short, it is permissible for the TPA to just pay for the abortifacients itself, and given the bureaucratic requirements attendant upon obtaining compensating credits, it strains credulity to think that, at least in the case of these Plaintiffs, the TPA would not simply make the payments itself. If it does, it will most assuredly be using these Plaintiffs' funds to do so, as a TPA has no source of revenue other than from its clients. So even if it reaches into its after-tax profits, or into its petty cash drawer, the funds it uses to pay for the abortifacients will come, at least in part, from these Plaintiffs.

services clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Smith*, 494 U.S. at 877, it is a protected exercise of religion for purposes of RFRA.

"Substantial" pertains not to the actions required of plaintiffs, *i.e.*, their religious exercise, but rather the type of pressure imposed by the Government, *i.e.*, the burden. 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of religion."). RFRA requires courts to assess the pressure exerted on a plaintiff to violate his beliefs, not the nature of the religious exercise. *Korte*, 735 F.3d at 684 (the Government's "insistence that the burden is trivial or nonexistent simply misses the point of this religious liberty claim").

Thus, in evaluating whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of the coercion employed by the government, rather than the "significance" of the actions required of plaintiffs. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh Day Adventist plaintiff of working on Saturday was "*de minimis*." Instead, the Court focused on the "pressure upon her to for[]go [her] practice." *Id.* at 404. Likewise, in *Thomas*, the Court did not focus on whether the Government "require[d Thomas] to change his behavior in any significant way," Doc. 68, at 3, but instead evaluated the "coercive impact" of the State's actions, concluding that they "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717–18; *see also Korte*, 735 F.3d at 683 ("It is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion."); *Hobby Lobby*, 723 F.3d at 1137 (focus is on "*the intensity of the coercion* applied by the government to act contrary to those beliefs" and the court's "only task is to determine whether . . . the government has applied substantial pressure on

the claimant to violate that belief.") (emphasis in original).[5]

The Government's attempt to focus on the time or effort required by the self-certification process misses the proper analytical point. "This argument—which essentially reduces to the claim that completing the self-certification places no burden on plaintiffs' religion because 'it's just a form'—finds no support in the case law. . . . Inquiring into the relative importance of a particular act to a particular plaintiff would necessarily place the court in the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Archdiocese of New York v. Sebelius*, 2013 WL 6579764, at *13 (citing *Lee*, 455 U.S. at 263 n.2).

2. The Government's "Modified Behavior" Argument Is Without Merit.

The Government now offers a newly-minted argument that a regulation can violate RFRA only if it requires these Plaintiffs to "modify their behavior." Doc. 68, p. 11. This argument is specious in both theory and fact.

Courts have uniformly held that RFRA is—and before *Smith* they held that the Free Exercise Clause was—violated by a law that requires one to act contrary to his religious beliefs, especially when required under penalty of fines.[6] Indeed, the touchstone of the substantial burden analysis is whether plaintiffs are compelled to act in violation of their religious beliefs. *Thomas*, 450 U.S. at 717 (stating that the substantial burden inquiry "begin[s]" with an assessment of whether a "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 403-04 (same). Whether a plaintiff's objective actions are altered or whether much physical effort is required is

[5] These same authorities demonstrate why *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. 2012), is fundamentally flawed. Whether one action (paying wages that may be used to purchase contraception) is morally indistinguishable from another (providing access to coverage for contraceptive services) is a question for religious authorities and individuals, not courts. *Thomas* squarely held that it is left to plaintiffs to "dr[a]w a . . . line" regarding the actions their religion deems permissible, and once that line is drawn, it "is not for [courts] to say [it is] unreasonable." 450 U.S. at 715.

[6] *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001) (RFRA is violated when a law "force[s Plaintiffs] to engage in conduct that their religion forbids"); *see also Yoder*, 406 U.S. at 218; *Thomas*, 450 U.S. at 717-18 (1981); *Kaemmerling*, 553 F.3d at 678 (same).

analytically irrelevant. For example, there is no difference in conduct between handing someone a knife to cut food and handing that person the same knife to commit murder. *Zubik*, 2013 WL 6118696, at *25. In *Southern Nazarene, supra,* the court explains it clearly:

> The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary. It is no answer to assert, as the government does here, that, in self-certifying, the institution is not required to do anything more onerous than signing a piece of paper. [citations omitted] **The government's argument rests on the premise that the simple act of signing a piece of paper, even with knowledge of the consequences that will flow from that signing, cannot be morally (and, in this case, religiously) repugnant – an argument belied by too many tragic historical episodes to be canvassed here.** The burden, under RFRA, is not to be measured by the onerousness of a single physical act. RFRA undeniably focuses on violations of conscience, not on physical acts. Thus, the question is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity. *Hobby Lobby*, at 1142.

Id. at 16-17 (emphasis added).

The facile reasoning of the opinions in *Priests for Life, University of Notre Dame*, and *Archbishop of Washington* (*see* n. 2, *supra*)—that all the Mandate requires of "accommodated" entities is to say and do what they have always said and done—is laid bare by the court in *Geneva College, supra*, which explains that "[t]he purpose for which the notification is provided, and the compulsion to file it, makes all the difference":

> For this reason, the court respectfully disagrees with the district court's conclusion, in *Priests for Life*, that the self-certification process cannot substantially burden an eligible organization's religious exercise because it "need not do anything more than it did prior to the promulgation of the challenged regulations – this is, to inform its issuer that it objects to providing contraceptive coverage." *Priests for Life*, 2013 WL 6672400, at *7. Prior to the ACA, the result of that notification was that employees could not obtain insurance coverage for the objected to services. After the ACA, the result of that notification is that employees must be provided insurance coverage for those same services. Under the ACA, Geneva has two choices: (1) provide insurance coverage to its employees, which will result in coverage for the objected to services; or (2) refuse to provide insurance coverage for its employees,

> which will result in fines, harm to its employees' well-being, and competitive disadvantages. Both options require Geneva to act contrary to its religious duties and beliefs.

Id. at 25 n.12. The moral content of an objective act is always dependent on its known consequences.

In any event, the Mandate *does* force these Plaintiffs to modify their behavior: in the past, these Plaintiffs sought to enter into health coverage contracts that would *not* result in the provision of such coverage to their employees. Sharpe Decl. ¶ 19; Melton Decl. ¶ 17. Under the Mandate, Plaintiffs must now enter into contracts that *will* facilitate, and in fact initiate, the provision of the objectionable products and services. They are now required to take numerous additional steps as part of the overall scheme, including becoming the active central cog in aiding the Government as it dragoons these Plaintiffs' agent, the TPA, into doing what they cannot do because of religious conscience. Moreover, if the Government has its way, what used to be happy events—hiring new employees, signing them up for health coverage, providing many of them with their first and only health care card—have now become events weighed down with complicity in moral evil. The Government now exacts from these Plaintiffs a huge moral price every time they make a new hire. And these Plaintiffs' provision of health care coverage to their employees and dependents is the "but for" cause, the *sine qua non,* of the provision of abortifacient coverage. If these Plaintiffs participate in the Government's scheme, their employees and dependents will either understand that these Plaintiffs approve of abortifacient products or that they are hypocritical in promoting the pro-life message. *See Gilardi*, 733 F.3d at 1218 (if forcing a plaintiff to choose between "paying a [massive] penalty" and "becom[ing] complicit in a grave moral wrong . . . is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail see how that standard could be met").

3. Improper Evaluation of Religious Beliefs

The Government's reading of RFRA impermissibly "cast[s] the Judiciary in a role that [it was] never intended to play." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Rather than evaluating whether the pressure placed on these Plaintiffs to violate their beliefs is "substantial," the Government would have this Court determine whether compliance with the Mandate is a "substantial" violation of these Plaintiffs' religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter involves an inherently *religious* inquiry. But the judiciary has no competence to determine the significance of a particular religious act; "[i]t is not within the judicial ken to question the centrality of particular . . . practices to a faith." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [courts] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715. On the Government's theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that the change in verbiage is a "*de mimimis*" act. Doc. 68, at 10.

Likewise, the Government's argument that there is no meaningful distinction between the payment of salaries and the provision of access to contraceptive benefits, Doc. 68, at 4, involves "impermissible line drawing, and [should be] reject[ed] out of hand." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 n.9 (D. Colo. 2012), *aff'd*, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). The moral distinction between wages used to purchase contraception and the Mandate is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142.

In any case, employees might use their paycheck to purchase contraceptives, cocaine, cotton candy, or anything in between. An employee's salary belongs to the employee, and the employer has no control over its use. But when an employer complies with the Mandate, it ensures that its employees are furnished with a health plan "coupon" that can be redeemed *only*

for abortifacient contraceptives, as long as the employment relationship lasts. The employer is thus a necessary part of, and complicit in, the purchase of abortifacient contraceptives, making such action qualitatively different from leaving it to employees to use their paychecks as they see fit.

Finally, it is important to understand what Plaintiffs are *not* saying. These Plaintiffs do not contend that the "mere fact" they "claim" the Mandate "imposes a substantial burden on their religious exercise" "make[s] it so." Doc. 68, at 15. Far from it. The Court is required only to accept these Plaintiffs' description of their religious exercise. The Court must still proceed to step two and conduct an independent assessment of whether the Government is substantially pressuring these Plaintiffs to violate their religious beliefs. Here, that inquiry is simple, as the Government imposes crippling fines and other negative consequences on these Plaintiffs for failure to toe the line and violate their religious beliefs.[7]

At bottom, the Government's argument reflects a misunderstanding of these Plaintiffs' religious objections. These Plaintiffs object not only to using the objectionable products and services, but also to taking actions that facilitate their use. *Cf. Hobby Lobby*, 723 F.3d at 1140; *Korte*, 735 F.3d at 684-85. As Judge Gorsuch explained,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

Hobby Lobby, 723 F.3d at 1152 (Gorsuch, J., concurring). Plaintiffs' faith has led them to the

[7] Thus, despite the Government's evident concern, this standard does not give religious actors carte blanche to exempt themselves from federal law. Even after accepting plaintiffs' description of their religious exercise, courts still must evaluate (1) sincerity, (2) whether it is religious, (3) the "substantial pressure" placed on adherents to modify their exercise, (4) the stated Government "compelling interest," and (5) whether the law is the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b). Likewise, courts need not accept claims "so bizarre, so clearly nonreligious . . . , as not to be entitled to protection." *Thomas*, 450 U.S. at 715. Such safeguards address the Government's claimed concerns. *Hobby Lobby*, 723 F.3d at 1141 n.16.

conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably theirs to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on these Plaintiffs to cross this line, the Government has substantially burdened these Plaintiffs' exercise of religion.

II. The Mandate Fails Strict Scrutiny.

As every court that has addressed the strict scrutiny question in the context of the Mandate has concluded, including this Court earlier in this case, the Government's abstract interests and lack of tailoring fail to satisfy the demanding RFRA standard—at least at the preliminary injunction stage.[8] In order to avoid again requesting permission to exceed the page limits of Local Rule 7-4.01(D), these Plaintiffs will not rehash the clear opinion of this Court and others regarding strict scrutiny.

CONCLUSION

Accordingly, the Plaintiffs' request that the Court issue a temporary restraining order and/or preliminary injunction.

Respectfully submitted this 25th day of December, 2013.

[8] *Korte*, 735 F.3d at 685-87; *Gilardi*, 733 F.3d at 1219-22; *Hobby Lobby*, 723 F.3d at 1143–44; *Zubik*, 2013 WL 6118696, at *28-30 & n.21; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

OTTSEN, LEGGAT AND BELZ, L.C.

By: /s/ Timothy Belz
Timothy Belz #MO-31808
J. Matthew Belz #MO-61088
112 South Hanley, Second Floor
St. Louis, Missouri 63105-3418
Phone: (314) 726-2800
Facsimile: (314) 863-3821
tbelz@omlblaw.com

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on December 25, 2013, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri to be served by operation of the Court's electronic filing system upon the following registered CM/ECF participants:

Jacek Pruski
U.S. Dept. of Justice—Civil Division
Federal Program Branch
20 Massachusetts Avenue, NW
P.O. Box 883
Washington, DC 20530

Christina Bahr Moore
Office of U.S. Attorney
111 S. Tenth Street
20th Floor
St. Louis, MO 63102

/s/ Timothy Belz