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 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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION TO CONVERT PRELIMINARY INJUNCTION INTO PERMANENT INJUNCTION

On November 21, 2013, the Court entered Preliminary Injunctions in these cases, based on a complete record that included 7 declarations, 172 paragraphs of joint stipulations, a day of witness testimony, 48 Plaintiffs' exhibits, and 16 Defendants' exhibits. The parties have conferred about the effect of that ruling, and the Government has indicated that it will not oppose converting the Preliminary Injunctions into Permanent Injunctions. To advance this Motion, Plaintiffs respectfully incorporate the legal arguments and evidence presented in support of their

motions for preliminary injunctions. *See* Doc. Nos. 4, 4-1 to 4-15, 6, 16, 23, 25, 29, 38, 43, 45, 52-57, 59-63, 65, 67, 68, 75, 76.[1]

Conversion is appropriate for several reasons. *First*, the factual and legal findings in the Court's November 21, 2013 Order and Memorandum Opinion resolve in Plaintiffs' favor all factual and legal issues with regard to Plaintiffs' RFRA claims. *See* Doc. Nos. 75, 76. That Order was issued after extensive briefing, joint stipulations and witness testimony, as well as the opportunity to submit all relevant documentary evidence. *Second*, the Government has represented that it will not present additional evidence or arguments and opposes any discovery in these cases. Therefore, a separate permanent injunction hearing will be duplicative and waste judicial resources.

I. BACKGROUND

The Court already concluded that "Plaintiffs have met their burden of proving all four criteria of the preliminary injunction test." Doc. No. 75 ("Slip op.") at 65. *First*, the Court held that Plaintiffs were likely to succeed on the merits of their claim that the Mandate violates RFRA. Specifically, the Court held that Plaintiffs satisfied their burden of showing "that the 'accommodation' in effect, causes these Plaintiffs to comply with the contraceptive mandate which violates their sincerely-held religious beliefs . . . and thus, places a substantial burden on Plaintiffs' ability to exercise their religion." Slip op. at 61. The Court reached that conclusion for several reasons, including the credibility of Plaintiffs' witnesses and the Government's concession that it did not (and had no basis to) challenge the sincerity and articulation of Plaintiffs' beliefs.

[1] Unless noted otherwise, citations to the record are to *Zubik v. Sebelius*, Case No. 2:13-cv-01459 (W.D. Pa.).

The Court also found that Defendants had "failed, factually and legally, to establish that its two stated governmental interests are" compelling, Slip op. at 58, because their interests were stated too broadly and were undermined by the religious employer exemption. *Id.* at 53-58. The Court also concluded that Defendants had not presented "any credible evidence" that the Mandate was the least restrictive means of achieving the stated interests. *Id.* at 60. The Court, thus, resolved all of the legal and factual issues relating to Plaintiffs' RFRA claims in Plaintiffs' favor.

Second, the Court held that Plaintiffs would suffer irreparable harm from the pressure to violate their religious beliefs, the ruinous fines and potential liens from enforcement of the Mandate, and the harm to the people Plaintiffs serve. Slip op. at 61-63. *Third*, the Court held there would be "no irreparable harm to the Government if the preliminary injunction is granted," as demonstrated by the many exemptions to the Mandate. *Id.* at 63-64. *Fourth*, the Court held entry of the injunctions "furthers the public interest" for several reasons, including to prevent severing the Church, to prevent restricting "Free Exercise of Religion" to "a Right to Worship only," and to prevent the ruinous fines from causing Plaintiffs to reduce their good works in the communities that need them. *Id.* at 64-65.

The Court reached these conclusions based on a fulsome record that included full briefing of the issues, 7 declarations (*Zubik*, Doc. Nos. 4-10 to 4-12; *Persico*, Doc. Nos. 9-8 to 9-11), and two rounds of joint stipulations totaling 172 paragraphs of joint stipulations (Doc. Nos. 43, 59). The Court also held an evidentiary hearing on November 12, 2013, providing the opportunity for both sides to present witness testimony. Plaintiffs presented the video deposition of Cardinal Timothy Dolan and live testimony from Bishop Zubik, Susan Rauscher, Bishop Persico, Father Scott Jabo, and Mary Maxwell. The Court also entered all 16 of the exhibits proffered by

Defendants and 48 of the 89 exhibits proffered by Plaintiffs. Doc. Nos. 55, 60; *see also* Text Order entered Nov. 14, 2013, 8:23 am. Finally, the Court held argument and allowed the parties to submit supplemental briefing after the argument. Doc. Nos. 56, 67, 68.

II. ARGUMENT

The Court should grant this Unopposed Motion to Convert Preliminary Injunction Into Permanent Injunction, based on the reasoning in its November 21, 2013 Memorandum Opinion and the fulsome record before it, for several reasons. The standard for a permanent injunction is the same as the standard for a preliminary injunction, except in the first prong, where the plaintiff must establish "actual success on the merits," not just a likelihood of success. Specifically, the court determines whether:

1. "the moving party has shown actual success on the merits;"
2. "the moving party will be irreparably injured by the denial of injunctive relief;"
3. "the granting of the permanent injunction will result in even greater harm to the defendant; and
4. "the injunction would be in the public interest."

Shields v. Zuccarini, 254 F.3d 476, 482 (3d Cir. 2001). Because, as discussed above, the second, third and fourth elements of a permanent injunction have already been satisfied, Slip op. at 61-65, only the first—"actual success on the merits"—could be at issue in a permanent injunction hearing here. *See Roman Catholic Archdiocese of N.Y. v. Sebelius*, __ F.Supp.2d ____, 2013 WL 6579764, at *19 (E.D.N.Y. Dec. 16, 2013) (entering a permanent injunction in favor of Catholic organizations affiliated with their local Archdiocese and Diocese, because "there is no genuine issue of material fact as to whether the Mandate substantially burdens their religious exercise, and the Government has failed to show that the Mandate is the least restrictive means of advancing a compelling governmental interest").

First, Plaintiffs have established that the Mandate violates RFRA and that they, therefore, actually succeed on the merits. As the Court has held, Plaintiffs have established—and the Government has conceded—that they sincerely believe signing the self-certification form and participating in the accommodation process will violate their religious beliefs. *E.g.,* Slip op. at 61. The parties have also stipulated to the substantial fines, even if they cannot be calculated with absolute precision at the moment. *See* Doc. No. 43 ¶¶ 50-51 (stipulating to "four mechanisms to enforce the challenged regulations," including $100 per day per affected beneficiary if the group health plans of "[c]ertain employers . . . fail to provide certain required coverage"); Doc. No. 59 ¶¶ 13-14 (stipulating to the $100 per day per affected beneficiary penalty "[r]egarding the fine for providing coverage without the objectionable preventive services" but that "[i]t is not possible to determine the exact amount of tax Plaintiffs could be assessed under this penalty"). Plaintiffs have thus met their burden of establishing a substantial burden on their religious exercise. In contrast, the Government "has failed, factually and legally," to justify the Mandate with any compelling interest. Slip op. at 58. Similarly, the Government has "failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing" its stated interests. *Id.* at 60. "The court is not required to hold a separate evidentiary hearing on a motion to convert when no triable issues of fact exist." *United States v. Bell*, Case No. 01-2159, 2004 WL 389442, at *1 (M.D. Pa. Jan. 29, 2004), *aff'd* 414 F.3d 474 (3d Cir. 2005) (citing *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983)).

Second, the Government has no additional evidence, does not challenge Plaintiffs' evidence, and does not oppose the motion. The Government has expressly represented to Plaintiffs that it does not intend to present any additional evidence in these cases.[2] Indeed, the

[2] At oral argument on November 13, 2013, in response to questioning from the Court, Defendants pointed to one paragraph of evidence to support their "least restrictive means"

Government has consistently opposed discovery in these cases. *E.g.,* Doc. No. 16 (Joint Status Report) at 3-4, 9; Doc. No. 47 (Rule 26(f) Report) ¶¶ 7-9. Consistent with its position throughout these cases, the Government has also represented that it does not intend to challenge the articulation or sincerity of Plaintiffs' religious beliefs. *See, e.g.*, Nov. 13, 2013 Arg. Tr. at 55:1-4 (Government representing that "[w]e don't question that the Plaintiffs sincerely believe everything to which they testified yesterday, and, yes, that includes the facilitation of evil."). Under these circumstances, it is proper for a court to grant a motion to convert. *See, e.g., Bell*, 2004 WL 389442, at *1 (granting opposed motion to convert: "[i]t appearing that the parties have no additional evidence to present, the court hereby reaffirms the findings of fact and conclusions of law set forth in the preliminary injunction opinion and order."); *see also U. of Cincinnati Chapter of Young Ams. For Liberty v. Williams*, No. 12-155 (S.D. Ohio Aug. 22, 2012) Doc. No. 87 (granting the unopposed motion to convert the preliminary injunction to a permanent injunction).

Because of the Government's position, conversion is also in the interest of judicial economy. Any future permanent injunction briefing and hearing would be duplicative of the preliminary injunction briefing and hearing that were already conducted. Additionally, conversion would obviate the need (1) for briefing on the completeness of the Administrative Record submitted by the Government to the Court's Chambers on November 5, 2013 (only

(continued…)
argument that alternatives to the Mandate were considered:

> Court: It uses the expression on Page 39,888, quote, all of these proposals were considered, close quote. Now, where is the documentation as to that consideration?
>
> Mr. Humphreys: **Well, this is the documentation, Your Honor.** I mean, the policy makers in considering the comments submitted in response to the requests for notice and comment conducted that analysis.

Nov. 13, 2013 Arg. Tr. at 58:25-59:7 (emphasis added).

excerpts of which were introduced into evidence), (2) for discovery, and (3) for briefing on Plaintiffs' remaining claims, all of which would be appropriate, even if the preliminary injunctions were appealed. *See, e.g., Contour Design Inc. v. Chance Mold Steel Co.*, 649 F.3d 31, 34 (1st Cir. 2011). Moreover, even during the pendency of such an appeal, the preliminary injunction could be converted to a permanent injunction, *Ry. Labor Executives' Ass'n v. City of Galveston*, 898 F.2d 481 (5th Cir. 1990) (affirming conversion of such an appealed preliminary injunction to a permanent injunction), which could moot the appeal of the preliminary injunction. *See, e.g., Grupo Mexicano de Desarrolo, S.A. v. Alliance Band Fund, Inc.*, 527 U.S. 308, 314 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction because the former merges into the latter."); *see also Brennan v. William Patterson College*, 492 F. App'x 258, 263-64 (3d Cir. 2012) (dismissing appeal of preliminary injunction as moot after entry of permanent injunction). Denying this motion could, thus, result in a substantial waste of judicial resources.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to Convert Preliminary Injunction Into Permanent Injunction and to enter a final order.

Dated: December 20, 2013

Respectfully submitted,

/s/ Paul M. Pohl
Paul M. Pohl (PA ID No. 21625)
John D. Goetz (PA ID No. 47759)
Leon F. DeJulius, Jr. (PA ID No. 90383)
Ira M. Karoll (PA ID No. 310762)
Alison M. Kilmartin (PA ID No. 306422)
Mary Pat Stahler (PA ID No. 309772)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh PA 15219-2514
Phone: (412) 391-3939
Fax: (412) 394-7959

Attorneys for Plaintiffs