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

(1) SOUTHERN NAZARENE UNIVERSITY; (2) OKLAHOMA WESLEYAN UNIVERSITY; (3) OKLAHOMA BAPTIST UNIVERSITY; and (4) MID-AMERICA CHRISTIAN UNIVERSITY, *Plaintiffs,* v. (1) KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; (2) THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; (3) JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; (4) UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; (5) UNITED STATES DEPARTMENT OF LABOR; and (6) UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants.*	)	Case No. 5:13-cv-01015-F

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff Universities hereby submit this reply in support of their motion for preliminary injunction, and state as follows:

I. THE MANDATE SUBSTANTIALY BURDENS THE UNIVERSITIES' RELIGIOUS EXERCISE AND THUS VIOLATES RFRA.

In their opposition to the Universities' motion for preliminary injunction, Defendants contend that the Mandate does not substantially burden the schools' religious

exercise. Defs.' Br. at 20-27. The Tenth Circuit's en banc decision in *Hobby Lobby Stores, Inc. v. Sebelius* dictates that a law "substantially burdens" a person's religious exercise when it "has applied substantial pressure on the claimant to violate [a sincere religious] belief." 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc). The Mandate undeniably forces the Universities to choose between (a) violating their sincere religious beliefs against facilitating access to abortifacients; and (b) facing crippling financial penalties. Under *Hobby Lobby*, there can be no other conclusion than the Mandate substantially burdens the Universities' religious exercise.

Defendants understandably attempt to escape *Hobby Lobby*'s clear teaching. If the "substantial burden" test truly involves nothing more than assessing "the intensity of the coercion applied by the government to act contrary to [one's religious] beliefs" (assuming sincerity), *id*., the Government cannot win. But this is precisely what *Hobby Lobby* teaches.

Defendants claim that *Hobby Lobby* is essentially irrelevant to the "substantial burden" analysis in the instant case because the so-called "accommodation" is available to the Universities. Defs.' Br. at 21, 26-27. To be sure, the availability of the accommodation to the Universities presents them with a slightly different moral analysis than Hobby Lobby Stores and Mardel Stores faced. But slightly changing the *moral* inquiry hardly means that the *legal* test for "substantial burden" should somehow change. Hobby Lobby, Mardel, and the Universities have all concluded that the Mandate forces them to facilitate access to abortifacients in violation of their religious convictions. The manner and mechanism through which that "facilitation" occurs may be slightly different, but that matters not. All are "substantially burdened" by the Mandate, because all are being substantially pressured to violate their beliefs.

In *Hobby Lobby*, the Government unsuccessfully argued that the plaintiffs needed to show *something more* than "substantial pressure." 723 F.3d at 1137. There, Defendants essentially contended that the Mandate did not substantially burden the

plaintiffs' religious exercise because "'[a]n employees' decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer.'" *Id*. (quoting government's brief). Put differently, Defendants argued that the burden on religious exercise was "too attenuated" to be "substantial" under RFRA.

Of course, this is precisely the same argument Defendants make in their opposition to the Universities' motion for preliminary injunction. Defs.' Br. at 27 ("[t]he challenged regulations also do not impose a substantial burden on plaintiffs' religious exercise because any burden is indirect and too attenuated to be substantial"). The Tenth Circuit unambiguously rejected this argument: "[t]his position is fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." 723 F.3d at 1137 (emphasis in original).

Multiple other courts adjudicating HHS Mandate cases have rejected Defendants' "attenuation" argument in its various forms. In *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), for example, the D.C. Circuit rejected the government's argument that the interposition of the corporate form between the Gilardis and their employees rendered the Gilardis' participation "too remote and too attenuated" to constitute a substantial burden. *Id.* at 1217. As the D.C. Circuit explained, "'[c]ourts are not arbiters of scriptural interpretation,'" *id.* at 1216 (quoting *Thomas v. Review Bd.*, 450 U.S. at 716); thus, "[w]hen even attenuated participation may be construed as a sin, it is not for courts to decide that the corporate veil severs the owner's moral responsibility." *Id.* at 1215 (citation omitted).

The district court in *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013), similarly rejected the government's argument:

> In sum, although the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides

> contraceptive products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

Id. at *25.

The decision in *Roman Catholic Archdiocese of New York v. Sebelius* , 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013), is in accord:

> The Government's argument that any burden placed on plaintiffs is too "attenuated" to be substantial is similarly flawed. Defendants argue that plaintiffs' self-certification would only result in the use of contraception after a series of independent decisions by plaintiffs' employees. Although factually accurate, this argument rests on a misunderstanding (or mischaracterization) of plaintiffs' religious objection. Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to actively participate in a scheme to provide such services. The Government feels that the accommodation sufficiently insulates plaintiffs from the objectionable services, but plaintiffs disagree. Again, it is not the Court's role to say that plaintiffs are wrong about their religious beliefs.

Id. at *14 (citing, *inter alia*, *Hobby Lobby*, 723 F.3d at 1142). (citations omitted). *See also Korte*, 735 F.3d at 684; *Hobby Lobby*, 723 F.3d at 1154 ("Whether an act of complicity is or isn't 'too attenuated' from the underlying wrong is sometimes itself a matter of faith we must respect. *Thomas* and *Lee* teach no less.") (Gorsuch, J., concurring); *Geneva Coll.*, 2013 WL 3071481, at *9; *Grote v. Sebelius*, 708 F.3d 850, 854-55 (7th Cir. 2013); *Beckwith Elec. Co. v. Sebelius* , 2013 WL 3297498, at *15-16 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 681-83 (W.D. Pa. 2013).

Defendants assert that the Mandate's burden on the Universities' religious exercise is insubstantial because all that they allegedly need to do is complete the self-

certification, a purely administrative task "which should take plaintiffs a matter of minutes." Defs.' Br. at 27 (effort required to complete the form "is, at most, *de minimis*").

Two district courts have squarely rejected Defendants' argument. In *Zubik v. Sebelius*, "[t]he Government acknowledge[d] that the act of self-certification will require the Plaintiff-entities to sign the self-certification and supply a third party with the names of the Plaintiffs' respective employees so that the third-party may provide (and/or pay for) contraceptive products, services, and counseling." 2013 WL 6118696, at *24. Defendants conceded that the plaintiffs there, like the Universities here, sincerely believed that life is sacred from the moment of conception and that "the facilitation of evil is as morally odious as the proliferation of evil." *Id*. "Given these concessions," the *Zubik* court "disagree[d] with the Government that Plaintiffs' ability or inability to 'merely sign a piece of paper,' and thus comport with the 'accommodation,' is all that is at issue here." *Id*. In other words, the question is not whether executing the self-certification is time-consuming or expensive, but rather whether Defendants are substantially pressuring religious employers like the Universities to violate their religious convictions. Without question, they are.[1]

Similarly, in *Roman Catholic Archdiocese of New York*, the court held the Defendants' argument "finds no support in the case law." 2013 WL 6579764, at *13. It declared, "where a law places substantial pressure on a plaintiff to perform affirmative acts contrary to his religion, the Supreme Court has found a substantial burden without analyzing whether those acts are *de minimis*." *Id*. (citing *United States v. Lee*, 455 U.S. 252 (1982), and *Yoder*, 406 U.S. 205). The court also concluded that the Government

[1] In *Priests for Life v. United States Department of Health and Human Services*, the plaintiffs there had no religious objection to completing the self-certification. Civ. No. 13-1261, ECF No. 36, Slip Op. at 3-4 (D.D.C. Dec. 19, 2013). Of course, the Universities *do* hold that completing the self-certification *would* transgress their religious obligations.

had failed to explain how its proposed test would work: "beyond its repeated insistence that this is an 'objective' inquiry, the Government provides no framework for how a court could determine whether an act that concededly violates a plaintiff's religious beliefs is actually only '*de minimis*.'" *Id*. at 24-25. As the Tenth Circuit stated in *Hobby Lobby*, "the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." 723 F.3d at 1142.

The court also highlighted the constitutional difficulties with Defendants' proposed approach:

> Inquiring into the relative importance of a particular act to a particular plaintiff would necessarily place the court in the unacceptable 'business of evaluating the relative merits of differing religious claims. *Lee*, 455 U.S. at 263 n. 2 (Stevens, J. concurring). There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection.

Roman Catholic Archdiocese, at *13.

The government's reading of RFRA—that a substantial burden exists only where the government requires the claimant to engage in "significant" conduct—is plainly contrary to the statutory text. RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). RFRA contains no requirement that the actions required of claimants be "significant" or "substantial." *Id.* Here, because the Universities' refusal to facilitate access to abortifacients clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), it is a protected exercise of religion for purposes of RFRA.

Defendants argue that this understanding of RFRA deprives the statutory word "substantial" of any significance. Defs.' Br. at 23-25. As is plain from the statutory text,

however, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their religious exercise—but rather the type of pressure imposed by the government—*i.e.*, the burden. 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of religion."). It requires courts to assess the pressure the government exerts on a plaintiff to violate his religious beliefs, not the nature of the religious exercise.

Thus, in evaluating whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of the coercion employed by the government, rather than the "significance" of the actions required of plaintiffs. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh-day Adventist plaintiff of working on Saturday was "*de minimis*." Defs.' Br. at 27. Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the resulting denial of unemployment benefits coerced her to abandon this religious exercise, ultimately concluding that the "pressure upon her to for[]go [her] practice [of abstaining from work on Saturday]" was tantamount to "a fine imposed against [her] for her Saturday worship." *See Sherbert*, 374 U.S. at 404.

Likewise, in *Thomas*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory that used the sheet metal for producing tank turrets caused increased expenditures time or effort. Rather, the Court evaluated the "coercive impact" of the state's refusal to award Thomas unemployment benefits when his pacifist convictions prevented him from accepting the transfer, concluding that the denial "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717–18. Defendants' attempt here to focus on how much time or effort is involved in the self-certification process misses the proper analytical point. The burden is the impact to the individual's religious beliefs by becoming a participant in the delivery of abortifacients.

Defendants' reading of RFRA also impermissibly "cast[s] the Judiciary in a role that [it was] never intended to play." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485

U.S. 439, 458 (1988). Rather than evaluating whether the pressure placed on the College to violate its beliefs is "substantial," Defendants would have this Court determine whether compliance with the Mandate is a "substantial" violation of Plaintiffs' religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter involves an inherently *religious* inquiry. But the judiciary has no competence to determine the significance of a particular religious act; "[i]t is not within the judicial ken to question the centrality of particular . . . practices to a faith." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [courts] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

Indeed, the impropriety—not to mention the impossibility—of courts determining whether an exercise of religion is significant or meaningful is self-evident. On Defendants' theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that the change in verbiage is a "*de minimis*" act. Defs.' Br. at 27. An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action "require[s] [him] to do next to nothing." *Id.* at 22. No "principle of law or logic" equips a court to decide the significance or "meaning[]" of these acts. *Smith*, 494 U.S. at 887. What may be "no big deal" to the government may be a very big deal to a believer.

Defendants also contend that a law or regulation's burden on religious exercise is "substantial" for RFRA purposes *only* if the regulation pressures claimants to "modify their behavior." Defs.' Br. at 22. And they claim that the Mandate does *not* require the Universities to change their conduct. They declare that the schools end up doing essentially the same thing *after* the Mandate as it did *before*—telling its issuer that it does not wish to cover abortifacients. Defs.' Br. at 22.

Yet, the Mandate *does* require the Universities to modify their behavior. Defendants' theory—that the schools' pre- and post-Mandate communications with their

insurers/TPAs are "the same"—works only if the intended and foreseeable consequences of actions are irrelevant in assessing whether they are the same or different. This is a remarkable contention. Defendants are essentially arguing that the moral significance of an act is completely detached from the consequences of that act. To Defendants, it matters not that the consequence of the Universities' prior practices (telling their insurers/TPAs not to provide abortifacients) was *members of their communities not obtaining access to life-destroying drugs and devices*, whereas the consequence of executing the self-certification is *exactly the opposite*. To contend that these two actions are the same, particularly when the claim is that the coerced conduct violates conscience, is astonishing.[2] That the two actions might be said, in a willfully truncated assessment of their significance, to bear some superficial resemblance hardly means that Defendants have not coerced the Universities into "modifying their behavior."

It is unsurprising that courts addressing this contention have summarily rejected it. In *Zubik*, the court embraced an analogy offered by the plaintiffs there:

> Plaintiffs liken this result by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.

2013 WL 6118696, at *25. The *Zubik* court thus held that the Mandate, even with the "accommodation," "still substantially burdens [the plaintiffs'] sincerely-held religious beliefs." *Id*.

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[2] In the New Testament, Jesus and His followers often greeted one another with a kiss, as was the custom at the time. *See, e.g.*, Rom. 16:16. It is reasonable to assume that, at some point, Judas Iscariot greeted Jesus with such a kiss. Later, of course, Judas betrayed Jesus with a kiss, identifying for the armed crowd sent by the chief priests and the elders of the people the man they ought to arrest. Matt. 26:47-50. Could one plausibly contend that these two superficially identical acts bore the same moral significance?

In *Roman Catholic Archdiocese of New York*, the court deemed "unpersuasive" the Government's argument that the Mandate, with the accommodation, required no change in the plaintiffs' conduct. 2103 WL 6579764, at *14. The court held that even if Defendants were correct that the Mandate did not require the plaintiffs to modify their behavior,

> the self-certification would still transform a voluntary act that plaintiffs believe to be consistent with the religious beliefs into a compelled act that they believe forbidden. Clearly, plaintiffs view the latter as having vastly different religious significance than the former. The Court cannot say that "the line [plaintiffs] drew was an unreasonable one."

Id. at 27 (footnote omitted) (quoting *Thomas*, 450 U.S. at 715). *See also Geneva Coll. v. Sebelius*, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (holding that then-proposed accommodation would not remove Mandate's substantial burden on religious exercise).

Because the Mandate substantially burdens the Universities' religious exercise, it is subject to strict scrutiny. As Defendants concede, the Tenth Circuit has already determined that the Mandate fails that scrutiny. Accordingly, the Universities are likely to succeed on the merits of their RFRA claim. The remaining preliminary injunction factors warrant the entry of relief. *See Hobby Lobby Stores v. Sebelius*, 2013 WL 3869832, at *1 (W.D. Okla. July 19, 2013) (on remand from en banc Tenth Circuit decision).

CONCLUSION

For the foregoing reasons, the Universities respectfully request that this Court grant their motion for preliminary injunction.

Respectfully submitted this 20th day of December, 2013.

s/ Gregory S. Baylor

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*Motions for pro hac vice admission to be filed.

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Gregory S. Baylor