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

GENEVA COLLEGE, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:12-cv-00207-JFC
	)	
KATHLEEN SEBELIUS, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF GENEVA COLLEGE'S SECOND MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Geneva College ("Geneva" or "the College") hereby files this Memorandum of Law in Support of its Second Motion for Preliminary Injunction. The College seeks an order protecting its employee health plan from Defendants' imminent requirement[1] that the plan give beneficiaries access to abortifacients in violation of its religious convictions. This Court's previous orders[2] enjoining application of the Mandate to the College's student plan and to the Hepler Plaintiffs' employee plan show that Geneva is entitled to injunctive relief with respect to its employee plan as well.

ARGUMENT

By forcing Geneva College to provide its employees access to morally objectionable abortion-inducing drugs and devices, Defendants violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"). Defendants' requirement, the "HHS Mandate,"

[1] Under the Temporary Enforcement Safe Harbor, the College is legally permitted to exclude morally objectionable abortion-inducing drugs and devices from its current employee health insurance plan. However, the Safe Harbor will expire with respect to the College's employee plan when a new plan year commences on January 1, 2014. *See* 78 Fed. Reg. 39,870, 39,872 (Jul. 2, 2013).

[2] Order Granting Preliminary Injunction (ECF No. 92) (College's student plan); Findings of Fact and Conclusions of Law (ECF No. 91) (same); Order Granting Preliminary Injunction (ECF No. 84) (Hepler Plaintiffs' employee plan); Findings of Fact and Conclusions of Law (ECF No. 83) (same).

substantially burdens the College's religious exercise, and imposing the Mandate upon the College's employee health insurance plan is not the least restrictive means of advancing a compelling governmental interest. 42 U.S.C. § 2000bb-1(a) (government generally may not "substantially burden" religious exercise); *id.* § 2000bb-1(b) (substantial burdens on religious exercise permissible only if government demonstrates that application of the burden to the person is the "least restrictive means" of furthering a "compelling governmental interest").

This Court has twice concluded in this case that application of the Mandate is likely to violate RFRA. It held that forcing Seneca Hardwood and its family owners to include contraceptives, sterilization, and abortifacients in their employee health plan in violation of their religious convictions would likely transgress RFRA. And it held that the College would likely succeed on its claim that RFRA forbids Defendants from coercing it to facilitate access to abortifacients through its student health plan. The Court's assessment of RFRA's elements (substantial burden, compelling governmental interest, least restrictive means) and the preliminary injunction factors (merits, balance of harms, public interest)[3] in those contexts applies equally in the present context (Geneva's employee plan). As acknowledged by this Court in enjoining the application of the Mandate to the College's student plan, Defendants' so-called "accommodation" of religious entities like Geneva[4] does not eliminate the Mandate's substantial burden on the College's religious desire to avoid complicity in grave moral evil and to promote life-protecting beliefs and behavior by its employees and students.[5] Accordingly, this Court should preliminarily enjoin Defendants from imposing the Mandate on the College's employee plan.

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[3] A preliminary injunction is warranted if the movant demonstrates: (1) a likelihood of success on the merits; (2) that the movant will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

[4] "Coverage of Certain Preventive Services Under the Affordable Care Act," 78 Fed. Reg. 39,870, 39,874-886 (Jul. 2, 2013); 26 C.F.R. § 54.9815-2713A; 45 C.F.R. § 147.131.

[5] Findings of Fact and Conclusions of Law, at 13 n. 8, 14, 15 (protecting student plan from "proposed rules," which included the substance of the soon-to-be-final "accommodation").

I. THE COLLEGE IS LIKELY TO SUCCEED ON ITS CLAIM THAT APPLYING THE HHS MANDATE TO ITS EMPLOYEE PLAN VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

The College is likely to succeed on its claim that applying the HHS Mandate to its employee plan violates the Religious Freedom Restoration Act. The Mandate substantially burdens the College's religious exercise; the final version of the then-proposed "accommodation" this Court considered in granting the College's earlier preliminary injunction motion warrants no departure from that conclusion. As this Court has already held, the Mandate is not the least restrictive means of advancing a compelling governmental interest.

A. Applying the Mandate to the College's Employee Plan Will Substantially Burden Its Religious Exercise.

This Court held that the Mandate, by requiring the Hepler Plaintiffs to include morally objectionable drugs, devices, procedures, and services in their health insurance plan, substantially burdened their religious exercise. Findings of Fact and Conclusions of Law at 12-16 (ECF No. 83). The Court observed that the Mandate forced the Hepler Plaintiffs to choose between transgressing their religious beliefs and dropping employee health coverage entirely in order to avoid that transgression. *Id*. at 14. It concluded that Defendants substantially burdened the Hepler Plaintiffs' religious exercise by inflicting this sort of Hobson's choice upon them. Indeed, this Court said that the Mandate imposed upon them "a quintessential substantial burden." *Id*. at 16.

The Court also held that the imposing the Mandate on Geneva's student plan would substantially burden the College's religious exercise, despite the (then-proposed) "accommodation." Findings of Fact and Conclusions of Law at 12-16 (ECF No. 91). Under the original version of the Mandate, the student plan would have to cover, without cost-sharing, all FDA-approved contraceptives, including the abortion-inducing drugs and devices to which the College objects. In its Notice of Proposed Rulemaking (NPRM), Defendants proposed a

rule that would allegedly "protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds." Findings of Fact and Conclusions of Law at 11 (ECF No. 91) (quoting 78 Fed. Reg. at 8,462–64). The College argued that, under the accommodation, it would still facilitate coverage and use of abortifacients in violation of its religious beliefs.

The Court held that the (the n-proposed) accommodation would *not* eliminate the substantial burden on the College's religious exercise:

> Geneva explicitly objects to the requirement that it facilitate the objectionable coverage to its students, *despite the accommodation proposed* by defendants. In light of this fact, Geneva will be forced to modify its behavior and to violate its beliefs by either giving up its [] health insurance generally or providing the objectionable coverage.…[T]his is a *quintessential substantial burden*….

Findings of Fact and Conclusions of Law at 15-16 (ECF No. 91) (emphasis added).

The proposed accommodation discussed in the Court's prior opinion subsequently became final in substantially the same form. *See* 78 Fed. Reg. 39,870, 39,874-879; 45 C.F.R. §45 C.F.R. § 147.131. In the Second Amended Complaint, the College expressly alleged that complying with the Mandate, even with its "accommodation," would transgress its religious belief in the dignity of human life. Second Amended Complaint, ¶¶ 7, 220, 222 (ECF No. 98). If the proposed accommodation would not have alleviated the burden on the College's religious exercise in the student plan context, the final accommodation surely does not alleviate the burden on Geneva in the employee plan context.

To the extent the government will argue that the accommodation changes things, it is important to recognize the centrality of Geneva College to the accommodation's scheme. Under the accommodation, the College is still forced to provide health insurance to its employees because it has more than 50 full-time employees. When the College signs a certification of its religious objection and provides it to the employee plan issuer, the insurer must then provide abortifacient coverage to the persons covered in the College's plan by giving those persons a promise of "payments" for abortifacients. This promise of payments occurs

only because the College is providing a plan to those persons—no promise would occur if the College did not have this insurance relationship with the plan participants. The promise of payments comes from the College's own insurer, because that insurer is being paid by the College to provide its employees health insurance. And the promise of payments is delivered precisely to the College's own employees and their dependents, because those people are participants in the College's plan. Thus, under the "accommodation," the College is a necessary and direct cause of abortifacient coverage for its health plan participants.

Defendants insist that the College is not required to "contract, arrange, pay, or refer for such coverage" and will presumably argue that it thus does not suffer a substantial burden. This is, in essence, a moral argument. But Defendants cannot circumvent RFRA's restraint on their power by second-guessing the College's moral judgment. The College religiously opposes facilitating abortifacient payments in connection with its own health plan. It objects to being a central cog in the machine of the Mandate's delivery of promised abortifacient payments to the College's own insured employees and their dependents. Defendants cannot argue that the burden on the College's religious exercise is not "substantial" because other ways of involving the College in providing access to abortifacients exist.

In any event, the government is not delivering the alleged benefits of the Mandate independent of the College, as if it were simply knocking on the doors of the College's employees and giving them abortifacients. The accommodation delivers abortifacient payments (1) to persons in the College's plan, (2) only because they are in that plan—they would not get it otherwise, and (3) through the insurer the College is paying for its underlying plan. In fact, the final rule emphasizes as a virtue of the accommodation that employees and students will not be receiving abortifacient payments under some separate policy or from a separate source; they will get their abortifacient payments in pure continuity with their own underlying insurance:

> This approach also minimizes barriers in access to care because plan participants and beneficiaries (and their health care providers) do not have to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy).

78 Fed. Reg. at 39,876. Thus, the inextricable relationship between these "separate payments" and the College's plan is expressly intended and deemed desirable. When the government re-labels what is happening as "separate," that does not change the reality that the College must play an indispensable role in the coverage of items to which it objects. The government's claim that this arrangement is somehow "free" to the College misses the point that the College does not merely object to paying for abortifacients; it objects to causing abortifacient coverage in connection to its own health plan.[6]

By analogy, suppose the government deemed pornography to be necessary to the health and equality of female employees, family members and students at Geneva College. If the College objected to providing access to pornography for those persons, the government could not negate the College's religious objection simply by requiring the College to provide employees and students with a "mere" subscription to cable television, and then turn around and mandate that the College's own cable company, "not" the College, provide "free" porn channels to the same group of persons enrolled in the College's cable subscription. The College's moral objection to facilitating access to pornography would still be ignored.

Thus, Defendants factually wrong when it claims the accommodation does not impact the College's beliefs against facilitating coverage for and the use of life-destroying drugs and devices. The government is also incorrect about "substantial burden." That element of RFRA cannot be a foundation for second-guessing a claimant's moral calculus, but instead measures the magnitude of the pressure the government imposes upon an individual or entity to violate its conscience. A law substantially burdens the exercise of religion when it compels one "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). A substantial burden also exists where a law places "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). As this Court concluded, the

[6] Geneva makes no financial contribution to the cost of student health insurance, yet this Court held that forcing the College to facilitate access to abortifacients by its students substantially burdens its religious exercise.

Mandate imposes a substantial burden simply by forcing the College "to choose between violating its deeply held religious beliefs," suffering penalties for not doing so, or suffering the harms inherent in dropping health insurance coverage. For the employee health plan, dropping health insurance coverage comes with explicit government fines, it takes a specific health plan away from employees who rely on it, it robs employees who share the College's beliefs of a plan that is morally acceptable to them, it harms the College's ability to keep and attract good employees, and it would practically require paying employees more money (beyond the government fines) for no longer receiving insurance as part of their compensation.

As this Court stated in its Opinion and Order on Defendants' Motion to Dismiss, "[c]ourts addressing similar challenges to the mandate's requirements have 'simply assume[d] that a law substantially burdens a person's exercise of religion when that person so claims.'" (ECF No. 74 at 37, quoting *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 at *6 (E.D. Mich. Oct. 31, 2012)). Three times this Court has rejected the government's argument that its Mandate is too "attenuated" to constitute a substantial burden. Most recently the Court considered the proposed accommodation and declared that "Geneva facilitates the provision of its student health insurance, and to force it to choose whether or not to facilitate a student health plan would be, like in *Thomas*[, 450 U.S. at 715], a line which it should not be forced to cross." Findings of Fact and Conclusions of Law at 15 (ECF No. 91). In its Findings of Fact and Conclusions of Law regarding the Hepler Plaintiffs' Motion for Preliminary Injunction, the Court similarly declared the government's "attenuation" argument as being inconsistent with the U.S. Supreme Court's decisions in *Yoder*, *Thomas*, and *Sherbert v. Verner*, 374 U.S. 398 (1963). Findings of Fact and Conclusions of Law at 13-15 (ECF No. 83). The Court also rejected this argument in ruling on Defendants' Motion to Dismiss. Memorandum Opinion and Order at 37-40 (ECF No. 74). The government's argument fares no better here.

B. The Mandate Is Not the Least Restrictive Means of Advancing a Compelling Governmental Interest.

This Court has previously held that the Mandate failed strict scrutiny under RFRA. Findings of Fact and Conclusions of Law at 16-20 (ECF No. 83) (Hepler Plaintiffs' employee plan); Findings of Fact and Conclusions of Law at 16-19 (ECF No. 91) (College's student plan). There is no basis for departing from those conclusions in the context of Geneva's employee plan. Accordingly, the College is likely to succeed on its claim that imposing the Mandate on its employee plan violates RFRA.

II. THE BALANCE OF HARMS AND PUBLIC INTEREST WARRANT A PRELIMINARY INJUNCTION.

The Court previously held that the other injunction factors warranted a preliminary injunction. Findings of Fact and Conclusions of Law at 19-22 (College's student plan); Findings of Fact and Conclusions of Law at 21-23 (Hepler Plaintiffs' employee plan). There is no basis for departing from those conclusions in the context of Geneva's employee plan.

CONCLUSION

For the foregoing reasons, Geneva College respectfully requests that this Court issue preliminary injunctive relief to protect its employee health plans from the Mandate.

Respectfully submitted this 12th day of November, 2013.

s/Gregory S. Baylor

Gregory S. Baylor
Texas Bar No. 01941500
gbaylor@ alliancedefendingfreedom.org
Steven H. Aden
DC Bar No. 466777
saden@alliancedefendingfreedom .org
Matthew S. Bowman
DC Bar No. 993261
m bowman@alliancedefendingfreedom.org
ALLIANCE DEFENDING FREEDOM
801 G Street, NW, Suite 509
Washington, DC 20001
(202) 393-8690
(202) 347-3622 (facsimile)

David A. Cortman
Georgia Bar No. 188810
dcortm an@alliancedefendingfreedom.org
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (facsimile)

Bradley S. Tupi
Pennsylvania Bar No. 28682
btupi@tuckerlaw.com
David J. Mongillo
Pennsylvania Bar No. 309995
dm ongillo@tuckerlaw.com
1500 One PPG Place
Pittsburgh, PA 15222
(412) 594-55-45
(412) 594-5619 (facsimile)
Local Counsel

Kevin H. Theriot
Kansas Bar No. 21565
ktheriot@ alliancedefendingfreedom.org
Erik W. Stanley
Kansas Bar No. 24326
estanley @alliancedefendingfreedom.org
ALLIANCE DEFENDING FREEDOM
15192 Rosewood
Leawood, KS 66224
(913) 685-8000
(913) 685-8001 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for Defendants.

s/ Gregory S. Baylor