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.,

PLAINTIFF,

v.

KATHLEEN SEBELIUS, et al.,

DEFENDANTS.

CIVIL ACTION NO. 1:13-00303

JUDGE ARTHUR J. SCHWAB

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants.

CIVIL ACTION NO. 2:13-cv-01459

JUDGE ARTHUR J. SCHWAB

JOINT STATUS REPORT

The parties submit this Joint Status Report pursuant to the Court's Order of October 10, 2013 [*Persico*, ECF No. 17; *Zubik*, ECF No. 12]. These two actions were filed separately and are separately pending. However, for the convenience of the Court and for efficiency at the upcoming Status Conference, the parties are providing one joint report.

1. On October 10, 2013, counsel for Plaintiffs promptly made counsel for Defendants aware of this Court's Orders. On October 15, 2013 counsel for all parties held a

preliminary discussion over the telephone regarding the issues outlined below. On October 17, 2013, counsel for all parties held a second, in-depth telephone conference that was conducted in good faith and was meaningful in substance on the issues outlined below.

2. Lead Trial Counsel for both parties will attend the Status Conference on October 24, 2013. Additionally, a representative of the Diocese of Erie and a representative of the Diocese of Pittsburgh will attend the conference on behalf of Plaintiffs. No client representative from Defendants plans to attend.

3. Motion to Re-assign:

a. **Defendants** intend to move to have these cases reassigned pursuant to this District's random assignment procedures. Defendants object to Plaintiffs' designation of these cases as related to *Pohl v. U.S. Dept. of Health and Human Services*, No. 2:130-cv-930. Plaintiffs' lawsuit is not related to *Pohl* under Local Civil Rule 40(D), and judicial efficiency will not be served meaningfully by the assignment of these cases to the same Judge. Because grounds do not exist in these cases for an exception to the Court's policy that cases be randomly assigned, these cases should be randomly reassigned pursuant to Local Civil Rule 40(C). Defendants, of course, would have no objection if this were to be assigned again to this Judge, or to any other Judge of this Court, through the random assignment process. However, in light of the erroneous nature of Plaintiffs' designation, defendants believe they are obligated to move for reassignment out of respect for the Court's random case-assignment process.

In general, the rule in this judicial District is that assignment of civil cases "shall be made by the Clerk of Court from a non-sequential list of all Judges" in the manner specified in the local rules. LCvR 40(C). The local rules provide an exception to the random assignment rule, however, where a newly filed case is "related" to another case previously docketed in this Court.

A civil case is "deemed related when an action filed relates to property included in another action, or involves the same issue of fact, or it grows out of the same transaction as another action, or involves the infringement of a patent involved in another action." LCvR 40(D)(2). If a judge who is assigned a purportedly related case determines that the cases in question are not in fact related, the judge may return the case to the Clerk of Court for random assignment. *See, e.g.*, *Westchester Fire Ins. Co. v. Treesdale, Inc.*, No. CIV.A. 05-1523, 2006 WL 1050518 (W.D. Pa. Apr. 19, 2006).

The present cases are in no way related to *Pohl*. Although the cases loosely relate to the same subject matter—the contraceptive coverage requirement of the preventive services coverage regulations—the similarities end there. The *Pohl* case is an action brought to seek production of documents, and the only issue in that case is whether various components of the Department of Health and Human Services (HHS) have met their requirements under the Freedom of Information Act (FOIA). These cases, by contrast, seek to enjoin regulations issued by HHS, the Department of Labor, and the Department of Treasury that Plaintiffs claim violate RFRA, the First Amendment to the United States Constitution, and the Administrative Procedure Act. The cases, therefore, are brought against different defendants under wholly different legal theories and do not implicate the same issues of fact. Nor do these cases arise out of the same "transaction" as the *Pohl* case. The relevant transaction in *Pohl* is HHS's response to Mr. Pohl's FOIA request; the relevant transaction in *Persico* and *Zubik* is the issuance of the regulations that the Plaintiffs here challenge.

It is of no moment that the Plaintiffs here intend to use the documents sought in the *Pohl* case to advance their prosecution of these cases. As an initial matter, because these cases involves challenges to an agency regulation, the Court's review should be limited to the

Administrative Record, which contains all non-privileged materials Defendants considered in promulgating the contraceptive coverage requirement, and thus the extra-record documents sought in *Pohl* are not relevant to Plaintiffs' claims. *See, e.g.*, *Camp v. Pitts*, 411 U.S.138, 142 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Even if the Court were to disagree, however, Plaintiffs' counsels' intention to use any documents received in *Pohl* to advance these cases does not bring these cases within the definition of "related" under Local Civil Rule 40(D)(2). "FOIA is not an avenue for obtaining documents for personal use, or a substitute for civil discovery." *Brown v. EPA*, 384 F.Supp. 2d 271, 280 (D.D.C. 2005). Rather, FOIA's "basic purpose" is to "open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). To the degree that the Court determines it is appropriate to review materials outside the Administrative Record in considering the merits of Plaintiffs' claims, Plaintiffs may, of course, submit whatever documents they obtain through the *Pohl* action as evidence. But there is no basis for these cases to be designated as "related" within the meaning of the local rules simply because Plaintiffs have sought documents in the *Pohl* case that touch on the same regulations that Plaintiffs substantively challenge in these cases.

Finally, *Smith v. Progressive Holdings,* LLC, No. 11-482, 2012 WL 225925 (W.D. Pa. Jan 25, 2012), which Plaintiffs cite for the proposition that reassignment is an "extraordinary remedy," is inapposite and, in fact, supports Defendants' position. In that case, the plaintiff—like the Plaintiffs here—was attempting to *avoid* the court's random assignment procedures by claiming that the case was related to another, previously filed case. The court explained, however, that "[l]itigants do not have the right to have their case heard by a particular judge." *Id.* at *1. Because the court was unconvinced that the two cases were related, or that judicial economy would be served by transferring the case to the judge who handled the purportedly

related case, the court declined to circumvent the court's random assignment procedures. *Id.* Similarly here, because neither of these cases is related to *Pohl*, and because judicial economy will not be advanced by accepting Plaintiffs' erroneous designation, these cases should be reassigned according to this District's random assignment process.

b. **Plaintiffs** state that they properly marked these cases as related to *Pohl v. U.S. Dept. of Health and Human Services*, No. 2:130-cv-930. Under W.D. Pa. LCvR 40(D), "counsel shall indicate on an appropriate form whether the action is related to any other pending or previously terminated actions in this Court." Under W.D. Pa. LCvR 40(D)(2), "civil actions are deemed related when an action filed . . . involves the same issue of fact, or [] grows out of the same transaction as another action. . . ."

On the Civil Cover Sheet filed with the Diocese of Erie Complaint (Doc. 1-1 at 1-2), Plaintiffs designated this action as related to *two* different actions: *Pohl v. U.S. Dept. of Health and Human Services*, an action currently pending before Your Honor, and *Most Rev. Persico v. U.S. Dept. of Health and Human Services*, No. 1:12-cv-123, a case previously terminated in this District. Similarly, on the Civil Cover Sheet filed with the Diocese of Pittsburgh Complaint (Doc. 1-1 at 1-2), Plaintiffs designated this action as related to *two* different actions: *Pohl v. U.S. Dept. of Health and Human Services*, an action currently pending before Your Honor, and *Most Rev. Zubik v. U.S. Dept. of Health and Human Services*, No. 2:12-cv-676, a case previously terminated in this District. Both actions were then assigned to this Court.

Defendants suggest that Plaintiffs have chosen to put these cases before Your Honor and to "avoid the court's random assignment procedures." They miss, however, that *Persico* and *Zubik* were each marked related to two cases – the *Pohl* case and its prior, terminated case challenging the prior version of the Mandate. At the time Plaintiffs marked these cases related,

under this Court's Local Rules, the cases would have likely been assigned to the judges with the prior cases, which have lower case numbers. LCvR 40(E)(1). Plaintiffs do not know how these cases were assigned but do not believe that the extraordinary remedy of reassignment is now warranted.

The *Pohl* case was filed on behalf of Paul Michael Pohl, counsel in this case, to challenge the U.S. Department of Health and Human Services' failure to respond to Freedom of Information Act ("FOIA") requests submitted over one year ago. Those FOIA requests were submitted in furtherance of and for use in litigating the very cases that are now before the Court. The FOIA requests seek background documents on the passage and issuance of the Mandate, which is at the heart of the current actions, and the documents produced in the FOIA case will overlap, not insignificantly, with the discovery sought in these cases, which is justified for the reasons discussed in greater detail below. These two cases thus deal with the same underlying facts as the FOIA case. Moreover, because Plaintiffs expect that documents produced in the *Pohl* case may help streamline discovery in these actions, it is efficient to have all three cases before Your Honor and have the cases proceed on a similar track. Other judges have similarly presided over both FOIA litigation and " related" litigation challenging the underlying merits. *See, e.g.*, *Poett v. U.S. Dep't of Justice*, No. 08-622, 2010 WL 254918, at *1 (D.D.C. Jan. 18, 2010) (same judge presided over FOIA litigation and "separate, related action" "brought under the Administrative Procedures Act"); *Owens v. U.S. Dep't of Justice*, No. 04-1701, 2006 WL 3490790, at *1 (D.D.C. Dec. 1, 2006) (same judge assigned to case challenging FBI's denial of plaintiff's FOIA request assigned to the underlying merits litigation).

Independently, the Court should not reassign because it would not serve the purpose of judicial economy. *See Smith v. Progressive Holdings, LLC*, No. 11-482, 2012 WL 225925, at *1

(W.D. Pa. Jan. 25, 2012) (denying unopposed motion to transfer case because Court was "unconvinced . . .that judicial economy would be served by reassigning this case."). Finally, as this Court has recognized, "[a]lthough a court may reassign a case based on relatedness, *see* LCvR 40.E.2, 'reassignment is an extraordinary remedy.'" *Smith*, 2012 WL 225925, at *1 (citing *Alboyacian v. BP Prods. N. Am., Inc.*, No. 09-5143, 2010 WL 56036, at *1 (D.N.J. 2010)). "[A]lthough this Court has the authority and discretion to reassign a civil action, it need not exercise that discretion." *Id.* Such an extraordinary remedy is not warranted here.

4. Preliminary Injunction Briefing Schedule. In light of Plaintiffs' request for a decision on their pending Motions for Preliminary Injunctions, the parties jointly propose the following schedule for parallel, independent briefing in each case:

a. **Defendants' Response Briefs** due October 31, 2013, with a 50 page limit.

b. **Plaintiffs' Reply Briefs** due November 6, 2013, with a 30 page limit.

c. **Oral argument**: If the Court deems oral argument necessary or helpful, Lead Trial Counsel for both parties are available on November 8, 2013 or the morning of November 13, 2013.

5. Uncontested Factual Issues Regarding the Motions for Preliminary Injunctions.

a. **Defendants** do not contest the facts in Plaintiffs' Declarations in support of their Motions for Preliminary Injunctions, including the operation of Plaintiffs' health plans [*Persico*, ECF Nos. 9-8, 9-9, 9-10, 9-11; *Zubik*, ECF Nos. 4-10, 4-11, 4-12].

b. **Defendants** do not contest the sincerity of Plaintiffs' religious beliefs, as articulated in the Complaints [*Persico*, ECF No. 1; *Zubik*, ECF No. 1], in the Memorandums of Law [*Persico*, ECF No. 8; *Zubik*, ECF No. 6] and in the Declarations in support of Plaintiffs'

pending Motions for Preliminary Injunctions [*Persico*, ECF Nos. 9-8, 9-9, 9-10, 9-11; *Zubik*, ECF Nos. 4-10, 4-11, 4-12].

c. **Defendants** believe an evidentiary hearing is unnecessary for this Court to decide Plaintiffs' pending Motions for Preliminary Injunctions.

d. **Plaintiffs** believe at this point that an evidentiary hearing is not necessary based on the information currently available to them. But, Plaintiffs have not yet seen the Government's arguments. Plaintiffs will advise the Court within five days of receiving the Government's Response papers – or by November 5, 2013 under the proposed briefing schedule – whether Plaintiffs believe an evidentiary hearing is necessary. If an evidentiary hearing is necessary, Lead Trial Counsel for all parties is available on November 8, 2013 or the morning of November 13, 2013.

6. Motion to Dismiss or, in the Alternative, for Summary Judgment.

a. Concurrent with the filing of their response to Plaintiffs' Motions for Preliminary Injunctions, **Defendants** intend to move to dismiss Plaintiffs' Complaints in their entirety for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants also intend to move, in the alternative, for summary judgment to the extent that the Court deems it necessary to consider the Administrative Record, which Defendants intend to file with their Motions, in addition to the face of Plaintiffs' Complaints.

It is not "premature," as Plaintiffs claim, for Defendants to file dispositive motions. A motion to dismiss under Rule 12(b)(6) may be brought at any time "before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b)(6). Contrary to Plaintiffs' assertions below, the filing of the Administrative Record will not automatically convert a Defendants'

motion to dismiss to a motion for summary judgment. Defendants intend to seek summary judgment only in the alternative, if the Court considers it necessary to look beyond the face of Plaintiffs' Complaints and to relevant public records, such as the contents of the challenged regulations, which the Court may consider on a motion to dismiss. *See Pension Ben. Guar. Corp. v. White Consol. Indus, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Additionally, Defendants' forthcoming motions are not premature because, as explained above, discovery is not appropriate in these cases because they involve challenges to an agency regulation. The Court's review should be limited to the Administrative Record, which contains all non-privileged materials Defendants considered in promulgating the contraceptive coverage requirement. Indeed, in other similar cases brought by similar plaintiffs to the preventive services coverage regulations, the plaintiffs—represented by the same law firm as the plaintiffs in these cases—have agreed to resolve those cases through dispositive motions practice, without the need for discovery. *See* Letter in Joint Submission Regarding Parties' Proposed Schedule, *Roman Catholic Archdiocese of New York v. Sebelius*, Case No. 1:12-cv-02542-BMC, ECF No. 66; Joint Motion for Entry of a Briefing Schedule, *Roman Catholic Diocese of Fort Worth*, Case No. 4:12-cv-00314-Y, ECF No. 67. Defendants respectfully submit that a similar procedure in these cases—which present largely legal questions—would allow the Court to most efficiently and effectively adjudicate Plaintiffs' claims.

b. **Plaintiffs** understand that in each case, along with their Response to the pending Motions for Preliminary Injunctions, Defendants intend to file a Motion to Dismiss or, in the Alternative, for Summary Judgment. Defendants plan to support those motions with the "Administrative Record" underlying the Final Rule.

Plaintiffs state that the dispositive motions Defendants intend to file, in conjunction with their Response to the pending Motions for Preliminary Injunctions, are premature for three reasons:

First, attaching the "Administrative Record," which is outside the pleadings, would by necessity convert the motions into motions for summary judgment. *See* Fed. R. Civ. P. 12(d). Although the Court can consider documents that are public record, the "Administrative Record" produced in other cases includes documents such as Data on Catholic Organizations and notes from telephone calls with insurers and interest groups that are not public records and which, as discussed below, warrant additional discovery. Moreover, the Government's citation to *Pension Benefits Guaranty Corp* is inapposite because the plaintiff in that case was faulted for "failing to attach" dispositive documents in its possession. 998 F.2d 1192, 1996 (3d Cr. 1993). Here, it is the opposite problem; Defendants have failed to disclose the full administrative record and discovery is necessary on the full contours and contents of the record, as discussed below. Therefore, Plaintiffs "must be given a reasonable opportunity to present all the material that is pertinent to the motion," Fed. R. Civ. P. 12(d), including the materials Plaintiffs will be seeking in discovery.

Second, Plaintiffs believe that summary judgment is premature because Plaintiffs are entitled to and need discovery on several issues in order to present a robust, developed record on the relevant issues for the Court's consideration. For example, it is premature to move for summary judgment based on the woefully inadequate "Administrative Record" that Defendants have produced in other cases and have said they intend to re-produce here. Even in Defendants' articulation, the Court is entitled to consider "**all** non-privileged materials Defendants considered in promulgating the contraceptive coverage requirement." *Supra* Section 6.a. But Plaintiffs have

learned that Defendants' "Administrative Record" is woefully inadequate, from three peeks behind the curtain of withheld documents.

Plaintiffs are entitled to discovery of the "whole record," which "consists of materials either directly or indirectly considered by the decision maker." *Am. Farm Bureau Federation v. EPA*, __ F.Supp.2d __, 2013 WL 5177530, at *15 (M.D. Pa. Sept. 13, 2013). The "whole record" includes everything that was before each agency "that *might* have influenced the agency's decision, and not merely those on which the agency relied in its final decision." *Stainback v. Sec'y of the Navy*, 520 F.Supp.2d 181, 186 (D.D.C. 2007) (emphasis added). Significantly, "the whole administrative record . . . is not necessarily those documents that the agency has compiled or submitted [as] 'the' administrative record." *Am. Farm Bureau Federation v. EPA*, 2011 WL 6826539, at *3 (M.D. Pa. Dec. 28, 2011). The "whole record" is required, for situations just like this one: "**Restricting judicial review to whatever documents an agency submits would permit an agency to omit items that undermine its position**." *Id.* (emphasis added).

Additionally, Plaintiffs are entitled to discovery on Defendants' decision-making processes because the Government's intent is at issue for several of Plaintiffs' claims. The Administrative Record that Defendants have produced in other cases has excluded materials being withheld on the basis of the deliberative process privilege, without providing a privilege log. But that privilege does not apply where, as here, the Government's intent is at issue. *See, e.g., In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (when a "cause of action is directed at the government's intent . . . it makes no sense to permit the government to use the privilege as a shield"); *see also New York v. Salazar*, 701 F.Supp.2d 224, 237 (N.D.N.Y. 2010) ("[W]hen the decision-making

process itself is the subject of the litigation, the overwhelming consensus and body of law within the Second Circuit is that the privilege cannot bar discovery, and it evaporates."); *Scott v. Bd. of Educ. of City of East Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004) ("[W]hen the deliberations of a government agency are at issue, the Privilege is not available to bar disclosure of such deliberations."). Plaintiffs are entitled to discovery into the Government's decision-making process and intent because the Government's intent is at issue for several of Plaintiffs' claims of targeting and discrimination in Count II (Targeting for Substantial Burden Free Exercise), Count III (Viewpoint Discrimination for Compelled Speech); and Count V (Religious Discrimination).

The following information, which is outside of the Administrative Record, demonstrates the inadequacy of the "Administrative Record."

(1) The record produced by Defendants in other cases omits key documents that undermine their position. Just this month, Plaintiffs learned of communications between the IRS and White House on the scope of the religious employer exemption. *See* Patrick Howley, "White House, IRS exchanged confidential taxpayer info" (Oct. 9, 2012), The Daily Caller, http://dailycaller.com; *see also* Redacted Emails of IRS Personnel (Plaintiffs' Exhibit 1). In those partially redacted emails from July 2012, senior officials are discussing taxpayer information – and appear to be discussing specific religious non-profit entities or taxpayers – to determine whether they will be exempt under specific tests for "religious employers." The emails were clearly "before" at least one agency-Defendant and seem to have directly, or at least indirectly *might* have, influenced its decision. But no such emails are in the Administrative Record.

(2) Similarly, the *Pohl* case has revealed that the "Administrative Record" that Defendants first produced in the *New York* case on August 30, 2013 is woefully inadequate. As of that date, Defendant HHS represented that the scope of responsive documents, under Mr. Pohl's original FOIA requests, included 7.6 million pages. Indeed, to-date, HHS has represented that it will need several months to complete its production of the heavily narrowed documents that Mr. Pohl was willing to accept, even though many of those documents are part of the whole record. For example, it is hard to imagine that formal and informal communications to and from HHS personnel regarding the

Mandate could not have influenced HHS' decision. All indications, including the positions taken here, are that the other Defendants in this case that are not parties to the *Pohl* case have done even less compiling to-date than HHS. The "whole record," that Defendants must provide the Court is, therefore, months—years if Defendants' representations in the *New York* case are to be believed, *see N.Y.* Doc. 60 at 2—from being produced and summary judgment is premature.

(3) On April 16, 2013, the plaintiffs in the *New York* case deposed HHS Designee Gary Cohen, the Director of the Center for Consumer Information and Insurance Oversight in the Centers for Medicare and Medicaid Services. He admitted that HHS was not taking steps to provide access to preventive care for women in exempted grandfathered plans, nor for women whose health plans were covered by the enforcement safe harbor. Cohen, Dep. Tr. at 41:7-21. Significantly for the compelling interest test, Cohen admitted that there was "no evidence" that employees of organizations like Plaintiffs "are more likely not to object to the use of contraceptives." *Id.* at 34:9-24.

This discovery is even more significant because these glimpses behind the curtain undermine Defendants' positions on several issues in these cases, including targeting, compelling interest, and narrow tailoring. For example, the admissions in the Cohen Deposition directly undermine Defendants' asserted compelling interest, including undermining the only difference Defendants have articulated between "exempt" and "accommodated" entities. *See* 78 Fed. Reg. at 39,874 (justifying the Final Rule on Defendants' "belie[f]" that the exempted houses of worship and integrated auxiliaries "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.").

It is irrelevant that other plaintiffs in other cases with other facts and other circumstances pursued a dispositive motion schedule without discovery. Much has been disclosed since those submissions, especially the IRS emails with the White House. In any event, the positions being taken by Plaintiffs in *Persico* and *Zubik* are not inconsistent with the positions taken by plaintiffs

in any other case where the undersigned's law firm is counsel. The plaintiff(s) in each case has argued that Defendants are not entitled to summary judgment. *New York*, Doc. 88; *Fort Worth*, Doc. 71. Additionally, the plaintiffs in all cases are seeking schedules that will allow the Court to render a decision on their motion for preliminary injunction by "early November 2013—to allow plaintiffs necessary lead time to prepare for implementation of their insurance plans prior to January 1, 2014." *See, e.g., N.Y.*, Doc. 66, at 2. Because the facts and circumstances in *Persico* and *Zubik* warrant discovery, summary judgment is premature. *Cf.* Fed. R. Civ. P. 56(d).

Third, Plaintiffs take the position that they need expedited relief on their pending Motions for Preliminary Injunctions, so they have time to plan for their employee health insurance plans, which go into effect on January 1, 2014. But there is no such urgency with regard to other dispositive motions. Neither the 6-step briefing schedule in the *New York* case, nor Defendants' proposed 4-step briefing schedule in the *Fort Worth* case would allow for a timely simultaneous decision on the preliminary injunction and dispositive motions. Instead, Defendants' plan will only delay the adjudication of Plaintiffs' rights or require briefing issues that are outside the preliminary injunction motions on an unnecessarily compressed schedule.

Plaintiffs believe that after the Court rules on their Motions for Preliminary Injunctions, the cases should proceed on regular discovery schedules, with Defendants filing Answers to the Complaints, the parties engaging in discovery, and then the parties filing any motions for summary judgment.

Plaintiffs therefore propose the following discovery schedule:

(1) Factual discovery begins after the Status Conference on October 24, 2013.

(2) Defendants' Answers due on December 16, 2013 (HHS and Secretary Sebelius received service of the Complaints in these cases on October 15, 2013).

(3) All documents produced by February 24, 2014.

(4) Factual discovery completed by March 26, 2014.

(5) No motions for summary judgment may be filed before April 15, 2014.

(6) Motions for summary judgment filed by April 30, 2014, in the form required by Local Rule 56.1 and by the Court's Chambers' Rules.

7. Alternative Dispute Resolution.

a. On October 9, 2013, these cases were designated for placement into the United States District Court's Alternative Dispute Resolution Program [*Persico*, ECF No. 16; *Zubik*, ECF No. 11].

b. The parties respectfully request that the Court exercise its discretion to exempt the parties from participation in the United States District Court's Alternative Dispute Resolution Program, because the First Amendment, Religious Freedom Restoration Act, and Administrative Procedure Act claims at issue in these lawsuits are unlikely to be resolved through the Alternative Dispute Resolution Program. Alternatively, the parties request that the Court delay the deadlines for the parties' participation in the Alternative Dispute Resolution Program until after Plaintiffs' Motions for Preliminary Injunctions are decided.

Dated: October 22, 2013

Respectfully submitted,

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