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

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Defendants respectfully submit this supplemental brief to address arguments raised at the November 13, 2013 oral argument on plaintiffs' motion for a preliminary injunction and in response to plaintiffs' reply brief. Specifically, defendants address plaintiffs' arguments with respect to what constitutes a "substantial burden" under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, and plaintiffs' arguments with respect to the scope of the religious employer exemption. In short, plaintiffs misstate the proper inquiry that RFRA requires. Because the regulations impose nothing more than a *de minimis* burden, if any, on plaintiffs' religious exercise—requiring them to do no more than what they do or have done already (*i.e.*, to inform their TPA of their religious objection to providing coverage for contraceptive services)—plaintiffs' RFRA claim fails. Additionally, plaintiffs' claim that the religious employer exemption violates the Establishment Clause has no basis in the law.[1]

ARGUMENT

I. PLAINTIFFS CANNOT SHOW THE NECESSARY "SUBSTANTIAL BURDEN" ON THEIR RELIGIOUS EXERCISE

As defendants have explained, in determining whether a law imposes a substantial burden on a plaintiff's religious exercise under RFRA, courts must determine (1) whether the plaintiff's religious objection to the challenged law is sincere, (2) whether the law applies significant pressure to comply, and (3) whether the challenged regulations actually require plaintiffs to modify their behavior in a significant—or more than *de minimis*—way. *See* Defs.' Opp'n at 16. Although plaintiffs describe the RFRA substantial burden inquiry as if it involves only the first two prongs of the test described above, *see* Pls.' Reply in Supp. of Mot. for Prelim. Inj. ("Pls.' Reply") at 3, ECF No. 34, they agree that, for a law to impose a substantial burden on plaintiffs,

[1] Although defendants do not respond to plaintiffs' arguments on strict scrutiny, the Free Exercise Clause, or the Free Speech Clause here because of space constraints, plaintiffs are unlikely to succeed on the merits of those claims as well for the reasons explained in defendants' opposition to plaintiffs' motion for a preliminary injunction. *See generally* Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Pre. Inj. ("Defs.' Opp'n"), ECF No. 28. Following plaintiffs' convention, for ease of reference, all docket citations are to filings from *Persico v. Sebelius*, unless otherwise noted.

it must "compel[them] to act," *id.* at 8. According to plaintiffs, that requirement is satisfied in this case for two alternative reasons. First, they contend that the challenged regulations *do* require them to substantially modify their religious behavior. *See id.* at 4-5. And second, they argue that, even if the regulations require only *de minimis* action on their part, this is sufficient to impose a substantial burden under RFRA. *See id.* at 8. Plaintiffs are wrong on both counts.

First, the regulations do not require plaintiffs to modify their religious behavior. The dioceses are entirely exempt from the contraceptive coverage requirement. And the remaining plaintiffs (the "non-diocese plaintiffs"), as eligible organizations, are not required to contract, arrange, pay, or refer for such coverage. To the contrary, these plaintiffs are free to continue to refuse to do so, to voice their disapproval of contraceptive use, and to encourage their employees to refrain from using contraceptive services. The non-diocese plaintiffs need only fulfill the self-certification and provide a copy to their TPA. Plaintiffs need not provide payments for contraceptive services for their employees. Instead, a third party—plaintiffs' TPA—provides separate payments for contraceptive services on behalf of the non-diocese plaintiffs' employees, at no cost to plaintiffs. In short, with respect to contraceptive coverage, plaintiffs need do what they did prior to the promulgation of the challenged regulations—that is, to convey to their TPA that they do not wish to provide contraceptive coverage in order to ensure that they are not contracting, arranging, paying, or referring for such coverage. Thus, the regulations do not require plaintiffs "to modify [their] religious behavior in any way." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). The Court's inquiry should end here. A law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiffs] engage[]." *Id.*; *see also Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (holding, in the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), that a substantial burden "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

Plaintiffs argue that the regulations do in fact require them to take certain actions, such as "provid[ing] the TPA with the names of employees of the non-exempt entities eligible to receive Preventive Services" and "sponsor[ing a] plan whose insurance cards will be used to obtain Preventive Services." Pls.' Reply at 4. These activities are either not attributable to the regulations, or not required at all. Plaintiffs already provide their TPA with the names of their employees. They also already sponsor a group health plan, and nothing in the regulations requires that plaintiffs' employees' existing insurance cards be used to obtain payment for services to which plaintiffs' object. *See* 78 Fed. Reg. 39,870, 39,879-80 (July 2, 2013).

Nor does the self-certification requirement itself impose a substantial burden. The non-diocese plaintiffs need *only* self-certify that they are non-profit religious organizations with a religious objection to providing contraceptive coverage and to share that self-certification with their TPA. Thus, plaintiffs are required to convey to their TPA that they do not intend to cover or pay for contraceptive services, which they have already done even absent these regulations in order to ensure that they are not contracting, arranging, or paying for contraceptive coverage. The sole difference in the communication is that they must inform their TPA that their intention not to cover contraceptive services is due to their religious objections—a statement which they have already made repeatedly in this litigation and elsewhere. Any burden imposed by this purely administrative self-certification requirement is, at most, *de minimis*, a matter of form, not substance. *See* Defs.' Opp'n at 10-14; *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007); *Kaemmerling*, 553 F.3d at 678 ("An inconsequential or *de minimis* burden on religious practice does not rise to this level [of a substantial burden]."); *Washington v. Klem*, 497 F.3d 272, 279-81 (3d Cir. 2007); *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004); *Civil Liberties for Urban Believers*, 342 F.3d at 761; *see also Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303-04 (1985) (noting that law would "work little or no change in [the plaintiffs'] situation").

Ultimately, plaintiffs' complaint is that their informing their TPA of their intention not to provide contraceptive coverage to their employees no longer has the effect of preventing their

employees from receiving such coverage. Prior to the adoption of the challenged regulations, plaintiffs' refusal to provide contraceptive coverage to their employees effectively meant that those employees went without it. In effect, plaintiffs had a veto over the health coverage that their employees received. Now, the same statement of objection by plaintiffs no longer deprives plaintiffs' employees of the provision of and payment for such services by someone else. In other words, plaintiffs' religious objection to offering and funding contraceptive coverage remains effective as to them, but their employees will receive such coverage from another source. But contrary to plaintiffs' argument, the fact that their employees will now receive contraceptive coverage does not mean that plaintiffs are put in the position of "offer[ing] their tacit permission," Pls.' Reply at 8, or in any other way condoning, the provision of such coverage to their employees. Plaintiffs' employees will receive coverage for contraceptive services from another source *despite* plaintiffs' religious objections, not *because* of those objections.

To put it another way, plaintiffs seem to object to the fact that, while the regulations do not require them to substantially change their behavior, the *consequences* of their behavior have changed because their employees will now receive contraceptive coverage from a third party. But this objection only serves to illustrate the problem with plaintiffs' argument. Plaintiffs have not alleged that they have any inherent religious objection to the self-certification requirement—their objection stems entirely from the actions of *other* parties once plaintiffs satisfy the self-certification requirement.[2]

Instead, not only do plaintiffs want to be free from contracting, arranging, paying, or referring for contraceptive coverage for their employees—which, under these regulations, they are—but plaintiffs also want to prevent *anyone else* from providing such coverage to their

[2] The nature of plaintiffs' objection distinguishes this case from the other examples offered by plaintiffs. *See* Pls.' Reply at 9. For example, a law that forced an Orthodox Jew "to flip a light switch on the Sabbath," *id.*, or required a Quaker "to swear, rather than affirm, the veracity of his testimony," *id.*, would likely impose a substantial burden on religious exercise because it would require the religious adherent to perform an activity that he or she finds inherently objectionable. Similarly, in *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), the plaintiff had an inherent objection to the direct production of armaments, as opposed to the production of material that would eventually be used to fabricate armaments. *See id.* at 710-11.

employees, who might not subscribe to plaintiffs' religious beliefs. They thus want to project their personal religious exercise onto third parties to dictate the third parties' conduct. That this is the *de facto* impact of plaintiffs' stated objections is made clear by their assertion that RFRA is violated whenever they are the "but-for cause of the objectionable coverage." Am. Compl. ¶ 104. This theory would mean, for example, that even if the government could realistically pay for contraceptive coverage to plaintiffs' employees directly (which it cannot), such benefits would be impermissible because they would be "trigger[ed]," *id.*, by plaintiffs' refusal to provide such coverage themselves. In fact, under plaintiffs' theory, the government would be unable to provide any benefit to employees of an entity with religious objections to that benefit if eligibility for the benefit were linked to the employer's objection to providing benefits otherwise required. That theory would leave the employees with only those benefits to which their employers do not to object. But RFRA is a shield, not a sword, *see O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1158-60 (E.D. Mo. 2012), *appeal pending*, No. 12-3357 (8th Cir.), and it does not give religious objectors both the right to a religious accommodation *and* the right to demand that no one else fill in any gaps left by that accommodation. The government remains able to provide alternative means of achieving important statutory objectives once it has provided such a religious accommodation. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

Plaintiffs' alternative argument is similarly flawed. In short, plaintiffs contend that, even if the regulations require only a *de minimis* change in behavior on their part, this would be sufficient for purposes of the RFRA substantial burden inquiry. *See* Pls.' Reply at 5. In plaintiffs' view, "what matters for purposes of RFRA is that plaintiffs sincerely believe that these actions violate their religious beliefs." *Id.* at 8. Thus, according to plaintiffs, the Court's inquiry is limited to the magnitude of the penalty imposed by the challenged regulations—if this penalty is "substantial," then so is the burden. *See id.* at 11.

This is not how RFRA works. In determining whether an alleged burden is substantial, courts look not only to the magnitude of the penalty imposed, but to the character of the actions required by the challenged law and the magnitude of the burden imposed by the requirements themselves. *See, e.g.*, *Living Water Church of God*, 258 F. App'x at 734-36; *Kaemmerling*, 553 F.3d at 678; *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007); *Klem*, 497 F.3d at 279-81; *McEachin*, 357 F.3d at 203 n.6; *Civil Liberties for Urban Believers*, 342 F.3d at 761; *Alamo Found.*, 471 U.S. at 303-04. It is telling that plaintiffs repeatedly attempt to re-label the "substantial burden" test as the "substantial pressure" test. *See, e.g.*, Pls.' Reply at 3, 6, 7. If plaintiffs' were correct that the only relevant question under RFRA is whether the challenged law imposes substantial pressure on the religious adherent, then one would expect court opinions in RFRA cases to focus primarily on the magnitude of the penalty imposed by the law. But they do not. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the plaintiffs were fined $5 for failure to comply with Wisconsin's compulsory school-attendance law. *See id.* at 207-08. Although the Court noted that this fine was a criminal sanction, it spent virtually no time on the question of whether the magnitude of the penalty was sufficient to amount to a substantial burden, *see id.* at 218—the only relevant question in plaintiffs' view. Instead, the Court focused on the character of the burden imposed by the challenged law. *See id. Yoder* and other cases make clear that, under RFRA, plaintiffs must show not only that the challenged regulations exert substantial *pressure—i.e.* a penalty of sufficient magnitude—but also that the *burden* imposed on plaintiffs' religious exercise is more than *de minimis*.

Under plaintiffs' alternative theory, the mere fact that plaintiffs claim that they sincerely believe that the challenged regulations violate their religious beliefs would be sufficient to amount to a substantial burden on their religious exercise under RFRA. Courts would play virtually no role in determining whether an alleged burden is "substantial"—as long as a plaintiff's religious belief is sincere, that would be the end of the inquiry. Courts have rejected such a hollow interpretation of the substantial burden standard. *See Conestoga Wood Specialties*

Corp. v. Sebelius, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013) ("[W]e reject the notion . . . that a plaintiff shows a burden to be substantial simply by claiming that it is."), *aff'd*, 724 F.3d 377 (3d Cir. 2013); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden—no matter how sincerely felt—really amounts to a substantial burden on a person's exercise of religion."), *aff'd*, 730 F.3d 618 (6th Cir. 2013). "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Conestoga*, 917 F. Supp. 2d at 413-14; *see also Autocam*, 2012 WL 6845677, at *7.

Contrary to plaintiffs' suggestions, the inquiry that the government asks this Court to undertake is not a theological one. The Court need not doubt the sincerity or centrality of plaintiffs' religious beliefs, parse the content of plaintiffs' beliefs, or make a "value judgment" about those beliefs. Instead, the Court must examine the alleged burden imposed by the challenged regulations *as a legal matter* outside the context of plaintiffs' religious beliefs (which need not be, and are not in this case, disputed)—that is, from the perspective of an objective observer. *See, e.g.*, *Roy*, 476 U.S. at 701 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct. . . . It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference."); *Yoder*, 406 U.S. at 218 ("Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a *subjective* point of view. It carries with it precisely the kind of *objective* danger to the free exercise of religion that the First Amendment was designed to prevent." (emphasis added)). Under RFRA, plaintiffs are entitled to their sincere religious beliefs, but they are not entitled to decide as a matter of law what does and does not impose a substantial burden on such beliefs. Although "[c]ourts are not

arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 917 F. Supp. 2d at 413.

II. THE RELIGIOUS EMPLOYER EXEMPTION IS ENTIRELY LAWFUL

In their reply brief and at the hearing and argument on their motion, plaintiffs have argued that the challenged regulations' definition of "religious employer" runs afoul of the Establishment Clause. Plaintiffs are incorrect.

Plaintiffs attempt to re-write Establishment Clause jurisprudence by arguing that the Clause prohibits the government from making not only denominational preferences but also any distinctions among "types of institution[s]" based on their structure and purpose. Pls.' Reply at 26. This is simply not the law. The Establishment Clause prohibits laws that "officially prefer[]" "one religious *denomination*" over another, *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added); it does not prohibit the government from distinguishing between different types of organizations—based on an organization's structure and purpose—when the government is attempting to accommodate religion. *See* Defs.' Opp'n at 36-37; *see also Liberty Univ., Inc. v. Lew*, 2013 WL 3470532, at *17-18 (4th Cir. July 11, 2013) (upholding another religious exemption contained in the ACA against an Establishment Clause challenge because the exemption "makes no explicit and deliberate distinctions between sects" (quotation omitted)); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (concluding exemption did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Grote v. Sebelius*, 914 F. Supp. 2d 943, 954 (S.D. Ind. 2012) ("[T]he Establishment Clause does not prohibit the government from [differentiating between organizations based on their structure and purpose] when granting religious accommodations as long as the distinction[s] drawn by the regulations . . . [are] not based on religious affiliation."), *overruled on other grounds*, *Korte v. Sebelius*, __ F.3d __, 2013 WL 5960692 (7th Cir. 2013); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) ("[T]his kind of distinction—not between denominations, but between

religious organizations based on the nature of their activities—is not what *Larson* condemns."). Indeed, the problem in *Larson*, on which plaintiffs rely, was not that the challenged statute distinguished between types of organizations based on their structure and purpose, but rather that it "was drafted with the explicit intention of including particular religious *denominations* and excluding others." *Larson*, 456 U.S. at 254 (emphasis added). The same is not true here. The religious employer exemption is available on equal terms to employers of all denominations.

Plaintiffs' effort to recast the religious employer exemption as distinguishing between "religious denominations that primarily rely on traditional categories of 'houses of worship'" and denominations "like plaintiffs" that "express their faith by operating health care facilities and schools," Pls.' Reply at 26, is baseless. Plaintiffs are all Catholic entities. Therefore, the fact that some plaintiffs are exempt while others are accommodated does not amount to discrimination among *denominations*.

Every court to have considered an Establishment Clause challenge to the prior version of the regulations—which also included a requirement that the organization be an organization as described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended—has rejected it. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1162 (upholding prior version of religious employer exemption because it did "not differentiate between religions, but applie[d] equally to all denominations"); *Conestoga*, 917 F. Supp. 2d at 416-17 (same); *Grote*, 914 F. Supp. 2d at 954 (same). This court should do the same.

Plaintiffs' challenge to the religious employer exemption on the basis of excessive entanglement claim also fails. Defendants' opposition brief explained that this claim is not ripe because it challenges non-binding Internal Revenue Service guidance that has not been—and likely never will be—applied by the government to plaintiffs. *See* Defs.' Opp'n at 38-39. Plaintiffs make no effort to respond to this argument in their reply.

Moreover, even if the Court were to determine that this claim were ripe notwithstanding plaintiffs' concession, the claim lacks merit. As defendants pointed out in their opposition brief, the Supreme Court has upheld laws that require considerably more intrusive government

monitoring than any limited inquiry that may be required to enforce the religious employer exemption. *See* Defs.' Opp'n at 39-40 (citing cases). Plaintiffs ignore this authority and instead resort to their oft repeated, but never supported, refrain that the exemption will require "intrusive" inquiries. Pls.' Reply at 27. But plaintiff's speculation about future government inquiries is unripe, *see* Defs.' Opp'n at 38-39, and their claim that such speculative future inquiries will be excessive in violation of the Establishment Clause is contrary to Supreme Court authority, *see id*. at 40.[3]

Finally, plaintiffs claim that, by requiring them to facilitate practices in violation of their religious beliefs, the regulations interfere with plaintiffs' "internal church governance" in violation of the Religion Clauses. *See* Pls.' Reply at 27-28. But, as defendants explained in their opposition to plaintiffs' motion, *see* Defs.' Opp'n at 40-41, that is merely a restatement of plaintiffs' substantial burden theory, which fails for reasons explained already. Nor, as plaintiffs appear to suggest, is this case about any law that regulates the structure of the Catholic Church; plaintiffs may choose whatever organizational structure they wish.[4]

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in defendants' opposition and at oral argument, the Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 15th day of November, 2013,

[3] The manner in which the law at issue in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), was administered required the government to make intrusive inquiries into a school's religious beliefs and practices by, for example, reading syllabi to determine if the theology courses offered by the school were likely to convince students of religious truths. *Id.* at 1261-62. The religious employer exemption requires no such inquiry. Qualification for the exemption does not require the government to make any determination, much less an unconstitutionally intrusive one. *See* Defs.' Opp'n at 37 n.19.

[4] For this reason, plaintiffs' reliance on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), is misplaced. *Kedroff* involved a state law that expressly sought to transfer control of St. Nicholas Cathedral from one church authority to another, when use and occupancy of the Cathedral depended upon the church's "choice of its hierarchy," a purely ecclesiastical issue. 344 U.S. at 119. Unlike *Kedroff*, this case does not involve any regulation of church property or purely ecclesiastical issues.

STUART F. DELERY
Assistant Attorney General

DAVID J. HICKTON
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS (VA Bar No. 83212)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7219
Washington, D.C. 20530
Tel: (202) 514-3367
Fax: (202) 616-8470
Email: bradley.p.humphreys@usdoj.gov

Attorneys for Defendants