IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE, *et al.*, ***Appellants*,** **v.** **KATHLEEN SEBELIUS, *et al.*,** ***Appellees.***	**Case No. 13-2723**

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

The resolution of this case turns on the answer to a straightforward question: absent interests of the highest order, can the government force religious organizations to take actions that violate their sincerely held religious beliefs? The Government does not dispute that Appellants' sincerely held religious beliefs bar them from participating in a scheme to provide their employees with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling (the "objectionable products and services"). Nor does the Government dispute that the regulations at issue here ("the Mandate") require Appellants to participate in just such a scheme on pain of substantial financial penalties. Instead, the Government claims that Appellants do not really object to the actions required of them by the Mandate and are really not "facilitating" anything. Effectively informing Appellants that they "misunderstand their own religious beliefs," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988), the Government purports to inform this Court that, in reality, Appellants' only objection is to the actions of third parties. The Government's foray into "the theology behind Catholic precepts" is not only inappropriate, *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013), but it is manifestly wrong. Appellants' undisputed affidavits establish that they have a religious objection to taking the actions the Mandate requires of them, whether it be submitting the self-certification, paying premiums to a third party authorized to provide contraceptive

coverage to Appellants' employees, or any one of the other actions Appellants have identified. To be clear, whatever the Government may claim, if this regulation is not enjoined, as of January 1, Appellants will be forced to choose between violating their religious beliefs or paying onerous penalties. If Appellants are to be put to such a choice, it should come only after this Court has had an opportunity to review the issue, which has divided courts throughout the country.[1]

I. APPELLANTS CANNOT OPT OUT OF THE MANDATE

The Government asserts, more than twenty times in its response, that the "accommodation" permits Appellants to "opt out" of the Mandate (*See, e.g.*, Gov. Br. at 12).[2] It is up to Appellants, not the Government, to determine whether their conduct makes them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at

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[1] In addition to the nine decisions granting injunctions in favor of similarly situated plaintiffs cited in Appellants' opening brief at 2, n.1., one other district court recently issued a similar decision. *See Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (doc. 99).

[2] The Government suggests that MCC's exemptions makes it undeserving of relief here. MCC, as sponsor of the MCC Plan for 827 Catholic employer entities, is required by the Mandate to designate its third party as the entity that will pay for the objectionable products and services. Thus, the Mandate renders MCC complicit in a scheme aimed at providing coverage to which MCC has a religious objection. Moreover, MCC will have to choose between complying with the Mandate by providing the objectionable coverage or ejecting non-exempt "Covered Units" from the MCC Plan such that those entities must find the objectionable services elsewhere. This, too, forces MCC to cooperate in a way that violates its religious beliefs, particularly where MCC was formed to ensure that Catholic entities would receive health care benefits in accord with Catholic teaching. The Mandate imposes a clear injury to MCC, whether exempt or not, by requiring it to facilitate access to objectionable services for its Catholic employers.

1217–18. For example, while the Government might believe the self-certification "'[is] just a form,'" *RCNY*, 2013 WL 6579764, at *13, for Appellants, submitting that form is an act in violation of their religious beliefs. "It is not for [a] Court to say otherwise." *Id.* at *14; *id.* at *13 ("There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection."). By asserting that the accommodation allows Appellants to "opt out," the Government has "purport[ed] to resolve the religious question underlying th[is] case[]: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Korte*, 735 F.3d at 685. The government's answer is "no," but again, "[n]o civil authority can decide that question." *Id.*

In any event, it is beyond dispute in this case that Appellants are not truly permitted to "opt out" of the Mandate. If Appellants were "opted out," they would be exempt, which they are not. If this case truly did involve the Government providing and paying for contraception, sterilization, and abortion-inducing products through third parties without Appellants' participation, there would be no lawsuit. Instead, the Government rejected such means, deciding instead to provide the objectionable coverage as part of an employer-based scheme.

The Government makes much of the fact that upon receiving the self-certification, Appellants' third-party administrator can choose not to provide the

objectionable products and services, making Appellants' injury speculative. (Gov. Br. at 14.) This is a repackaging of the standing argument made, and rejected, in the district court. (Dist. Ct. Op. at 6 ("Defendants' argument is flawed. Regardless of whether the government can force the TPA to take any action, the 2013 final rule requires Catholic Charities to take some action—provide contraceptive services or self-certify.")). What Defendants fail to tell this Court is that the TPA's decision to provide or not provide coverage is made *only upon* Appellants' self-certification. Defendants' argument is akin to saying that to provide a weapon to a friend, *knowing that the friend needs the weapon to cause harm to another*, is not immoral because the friend can independently decide whether to harm another. Appellants' certification provides the authorization for the TPA's ultimate decision, and should Appellants decide against certification, they face ruinous fines.

The Government's characterization of Appellants' involvement in the provision of the objectionable products and services is also misguided. Appellants cannot simply "opt out" of the process by signing the self-certification form. Rather, Appellants must play an undeniable role and take specific actions in furtherance of the provision of products and services against their faith. Importantly, Appellants do not object only to *providing* or *using* contraception. Rather, Appellants object to the actions that *they themselves* must take under the Mandate—namely, providing a "self-certification" that designates or authorizes a

third party to provide contraception. In short, Appellants object to being forced to participate in a scheme to pay for, provide access to, and/or facilitate access to contraception (whether ultimately used or not).

For example, due to their beliefs, Appellants have always contracted with third parties that would refrain from providing contraception, sterilization, and abortion-inducing products. Now, because of the Mandate, Appellants could find themselves actively seeking out third parties to provide the objectionable products and services. And where before Appellants participated in the employer-based health care market only when their actions did not facilitate access to the objectionable products and services, now their sponsorship of health plans does just the opposite. It is beyond dispute that Appellants must execute the self-certification, and work with the third parties, thus keeping open the pipeline by which the benefits may flow to their employees.

Both the district court and the Government boldly state that the acts Appellants must take—from sponsoring health plans through which the objectionable products and services will be provided, to submitting certifications that authorize provision of the objectionable products and services—do not "facilitate" anything. (Dist Ct. Op. at 13; Gov. Br. at 11, 17, 23). But, again, "facilitation" is a religious term, not a secular one, and the analysis is theological, not factual (i.e., do the actions required of Appellants violate the Catholic doctrines

of material cooperation with immoral conduct and scandal). Appellants have made the determination that the role they must play is one that violates their religious beliefs. It is not for the Government or this Court to say otherwise. Appellants want only to "opt out"—to be in the same position as those entities deemed by the Government as sufficiently religious to be exempt from the Mandate—in accordance with their faith. The Government will not allow them do so.

Like the district court, the Government focuses myopically on the act of self-certification, arguing that merely notifying a third party of a religious objection cannot be a substantial burden on the exercise of religion. But this argument completely ignores the *context* of the self-certification, which forces Appellants to cooperate with a third party to provide contraception to Appellants' employees and solely by virtue of the health plan that Appellants are required to maintain. Should Appellants adhere to their sincere religious beliefs and decide against submitting the self-certification, they face financial ruin. Thus, by placing intense governmental pressure on Appellants to act contrary to their religious beliefs, the Mandate imposes a substantial burden on their exercise of religion. *See Korte*, 735 F.3d at 683 ("The substantial-burden test under RFRA focuses primarily on the intensity of the coercion applied by the government to act contrary to [religious] beliefs." (quotation omitted)).

II. THE MANDATE MAKES APPELLANTS INDISPENSABLE PARTIES TO THE PROVISION OF CONTRACEPTION

Contrary to the Government's argument, Appellants are indispensable to the regulatory scheme and have a sincere religious objection to numerous actions required under the so-called "accommodation." As established in undisputed affidavits, Appellants object to executing the "self-certification," which authorizes or "designate[s]" a third party administrator and trigger an insurer to provide contraceptive benefits to their employees. *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009 (S.D. Tex. Dec. 27, 2013) (Doc. 133) (distinguishing *Kaemmerling*). In a semantic game, the Government suggests that the certification is not really an "authorization," but merely a notification to administrators of Appellants' objection to the provision of objectionable products and services. (Gov. Br. at 3, 19.) Whether an "authorization," or "notification," the certification is a necessary precondition for the TPA's ultimate decision. If it were not, then the requirement for the certification would be a meaningless exercise. That the certification is required is evidence of Appellants' involvement in the objectionable scheme.

Moreover, even after Appellants provide the self-certifications, they must then take others actions that they find religiously objectionable because, according to Catholic doctrine, these actions constitute impermissible facilitation of contraception. Most obviously, they must continue offering insurance to their employees while cooperating with a third party to provide contraceptive benefits.

These actions are religiously objectionable to Appellants in the context of the Government's regulatory scheme, and it is impossible to say that Appellants play no role. On the contrary, Appellants are forced to play an integral role by arranging and then actively maintaining relationships through which objectionable products and services may flow to Appellants' employees.

According to the Government, Appellants' position "lacks any discernible limiting principle," and would "transform RFRA from a shield into a sword" by allowing RFRA plaintiffs to "veto any conduct by others." (Gov. Br. at 23.) That characterization is plainly false. Indeed, as Appellants have previously noted, the Government could have avoided this litigation altogether by the use of less restrictive and burdensome means that did not involve Appellants. Thus, if the Government or a third party were to provide contraceptive benefits directly to Appellants' employees without requiring Appellants to take any action, Appellants would have no RFRA claim. But that is not what the Government opted to do. Rather, the Government's decision to require religious institutions to play a role—a role at odds with their religious beliefs—in the provision of the objectionable products and services gives rise to Appellants' RFRA claim.

III. THE MANDATE DOES NOT FURTHER A COMPELLING GOVERNMENT INTEREST

The Government says that even if there is a substantial burden on Appellants, such a burden is justified because the Mandate furthers the promotion

of public health and gender equality. (Gov. Br. at 22-23.) In so doing, the Government fails to cite a single case holding as such, *because every court to consider the question has held to the contrary*. Rather, the Government relies solely on the *Korte* dissent to argue that the Mandate survives strict scrutiny.

As Appellants laid out in their original motion, the Mandate cannot be justified as protecting a compelling state interest when the Affordable Care Act exempts millions of people through grandfathering provisions, houses of worship exemptions, and small business exemptions. (Mot. at 20) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 580 U.S. 520, 547 (1993)). The Government does not respond to this basic inquiry. (*See* Gov. Br. at 22-24.) Simply put, an interest cannot be of the highest order when the Government *willingly* chooses to enforce that interest haphazardly. *See Hobby Lobby*, 723 F.3d at 1144. Moreover, the Government concedes in its response that TPAs are able to make the decision not to provide coverage without recourse. (Gov. Br. at 14.) Thus, the interests that the Government points to would not necessarily be furthered should TPAs decide against coverage, as the Government says they may.

But even if the Mandate furthers such an interest, it does not do so in the least restrictive way possible. As Appellants explained in their motion, the Government could have sought to provide the objectionable services directly, or through third parties, obviating the need for Appellants' participation. (Mot. at

23.) To this, the Government says that the certification is necessary so as to inform it or a third-party that such coverage is needed. But why is this any less restrictive than a program allowing for Appellants' plan beneficiaries to contact contraceptive services providers directly, and simply aver that their plan does not provide benefits? So doing would further the above-mentioned interests better than the Mandate, while respecting the rights of religious institutions.

CONCLUSION

Appellants are about to be forced to make a choice that no Government should require. Appellants believe that issuing a self-certification is a fundamentally immoral act that forces them to pay for, provide access to, and/or facilitate the provision of the objectionable products and services. It is not for the Government, or this Court, to tell Appellants that it is not. Rather, it is the province of this Court to consider whether the Government has exerted substantial pressure on Appellants to engage in such immoral acts. The levying of draconian penalties rises to such pressure, constituting a substantial burden on Appellants' exercise of religion. And because the Government is unable to demonstrate that its reasons for exerting such pressure are compelling, the Mandate cannot survive strict scrutiny. Accordingly, Appellants' emergency motion for an injunction pending appeal should be granted.

Respectfully submitted, this the 31st day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 31, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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