UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

THE AVE MARIA FOUNDATION; AVE MARIA COMMUNICATIONS (a/k/a "Ave Maria Radio"); DOMINO'S FARMS PETTING FARM; RHODORA J. DONAHUE ACADEMY, INC.; and THOMAS MORE LAW CENTER, Plaintiffs, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No. 2:13-cv-15198 Judge Stephen J. Murphy, III Magistrate Judge Mark A. Randon

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

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ARGUMENT

Defendants' brief exhibits great intolerance for Plaintiffs' less politically popular sincerely held religious beliefs.[1] Defendants purport to know Plaintiffs' religious beliefs better than Plaintiffs do, but simply asserting, without support, that the Mandate is "too attenuated" and imposes only "de minimis" burdens upon Plaintiffs does not make it so. Defendants do not have a better understanding of Plaintiffs' religious views and the substantial burdens Defendants are causing than Plaintiffs. Forwarding this argument only highlights Defendants' clear intolerance for Plaintiffs' religious views. Plaintiffs, as exhibited in the declarations attached to their original motion, know their religious beliefs and Defendants do not challenge the sincerity of Plaintiffs' beliefs—Defendants, however, disagree with these beliefs, essentially arguing that Plaintiffs "take one for the team" and violate their religious beliefs to help further Defendants' interests. Defendants ignore that the Mandate forces Plaintiffs to formally cooperate with evil and commit grave sin. The Mandate forces Plaintiffs to violate Catholic religious doctrine, the very

[1] *See Beckwith v. Sebelius*, Case No. 8:13-cv-648, slip op. at *5 (Dkt. 39) (M.D. Fla. June 25, 2013) ("Religious tolerance serves as an important foundational tenet in the governance of any society. A commonly misunderstood term, to 'tolerate' does not mean with which to agree; it does not mean to understand; and it most certainly does not mean to adopt a belief as one's own. By definition, to tolerate means 'to respect (others' beliefs, practices, etc.) without sharing them. . . . This case tests whether the challenged federal laws are 'true to the spirit of practical accommodation that has made the United States a nation of unparalleled pluralism and religious tolerance.'") (internal citations omitted). Since Defendants call for Plaintiff to violate a tenet of their faith by knowingly providing insurance which will unquestionably have the effect of providing contraceptives, abortifacients, and sterilization to their employees, Defendants have failed to accommodate Plaintiff's sincerely held religious beliefs.

doctrine upon which Plaintiffs were founded. Without protection from the court, Plaintiffs will be required to facilitate access to contraception, sterilization and abortifacients through providing their employee health benefits plan—in direct contravention of Plaintiffs' religious beliefs, resulting in irreparable harm.

I. RFRA DEMANDS INJUNCTIVE RELIEF

Congress did not decide that contraception, sterilization, and abortifacients would be mandatorily included in all employee health benefits plans—Defendants did. 42 U.S.C § 300gg-13(a)(4) (Defendants determining that all FDA approved contraception, sterilization, and abortifacients would be mandatory). Congress left up to Defendants the ability to determine what would constitute "preventive care." In doing so, Congress did not exclude the Patient Protection and Affordable Care Act and the implementation of the women's preventive health service requirement from RFRA. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter."). Defendants promulgated interim final regulations that authorized an exemption, but only to "certain religious employers from the Guidelines where contraceptive services are concerned." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

Instead of following RFRA's controlling statutory command that "[g]overnment shall not substantially burden a person's exercise of religion," 42

U.S.C. § 2000bb-1(a), Defendants' "religious employer" exemption addressed only "the unique relationship between a house of worship and its employees in ministerial positions." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). And rather than formulate this exemption from the federal contraceptives mandate in accordance with federal law (i.e. RFRA), Defendants sought to "be consistent with the policies of States that require contraceptive services coverage." *Id.* This focus was particularly inapt for determining the scope of a religious exemption given that RFRA is inapplicable against States and local governments under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

During the comment period, Defendants received 200,000 comments on the scope of the religious employer exemption, including comments about RFRA. On January 20, 2012, however, Secretary Sebelius announced that Defendants would not expand the exemption. And in February 2012, Defendants issued regulations that "finalized, without change," the interim final regulations issued in August 2011. Final Rule 77 Fed. Reg. 8725, 8725 (Fed. 15, 2012).

At the same time Defendants finalized their narrow religious employer exemption, Defendants also stated their intention to develop an "accommodation" for "non-exempt" non-profit employers and to provide a temporary enforcement safe harbor. *Id.* Defendants then asserted, without explanation, analysis, or

justification, that "this approach complies with [RFRA], which generally requires a federal law to not substantially burden religious exercise." *Id.* at 8729.

Defendants reopened their rulemaking process for religious non-profits, such as Plaintiffs and other faith groups, in an effort to ostensibly reassess why Defendants were forcing faithful, religious groups to violate the very faith for which they formed. Defendants proposed an "accommodation," which has now been enacted as their Final Rule. The United Conference of Catholic Bishops and thousands of other faithful individuals commented during rulemaking that this Final Rule did not alleviate Plaintiffs' faith objections. Defendants ignored these comments and persisted with their political goals. It should be no surprise that this Final Rule and Mandate has fueled outrage and lawsuits. (http://www.becketfund.org/hhsinformationcentral/, last visited Dec. 30, 2013).

By failing to follow RFRA when considering the scope of religion-based exemptions from the Mandate, Defendants guaranteed that partisan political considerations would take the place of reasoned legal consideration. This is exactly what the original proponents of RFRA worried would happen under the *Smith* approach that RFRA reversed. *See Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. On Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797) ("Religion will be subject to the standard interest-group

politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading."). Therefore, Congress walled off religious freedom from the "vicissitudes of political controversy." *West Virgina State Bd. of Educ. V. Barnette*, 319 U.S. 624, 638 (1943). RFRA accomplished this "by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions." *Religious Freedom Restoration Act of 1991: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas). Pursuant to RFRA, Defendants must demonstrate that their application of a substantial burden on Plaintiffs' religious freedom complies with a compelling government interest and uses the least restrictive means. 42 U.S.C. § 2000bb-1(b); 42 U.S.C. § 2000bb-2(3). The Mandate fails to comply with RFRA; it fails strict scrutiny.

a. Plaintiffs' Faith is Substantially Burdened by the Mandate.

Defendants in their struggle to understand Plaintiffs' religiosity and analyze how the Mandate imposes a substantial burden on Plaintiffs' religious freedom skips the important first step of this analysis: to define the fundamental tenet or belief. Plaintiffs' faith disallows facilitating access to or knowingly being involved

in providing contraception, sterilization and abortifacients. Such a violation of conscience is not new territory for the courts.

In *Thomas v. Review Board*, the Supreme Court analyzed a claim of a Jevovah's witness who worked in a roll foundry. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 404U.S. 707, 709 (1981). Thomas was transferred into a division which produced tank turrets, the domelike structure which would eventually be affixed to the top of a tank's hull. *Id.* Thomas "claimed his religious beliefs prevented him from participating in the production of war materials." *Id.* The tank turrets, while not a war material in and of themselves, could eventually be used as a part of a tank that could be used by others as war materials. *Id.* at 709-11. When Thomas realized his work was "weapons related," Thomas requested a transfer into a different department, which was unavailable, so Thomas quit his job to avoid a violation of his conscience. *Id.* at 710. Thomas testified that he was "daily faced with the knowledge these are tanks" even though his work merely involved hammering the turrets. *Id.* at 714. The State of Indiana denied Thomas unemployment benefits concluding "that denying Thomas benefits would create only an indirect burden on his free exercise rights and that the burden was justified." *Id.* at 713. However, the Supreme Court reversed that decision, holding a "'religious' belief or practice . . . is not to turn upon a judicial perception . . . religious beliefs need not be acceptable, logical, consistent, or comprehensible

to others in order to merit *First Amendment* protection." *Id.* at 714 (emphasis in original).

Similar to how Thomas could not work on a turret with the knowledge it would be used as a weapon without violating the principles of his religion, Plaintiffs cannot provide insurance that will result in the obtainment of sterilization procedures, chemical abortions, and contraception. *Id.* at 710. Although Defendants claim to have attenuated Plaintiffs' concern, Plaintiffs' conscience and religious beliefs do not support that claim. Instead, Plaintiffs are "daily faced with the knowledge" that if they provide the required insurance, that insurance will mandatorily include sterilization, contraception, and abortifacients. This coverage is triggered by Plaintiffs' employee health benefits coverage and lasts only as long as Plaintiffs provide their health benefits plan through the agent(s) Plaintiffs hire to administer their insurance plan. Plaintiffs' only options are to 1) quit providing insurance to their employees or 2) violate the tenets of their Catholic faith.

Defendants rely on the non-binding case of *Conestoga Woods v. Sebelius*, 917 F. Supp. 2d 394, 414 (E.D. Pa. 2013), which took the radical position that the Mandate's burden was too attenuated to be substantial. Defendants' reliance is misplaced. First, the Third Circuit on appeal failed to uphold the substantial burden analysis cited by Defendants. The only substantial burden analysis in the Third Circuit's 2-1 panel decision was addressed by the dissent who retorted,

"[t]he District Court here failed to appreciate the applicability of" *Yoder* and *Sherbert*." *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 724 F.3d 377, 409 (3d Cir. 2013) (Jordan, J.) (dissenting) (cert. pending). Second, the Third Circuit's analysis, much like the Sixth Circuit's analysis in *Autocam*, limited its scope to whether "a for-profit corporation can engage in religious exercise," and both holdings are unavailing to the present case. *Id.* at 388; *Autocam v. Sebelius*, No. 12-cv-2673, slip op. *13 (6th Cir. Sept. 17, 2013).[2]

Cases cited by Defendants, such as *Living Water Church of God v. Charter Township of Meridian*, 258 Fed. Appx. 729 (6th Cir. 2007), actually support that the Mandate substantially burdens Plaintiffs' free exercise of religion. In *Living Water*, the court quoted the definition of substantial burden from *Thomas*, and clarified that "courts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs." *Living Water*, 248 Fed. Appx. at 734-35. Unlike the facts in *Living Water,* the Mandate does not only Plaintiffs' religious beliefs "merely more

[2] Defendants do not explain why for litigation purposes it divides plaintiffs into two groups 1) for-profit companies which have no rights under RFRA and 2) non-profit companies which categorically have full rights under RFRA, then in its rule-making creates a divide amongst non-profit companies: exempt and non-exempt but "accommodated." If non-profit companies all share the same amount of religious freedom under RFRA, then the strength of these claims and exemptions provided should be equal. Especially in light of defendants not providing any evidence or legal basis under RFRA for distinguishing between the non-profits who receive exemptions and other religious non-profits, like Plaintiffs, who are not exempt from the Mandate.

difficult or more expensive;" it requires action that is "inherently inconsistent" with Catholic doctrine. The Mandate drives Plaintiffs out of the employee health benefits market entirely *or* forces Plaintiffs to violate the tenets of their Catholic faith to remain in the employee health benefits market. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Thomas*, 450 U.S. at 716-17.

Lastly, Defendants try to distinguish the instant case from *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013). However, Defendants make no argument for how the two cases are actually distinguishable—relying only on the argument that *Legatus* was decided incorrectly. *Legatus* was not wrongly decided—and neither were the several cases nationally which have also granted injunctive relief from the "accommodation." *See, e.g., Reaching Souls International Inc. v. Sebelius*, No. 5:13-cv-1092, slip op. (W.D. Okla. Dec. 20, 2013); *The Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 U.S. Dist. LEXIS 176432 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius,* No. 13-cv-1459, 2013 U.S. Dist. LEXIS 165922 (W.D. Penn, Nov. 21, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-207, slip op. (W.D. Pa. Dec. 23, 2013); *South Nazarene University v. Sebelius*, No. 5:13-cv-1015, slip op. (W.D. Okla. Dec. 23, 2013); *East Texas Baptist University v. Sebelius*, No. 4:12-cv-3009, slip op. (S.D. Tex. Dec. 27, 2013); *Grace Schools v. Sebelius*, No. 3:12-cv-459, slip op. (N.D. Ind. Dec. 27, 2013).

b. Defendants Have Not Evidenced a Compelling Interest

The Supreme Court described a compelling state interest as a "high degree of necessity," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011), noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *See id.* at 2738 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980).

Defendants proffer two compelling governmental interests for the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8279. Defendants' invocation of the promotion of health and gender equality as compelling interests, without more, is insufficient to meet the demands of strict scrutiny. While recognizing "the general interest in promoting public health and safety," the Supreme Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. Defendants must demonstrate "some substantial threat to public safety, peace, or order," or an equally compelling interest, that would be posed by exempting the claimant. *See Yoder*, 406 U.S. at 230.

Defendants fail to evidence that employed women, such as the women at Plaintiffs' nonprofits, forgo contraception, sterilization, or abortifacients due to cost sharing. Furthermore, Defendants fail to adequately explain why the religious

exemption cannot include a purely religious nonprofit corporation. Plaintiffs are all religious, non-profit corporation established to further the Catholic faith. Pl's Mot. at Decl. of Thomas S. Monaghan. Defendants state in conclusory fashion that there is a rational distinction between this narrow exemption and the expansion plaintiffs seek. Defs. Br. at 27-28. However, Defendants do nothing to evidence their claimed "rational manner" defense. Defendants state that Houses of Worship are more likely to employ people of the same faith than religious, nonprofit organizations. This statement is not rational, nor does it meet Defendants' burden in establishing strict scrutiny. Defendants cannot support a claim that a religious nonprofit organization that is established for and carries out a religious purpose, such as employees of the *Ave Maria*[3] Foundation, would be less likely to employ people of the same faith and have a greater need for abortifacients, sterilization, or contraception than a church. *See O Centro*, 546 U.S. at 432-37. Thus, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with the Mandate when that same Mandate does not apply to other religious employers, who fit under the Defendants' narrow exemption. Defendants cannot show a "substantial threat" to their asserted interests should Plaintiffs be exempted from the Mandate. *Yoder*, 406 U.S. at 230.

[3] Ave Maria is Latin for Hail Mary, which in the Catholic faith is a prayer asking for the help and intercession of Mary, the Mother of Jesus. (http://www.usccb.org/prayer-and-worship/devotionals/rosaries/prayers-of-the-rosary.cfm, last visited Dec. 30, 2013).

c. Defendants Do Not Use the Least Restrictive Means

The existence of a compelling interest in the abstract does not give Defendants *carte blanche* to promote that interest through any regulation of their choosing particularly where, as here, a fundamental right is substantially burdened. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967) (noting that compelling interests "cannot be invoked as a talismanic incantation to support any [law]"). If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). Even if the government claims these options would not be as effective as the Mandate, "a court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 824 (2000). Defendants do nothing to refute that their interests could be achieve by utilizing the exchanges website—which would remove Plaintiffs' insurance plan from any process of obtaining contraceptives, abortifacients or sterilization without cost sharing. Defendants currently arranged for insurance companies to provide these devices, procedures, and drugs free of charge. Using the government's already established website for obtaining these devices, procedures, and drugs, independent of Plaintiffs' employee health benefits plan, would eliminate Plaintiffs' involvement and avoid a violation of Plaintiffs' religious

beliefs. Further, as one Court previously noted, "[c]ertainly forcing private employers to violate their religious beliefs . . . is more restrictive than finding a way to increase the efficacy of an already established program that has a reported revenue stream of $1.3 billion." *Beckwith v. Sebelius*, slip op at *34, n. 16 (quoting Family Planning Annual report: 2011 National Summary, available at http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf, last visited Oct. 18, 2013). In fact, if a less restrictive alternative would serve the government's purposes, as would occur here, Defendants "must use that alternative." *Playboy Entm't Grp., Inc.*, 529 U.S. at 813; *see also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

II. CONCLUSION

For these reasons and the reasons offered in their opening brief, Plaintiffs respectfully request that this Court grant their motion for a temporary restraining order.

Respectfully submitted this 30th day of December, 2013.

Attorney for Plaintiffs:

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None

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