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

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, *et al.*,	
Plaintiffs,	**CIVIL ACTION NO. 1:13-cv-00303**
v.	**ELECTRONICALLY FILED**
KATHLEEN SEBELIUS, *et al.*,	
Defendants.	
MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, *et al.*,	**CIVIL ACTION NO. 2:13-cv-01459**
Plaintiffs,	**ELECTRONICALLY FILED**
v.	
KATHLEEN SEBELIUS, *et al.*,	
Defendants.	

PLAINTIFFS' JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTIONS FOR PRELIMINARY INJUNCTIONS

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Plaintiffs are seeking preliminary injunctions to prevent the Mandate, 45 C.F.R. § 147.130(a)(1)(iv), from being applied and enforced against them and/or their group health plans. The initial element, likelihood of success on the merits, is the primary dispute between the parties in these cases.

Plaintiffs' central claim is that the Mandate violates the Religious Freedom Restoration Act ("RFRA"). Under RFRA, Plaintiffs have the initial burden to establish a substantial burden on their sincerely-held religious beliefs. Plaintiffs presented five live witnesses, a video deposition, joint stipulations, and several exhibits that credibly demonstrate Plaintiffs' long-standing, sincerely-held beliefs in the sanctity of life from conception until natural death, which would be violated by facilitating the required Preventive Services. The witnesses credibly testified that signing the self-certification form and participating in the accommodation process would violate these religious beliefs. Significantly, the Government has conceded all of these facts. There is also no dispute that if Plaintiffs refuse to compromise their beliefs and refuse to participate in the accommodation process, they will incur devastating fines that will force the organizations to close their doors. It is difficult to imagine a more substantial burden.

Once a substantial burden is established, the burden of proof then shifts to the Government to establish that the Mandate is narrowly tailored to a compelling interest. As every circuit court that has addressed the issue has concluded, the Government has not and cannot meet that burden. The Government has included only sixteen exhibits, not the entire administrative record, in this case. Those exhibits are woefully inadequate to establish any Government interest, let alone a compelling one, in applying this law to Plaintiffs. Indeed, the Government has chosen to exclude millions of people from the reach of the Mandate. It has no justification to force Plaintiffs to participate in its accommodation process and cannot credibly argue it considered

alternative means. Plaintiffs, therefore, a likely to succeed on the merits of their claims.

The remaining preliminary injunction factors also weigh in Plaintiffs' favor. The violation of Plaintiffs' conscience is irreparable, the Government has no interest in enforcing an unconstitutional law, and preservation of the status quo will protect Plaintiffs' employees and those who are served by Plaintiffs.[1] The Court should issue a preliminary injunction to preserve the status quo and protect Plaintiffs' religious liberty.

ARGUMENT

I. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS.

A. Plaintiffs Have Established a Substantial Burden on Their Exercise of Religion

Under RFRA, Plaintiffs were required to establish a substantial burden on their religious beliefs. 42 U.S.C. § 2000bb-1. This required Plaintiffs to demonstrate: (1) sincerely-held religious beliefs, (2) that the law requires them to violate, (3) under substantial pressure. *See, e.g.*, *Persico*, Doc. No. 8 at 15-16, 22 (citing cases). All three elements were met here.

The Government does not dispute the first two prongs. Plaintiffs established that they have sincerely-held and long-standing religious beliefs in the sanctity of life and prohibiting facilitation of evil that would be violated by complying with the accommodation process.[2] *See, e.g., Persico*, Doc. No. 52-1 (Cardinal Dolan Depo.); Nov. 12, 2013 Hearing Transcript ("Hrg. Tr.") 43:2-15 (Bishop Zubik testifying he intends not to sign the form because "I wouldn't be able to live with myself to know that we would be contradicting what our beliefs are."); 80:6-8 (Bishop Persico agreeing that signing the form "[a]bsolutely" would "constitute the facilitation

[1] Plaintiffs bear the burden only on the first two preliminary injunction factors. *Persico*, Doc. No. 30, at 3 (citing *Karakozova v. U. of Pittsburgh*, No. 09-458, 2009 WL 1652469, at *1-2 (W.D. Pa. June 11, 2009)). Regardless, all four factors clearly favor Plaintiffs.

[2] *See also* Hrg. Tr. 28:16-22, 36:14-25, 37:12-38:1 (Zubik); 59:17-60:11 (Rauscher); 75:13-76:9, 80:24-81:15 (Persico); 93:14-23, 97:2-7 (Jabo); 113:15-22 (Maxwell).

of evil"). Similarly, Plaintiffs testified that signing the self-certification would violate their religious beliefs by causing scandal. *See, e.g., id.* at 99:11-100:5 (Jabo) ("I would become a hypocrite and the school would become a hypocrisy[.]").[3]

The Government conceded that these beliefs are sincere and would be violated by signing the self-certification form and participating in the accommodation process:

> THE COURT: Does the Government accept the facilitation of evil tenet that we heard about as being a sincerely held belief?
>
> MR. HUMPHREYS: We don't question that the Plaintiffs sincerely believe everything to which they testified yesterday, and yes, that includes the facilitation of evil.
>
> THE COURT: Does it include the belief that, as was testified, that signing the self-certification form would, according to their testimony, facilitate evil?
>
> MR. HUMPHREYS: The Government has no reason to question that, Your Honor.

Nov. 13, 2013 Argument Transcript ("Arg. Tr.") 54:23-55:9; *see also* Hrg. Tr. 8:15-18 (stipulation to sincerity); *Persico,* Doc. No. 39 (Joint Stipulations) ¶¶ 52-56, 114-17.

The only disputed issue on which Plaintiffs have the burden—and the core issue in this case—is whether the Mandate imposes *substantial* pressure on Plaintiffs to violate these sincerely-held religious beliefs. Under the Affordable Care Act's enforcement provisions, Plaintiffs would be subject to fines if they do not comply. *Persico*, Doc. No. 39 ¶¶ 50-51 (citing the applicable statutes). Although those fines cannot be exactly calculated at this time, *Persico*, Doc. No. 58 ¶ 14, there is no dispute that the fines could be several million dollars, as Plaintiffs estimated during the hearing.[4] Hrg. Tr. 33:4-10 (Zubik); 61:6-16 (Rauscher); 115:17-116:10

[3] Ex. P92 ¶¶ 26-27; Ex. P89 ¶¶ 13, 15-16; Ex. P90 ¶¶ 14, 17; Ex. P88 ¶¶ 35-36; Ex. P86 ¶ 16.

[4] The parties stipulated the fines are per "affected beneficiary." *Persico,* Doc. No. 58 ¶ 13. The fines are not based solely on affected employees as Plaintiffs' counsel suggested during argument. Arg. Tr. 25:10-26:19.

(Maxwell). The witnesses each testified that the organizations could not afford to pay these fines and would have to close their doors if they were subject to them. *Id.* at 61:6-62:5 (Rauscher); 98:12-99:10 (Jabo); 115:3-116:10 (Maxwell).

As the Seventh Circuit recognized in a for-profit case challenging the Mandate, "ruinous fines" that would force a choice between saving one's company and "following the moral teachings of [one's] faith" are clearly a substantial burden. *Korte v. Sebelius*, __ F.3d __, 2013 WL 5960692, at *23 (7th Cir. Nov. 8, 2013). "This is at least as direct and substantial a burden as the denial of unemployment compensation benefits in *Sherbert* and *Thomas*, and the obligation to withhold and pay Social Security taxes in *Lee*." *Id.*; *Persico,* Doc. No. 8 at 22-25, Doc. No. 34 at 3-5 (citing cases). For religious non-profit organizations such as Plaintiffs that are an integral part of the Catholic Church and must follow church teaching, compliance would undermine the teachings of the Church itself. Hrg. Tr. 19:6-24:23 (Zubik); 49:15-51:21 (Rauscher); 69:12-73:9 (Persico); 90:15-92:14 (Jabo); 106:8-24, 109:3-110:20 (Maxwell).

The Government's argument that "any impact on Plaintiffs' religious beliefs is attenuated at best" misses the point. Arg. Tr. 52:7-24. The Government cannot decide when Plaintiffs' religious beliefs are violated or how much complicity in the facilitation of the objectionable Preventive Services is acceptable to a particular faith. In fact, "[n]o civil authority can decide that question." *Korte*, 2013 WL 5960692, at *24; *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J. concurring) ("the problem of complicity . . . in the wrongdoing of others" is an area where "[f]or some, religion provides an essential source of guidance"). While Plaintiffs previously performed some of the actions required by the accommodation, those actions did not facilitate or trigger the provision of these services. Hrg. Tr. 37:18-22 (Zubik); 59:7-16 (Rauscher); 84:3-5 (Persico); 97:8-21 (Jabo). Indeed, the self-certification form may

only take "a few minutes to sign, but the ramifications are eternal." *Id.* 81:21-25 (Persico).

Nor does the Government's reliance on *Bowen* and *Kaemmerling* fare better. Arg. Tr. 50:17-51:23. In those cases, no conduct was required of the plaintiff himself. *Bowen v. Roy*, 476 U.S. 693, 700 (1986) (Government assigning plaintiff's daughter a Social Security number with no conduct at all on his part); *Kaemmerling v. Lappin*, 553 F.3d 669, 678-80 (D.C. Cir. 2008) (challenging the use of DNA in the Government's possession but not challenging collection of that DNA).[5] Here, in contrast, the action complained of—that violates Plaintiffs' religious beliefs as Defendants conceded—is the act of *Plaintiffs* signing the self-certification and participating in the accommodation process. Plaintiffs have never contended that RFRA would bar a Government-run program that does not involve action by Plaintiffs, such as Medicaid. It is the Government's insistence that Plaintiffs actively participate in this process that creates the religious conflict.

B. The Government Has Not Met Its Burden to Establish a Compelling Interest in Applying the Mandate to Plaintiffs

The Government has not met its burden to demonstrate a compelling interest to apply the Mandate to the Plaintiffs who are the "particular claimant[s]" here. *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006). Plaintiffs are non-profit religious organizations that are integral to and further the religious mission of the Catholic Church. *See, e.g.,* Hrg. Tr. 25:11-17 (Zubik) ("It's an absolute essential of living out the gospel."); 51:7-21 (Rauscher); 73:4-9 (Persico); 90:15-91:15 (Jabo); 109:15-110:20. As the witnesses testified, it is part of their faith to perform good works and teach the faith. *See, e.g., id.*

[5] Moreover the Government's argument that there is no burden because the accommodation imposes no direct monetary cost on Plaintiffs ignores countless cases that found a substantial burden when there was no monetary cost to the believer. *See, e.g., Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (denial of halal meat to a Muslim practitioner). The Government also ignores that the issue here is the "integrity" of Plaintiffs' beliefs, not money. *See, e.g.,* Hrg. Tr. 38:6-10 (Zubik); 82:6-9 (Persico).

at 36:8-13 (Zubik); 88:4-8, 89:24-90:14 (Jabo). The Government has pointed to no evidence that these organizations should be treated different from houses of worship. Instead, the Government relies on its own "belie[f]" that there is a distinction, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013), and claims it is "simply common sense" that some hypothetical "large employer," like a hospital—not entities like the Plaintiffs—would have more employees who disagree with it than a house of worship. Arg. Tr. 53:13-54:13. Such bald conclusions cannot sustain its burden.

Instead, the only evidence in the record is to the contrary. The witnesses are not aware of Plaintiffs' employees having ever complained about the absence of the Preventive Services from their plans nor suffering any negative health consequences as a result. Hrg. Tr. 55:18-56:5 (Rauscher); 93:24-94:21 (Jabo); 111:23-112:12 (Maxwell). More generally, this distinction is arbitrary, splitting the church in a way that is antithetical to Church doctrine and that unconstitutionally interferes with the Church's internal governance.[6] *Id.* at 21:6-18, 25:11-17, 42:13-43:1 (Zubik), 73:4-9 (Persico) ("Well, if we look at scripture, faith without good works is dead, so I don't see how we can separate it."); 91:2-15 (Jabo).

Even if the Government had some evidence as to the need to apply the Mandate to Plaintiffs, the Government's stated general interests in "public health" and "workplace equality" are too broad to satisfy the RFRA test. "By stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 2013 WL 5960692, at *25. As the D.C. Circuit explained, the Government's stated interest is "sketchy and highly abstract," which prevents the Government from "demonstrate[ing] a nexus between this array of issues and

[6] The preliminary injunction could also be granted because splitting the Church in this way unconstitutionally interferes with Plaintiffs' internal church governance. *Persico,* Doc. No. 8 at 41-42. For example, the long-standing definition of "church plans" exempt from ERISA, 26 U.S.C. § 414(e), would have been a rational standard here. The easy way to resolve the violation is to expand the definition of "religious employer" in 45 C.F.R. § 147.131(a) to include Plaintiffs.

the mandate." *Gilardi v. U.S. Dep't of Health and Human Servs.*, __ F.3d __, 2013 WL 5854246, at *10 (D.C. Cir. Nov. 1, 2013). The court held it was impossible to identify the public health problem the Government was "trying to ameliorate." *Id.* at *11.

Moreover, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143. In this case, the Government has stipulated that approximately 100 million people are on grandfathered health plans that will not ever have to comply with the Mandate. *Persico*, Doc. No. 58 (Joint Add'l Stip) ¶¶ 4, 6 (estimating 98 million people on grandfathered plans). But there are countless additional people on plans that are exempt from the Mandate, such as plans by religious employers and millions of small employers, or whose effective date has been extended through the safe harbor and the one-year delay of the employer mandate. *Id.* ¶¶ 7-8, 11 Just yesterday, the Government further exempted certain individual plans from the Affordable Care Act, effectively "extend[ing]" grandfathering "both to people whose plans have changed since the law took effect, and to people who bought plans since the law took effect." White House, *Statement by the President on the Affordable Care Act* (Nov. 14, 2013), http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act.

As the circuit courts that have addressed this issue have held, these exemptions undermine any compelling interest: "If the peyote exemption in *O Centro*, which applied to 'hundreds of thousands of Native Americans,' was enough to undermine the government's compelling interest argument in that case, we conclude the exemption for the millions of individuals here must dictate a similar result." *Hobby Lobby*, 723 F.3d at 1144; *see also Conestoga Wood Specialties Corp. v. Sec'y U.S. Dep't of Health and Human Servs.*, 721 F.3d 377, 414 (3d Cir. July 26, 2013) (Jordan, J. dissenting) (the Mandate "cannot legitimately be said

to vindicate a compelling governmental interest because the government has already exempted from its reach grandfathered plans, employers with under 50 employees, and what it defines as religious employers.").[7] It is impossible to see how the Government can excuse millions of people from complying with the Mandate yet turn a deaf ear to Plaintiffs' pleas.

C. The Government Has Not Met Its Burden To Establish That the Mandate is the Least Restrictive Means of Achieving Any Compelling Interest.

The Government also "has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." *Korte*, 2013 WL 5960692, at *25-26. There are many ways the Government could have achieved a compelling interest here such as providing a "public option" or giving tax incentives to either suppliers or consumers. *Id.* at *26. Or, the Government could have worked directly with the TPAs, without involving Plaintiffs or other religious employers at all. Arg. Tr. 57:25-58:5. But the Government "has not made *any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality." *Korte*, 2013 WL 5960692, at *26. Indeed, the Government's argument "suffers from two fatal flaws that cannot be overcome." *Gilardi*, 2013 WL 5854246, at *13. First, it ignores the "viable alternatives" without making any case regarding the burdens they would impose; "for all we know, a broader religious exemption would have so little impact on so small a group of employees that the argument cannot be made." *Id.* Second, the "mandate is self-defeating" because it exempts nonreligious conduct and is "unquestionably underinclusive." *Id.* The Government has not even attempted to refute these arguments.

The Government's only evidence on least restrictive means is two paragraphs in the

[7] The *Conestoga Wood* majority never reached the question of compelling interest or narrow tailoring because it concluded for-profit companies cannot exercise religion. *See, e.g.,* 724 F.3d at 381. Its holding does not affect these non-profit cases.

Federal Register that baldly state the Government "considered" and rejected alternatives. Arg. Tr. 57:18-59:7 (citing Ex. D1, 78 Fed. Reg. at 39,888). The Government made no effort to explain why those alternatives would not work, and there is no factual or legal basis for concluding that the Government properly rejected those alternatives. *See, e.g., Agency for Int'l Development v. Alliance for Open Society Int'l, Inc*., 133 S. Ct. 2321, 2326 (2013). Nor can the Government feign a lack of authority to protect Plaintiffs' rights. The question is whether the federal government—not an individual agency—could adopt a proposed less restrictive means. *See* 42 U.S.C. § 2000bb-1(b) ("Government" cannot substantially burden religious exercise unless doing so "is the least restrictive means of furthering" a compelling interest). If the Government's argument were adopted, Congress could avoid strict scrutiny simply by preventing agencies from considering reasonable, practical solutions. That is not and has never been the law.

II. PLAINTIFFS HAVE ESTABLISHED THAT THEY WILL SUFFER IRREPARABLE HARM IF THE INJUNCTIONS ARE DENIED

The Government has conceded irreparable harm is established if Plaintiffs demonstrate a likelihood of success on the merits. *See Persico*, Doc. No. 28 at 51 ("the merits and irreparable injury prongs of the preliminary injunction analysis merge together"). Indeed, being forced to violate one's religious beliefs, even for a moment, is an irreparable harm. *See, e.g., Ramsey v. City of Pittsburgh*, 764 F.Supp.2d 728, 734 (W.D. Pa. 2011); *Persico*, Doc. No. 8 at 42-45.

III. NO HARM TO THE GOVERNMENT FROM GRANTING INJUNCTIONS

On the other hand, the Government will suffer no harm from the granting of a preliminary injunction. As explained above, millions of people are not currently required to provide the objectionable Preventive Services. *See supra* Sec. I.B. The Government has not attempted and could not demonstrate that providing preliminary relief for the Plaintiffs here would seriously undermine or harm any governmental interests. To the contrary, the witnesses

testified that they have never heard complaints about the current health plans, which do not provide for objectionable Preventive Services, and are not aware of any negative health consequences due to the absence of such coverage. *See supra* Sec. I.B. Furthermore, the Government does not have an interest in enforcing an unconstitutional law. *Am. Civil Liberties Union v. Reno*, 31 F.Supp.2d 473, 497-98 (E.D. Pa. 1999).

IV. THE PUBLIC INTEREST FAVORS GRANTING THE INJUNCTION

Nor would denying an injunction be in the public interest. There is a substantial public interest in protecting Plaintiffs' religious liberty. *See, e.g., Ramsey*, 764 F.Supp.2d at 734-35. Additionally, Plaintiffs' employees and those who are served by Plaintiffs have a strong public interest in ensuring the viability of the organizations. *Cf. Feed the Children, Inc. v. Metro Gov't of Nashville & Davidson Cnty.*, 330 F.Supp.2d 935, 948 (M.D. Tenn. 2002). As Ms. Rauscher explained, the impact in Pittsburgh would be felt by people in need who receive shelter, meals, free health care, heat, electricity and emergency food assistance. Hrg. Tr. 62:18-63:6 (Rauscher). Ms. Maxwell also described how it would be "devastating" to "the poor" in Erie, including single women, children, the elderly, and refugees. *Id.* at 115:17-116:5 (Maxwell). She concluded (*id.* at 116:5-10):

> [I]t would be drastic if – if these fines had to be dealt with.
>
> . . . [P]eople would lose jobs. Our community in Erie counts on St. Martin Center. It – it would be devastating for all concerned, for our church. It just – it – it isn't something that we could cope with.

CONCLUSION

Accordingly, the Court should grant Plaintiffs' request for a preliminary injunction.

Respectfully submitted, this 15th day of November, 2013.

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