

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

MOST REVEREND DAVID A. ZUBIK,  
*Bishop of the Roman Catholic Diocese of  
Pittsburgh, as Trustee of the Roman Catholic  
Diocese of Pittsburgh, a Charitable Trust, ET*  
AL.,

13cv1459

**ELECTRONICALLY FILED**

Plaintiffs,

v.

KATHLEEN SEBELIUS, *In Her Official  
Capacity as Secretary of the U.S. Department  
of Health and Human Services, ET AL.,*

Defendants.

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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, as Trustee of the Roman  
Catholic Diocese of Erie, a Charitable Trust,*  
ET AL.

13cv0303 Erie

**ELECTRONICALLY FILED**

Plaintiffs,

v.

KATHLEEN SEBELIUS, *In Her Official  
Capacity as Secretary of the U.S. Department  
of Health and Human Services, ET AL.,*

Defendants.

**MEMORANDUM ORDER  
DENYING MOTIONS TO STRIKE CERTIFICATION  
(13-cv-1459 AT DOC. NO. 51; 13-cv-303, AT DOC. NO. 50)**

Before the Court are Plaintiffs' Motions to Strike the Certification of Ms. Shawn Braxton Concerning the Administrative Record in each of the cases referenced above. See 13-cv-1459 at doc. no. 51; and 13-cv-303 at doc. no. 50. Defendants ("the Government") filed Responses, and

Plaintiffs filed Replies. See 13-cv-1459 at doc. nos. 69 and 71, respectively; and 13-cv-303 at doc nos. 68 and 70, respectively. The matter is now ripe for adjudication.

During the October 24, 2013, status conference which the Court held in advance of the November 12-13, 2013, Preliminary Injunction Hearing, the Court asked Plaintiffs what they planned to present as evidence in support of their Motions for Expedited Preliminary Injunction, and Plaintiffs indicated they needed some discovery and would present witness testimony at the Preliminary Injunction Hearing. See, 13-cv-1459, doc. no. 22, generally. Likewise, the Court asked the Government what it would present in defense of Plaintiffs' Motions for Expedited Preliminary Injunction, and in particular, asked the Government to highlight for the Court during the Preliminary Injunction Hearing what "irreparable harm" the Government would face if a preliminary injunction would issue. *Id.* at pp. 42-43. The Government responded that the Court's review would be "limited to the administrative record." *Id.* at p. 44. The Government further asserted that if the Court were to reach the strict scrutiny test under the RFRA, the Government's position was that the Court could stand on "that [administrative] record[.]" *Id.* at p. 45. In short, the Government summed up its position by stating, "[t]he Court's review of whether or not the regulations can survive Plaintiffs' legal challenges in terms of evidence should be based exclusively on the administrative record." *Id.*

Following this status conference, the parties filed a Joint Status Report (dated October 31, 2013), a Joint Stipulation of Undisputed Facts (dated November 7, 2013), and a Joint Exhibit List (dated November 8, 2013) – all of which pertained to the (then) upcoming Preliminary Injunction Hearing. The Joint Exhibit List contained sixteen exhibits that were being proffered by the Government. See 13-cv-1459 at doc. no. 45, pp. 23-27; and 13-cv-303 at doc. no. 43, pp. 23-27. Plaintiffs raised no objection to the authenticity or admissibility of these exhibits. *Id.*

These sixteen exhibits comprise only a portion of the entire “Administrative Record” that exists with respect to the promulgation of various regulations related to the Patient Protection and Affordable Care Act (“ACA”), at least one of which is at issue in the instant cases. See case no. 13-cv-1459 at doc. no. 61, p. 139, and case no. 13-cv-303 at doc. no. 60, pp. 139, where the Government indicates its belief that the entire “official administrative record” consists of 185,000 pages.

Plaintiffs’ current Motions seek to strike the certification supplied by Ms. Braxton which accompanied the portion of the Administrative Record which was submitted to the Court for the Preliminary Injunction Hearing and was divided into sixteen exhibits. Plaintiffs’ Motions and the oral arguments indicate that if the Court were to strike Ms. Braxton’s certification, the Government would be foreclosed from submitting evidence predicated upon those portions of the Administrative Record submitted as Defendants’ Exhibits 1 through 16. See case no. 13-cv-1459 at doc. nos. 51, p. 11, and doc. no. 61, p. 138; and case no. 13-cv-303 at doc. no. 50, p. 11 and doc. no. 60, pp. 138.

Given that the Court has been asked to rule in an expedited fashion on Plaintiffs’ Motions for Preliminary Injunction, the Court will DENY the Plaintiffs’ Motion to Strike the Certification of Ms. Braxton, without prejudice to re-raise this issue at a later point in the litigation, so that the Court may consider the evidence presented by the Government in its Exhibits 1 through 16 in ruling on the Motions for Expedited Preliminary Injunction. Further, Plaintiffs may take an appropriate Rule 30(b)(6) deposition in either or both cases (13-cv-1459 and/or 13-cv-303) on the issue relating to the Administrative Record, should Plaintiffs deem it necessary to do so as these cases progress.

SO ORDERED, this 20<sup>th</sup> day of November, 2013.

s/ Arthur J. Schwab  
Arthur J. Schwab  
United States District Judge

cc: All Registered ECF Counsel and Parties