IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH, Plaintiff, v. KATHLEEN SEBELIUS, *et al.* Defendants.	Case No. 4:12-cv-00314-Y (TRM) DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) PERMITTING IMMEDIATE APPEAL

Since defendants filed their opening brief, five more courts have dismissed lawsuits that are identical in all relevant respects to this one for lack of jurisdiction.[1] This Court should reconsider its January 31, 2013 Order to bring it in line with the decisions of the overwhelming majority of courts (21 of 23) that have considered the legal questions presented by defendants' jurisdictional motion.

Defendants have firmly committed *never* to enforce the current version of the contraceptive coverage requirement – the only regulations that are at issue in this case – against plaintiff Roman Catholic Diocese of Fort Worth. Neither plaintiff's obstinacy in refusing to take the government at its word, nor plaintiff's empty accusations of nefariousness, negates the presumption of good faith to which the government is entitled as a matter of law. Because this Court did not apply that presumption to the government's non-enforcement commitment, and instead denied defendants' motion to dismiss based on its perception – both negated by the existing facts and irrelevant as a matter of law – that there remained a possibility that defendants

[1] *See Ave Maria Univ. v. Sebelius*, No. 2:12-cv-88-Ftm-99SPC, ECF No. 72 (M.D. Fla. Mar. 29, 2013); *Eternal Word Television Network, Inc. v. Sebelius*, 2013 WL 1278956 (N.D. Ala. Mar. 25, 2013); *Franciscan v. Sebelius*, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Geneva Coll. v. Sebelius*, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Wenski v. Sebelius*, Case No. 12-23820-CIV, ECF No. 46 (S.D. Fla. Mar. 4, 2013).

would enforce the current regulations against plaintiff, the Court committed manifest error and reconsideration is warranted.[2]

Plaintiff makes much of the fact that standing is assessed as of the time of filing, and, in plaintiff's view, the government's non-enforcement commitment was not made until after this lawsuit was filed. This assertion, even if true (and it is not), ignores defendants' alternative jurisdictional argument – ripeness. Indeed, plaintiff's response entirely ignores ripeness. Ripeness looks at "the situation now" rather than the situation at the time of filing. *Anderson v. Green*, 513 U.S. 557, 558 (1995). Even if it were unclear before (and it was not), now, it is abundantly clear that defendants will *never* enforce the current version of the regulations against plaintiff. Plaintiff, therefore, cannot show any current or future injury or harm from the current regulations as required to establish a ripe claim.

Moving forward with plaintiff's challenge to the current regulations will serve absolutely no purpose other than to waste the parties' and the Court's time and resources. Come August of this year, there will be new and different rules in place with respect to plaintiff. Indeed, in its response, plaintiff does not dispute that, if finalized as proposed in the Notice of Proposed Rulemaking ("NPRM"), the new rules will almost certainly ensure that plaintiff is entirely exempt from the contraceptive coverage requirement. The NPRM, which was issued after this Court's Order, provides yet another basis for reconsideration. Plaintiff, of course, is free to challenge the new regulations once they are finalized if plaintiff believes its concerns have not been adequately addressed. But nothing the Court does now could alleviate any of plaintiff's uncertainty about the new rules, making any opinion on the merits of plaintiff's challenge to the current regulations purely advisory and thus outside of the Court's jurisdiction.

[2] To fail to recognize the certainty of non-enforcement, the Court would have to presume the representations of defendants' counsel were unauthorized and that their declarant lied. There is obviously no basis for doing so.

If the Court does not grant reconsideration, defendants ask the Court to certify its Order for immediate appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b). Plaintiff does not dispute that two of the three requirements for certification are satisfied. And plaintiff is wrong in arguing that the Court's Order is based on the application of well-established law to disputed facts. Defendants' disagreement with the Court's ruling is a purely legal one: As a matter of law, a court lacks jurisdiction over a challenge to regulations that are in the process of being changed and that the government has committed never to enforce against plaintiff in their current form. Plaintiff's suggestion that the existence of jurisdiction here is "well-established" is belied by the rulings of twenty-one courts that have decided this controlling question of law the other way.

I. THE STANDARD FOR RECONSIDERATION IS SATISFIED

Plaintiff devotes the majority of its response to disingenuously parsing and twisting the government's words to try to render unclear what the government has repeatedly made crystal clear, *i.e.*, that it will never enforce the regulations in their current form against plaintiff (or similarly situated entities). The government made this representation in briefing on its motion to dismiss, repeated it at oral argument before the D.C. Circuit, and reiterated it again and again in notices of supplemental authority filed with this Court in this case. *See, e.g.*, Defs.' Mot. for Reconsideration or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b) ("Defs.' Mot."), at 6-7, ECF No. 47. As if these repeated statements were not enough, the government also filed a declaration with the Court in support of its motion for reconsideration making it abundantly clear that "defendants will never enforce the contraceptive coverage requirement in its current form against plaintiff." Decl. of Teresa Miller ¶ 5, Feb. 26, 2013, ECF No. 47-1.

Instead of taking the government "at its word," as the law requires and as the overwhelming majority of courts have done,[3] plaintiff attempts to dissect and distort those words for any hint that might suggest (and there is none) that the government did not mean what it said. Plaintiff, through accusation, innuendo, and, at several points, blatant misrepresentation, seeks to turn the government's non-enforcement commitment into a "lawyerly" and "coy" ploy to "leave[e] the option open to enforce the regulations against Plaintiff." Pl.'s Resp. to Defs.' Mot. for Reconsideration or Immediate Appeal ("Pl.'s Resp."), at 4-5, ECF No. 52. Plaintiff's arguments are absurd. When the government says "it will never enforce the current regulations against plaintiff" it means "never," not maybe or possibly or at some point.

Plaintiff misrepresents the record when it says that "the government made no such representations [that it will never enforce the current regulations against plaintiff in this case]." *Id*. at 2. As defendants recounted in their opening brief, the government has repeatedly made this exact representation here. Defs.' Mot. at 6-7. Moreover, despite plaintiff's mental and linguistic gymnastics, the representation made by the government at oral argument in *Wheaton* extends to plaintiff here. The non-profit, religious colleges in *Wheaton* and the Roman Catholic Diocese of Fort Worth here are "similarly situated as regards contraceptive services." *Wheaton*, 703 F.3d at 552; *see Archbishop of Wash.*, 2013 WL 285599, at *3 (concluding government's non-enforcement commitment from *Wheaton* extended to the plaintiff Archdiocese and dismissing case).[4] And, even if it were not clear from the government's statements in *Wheaton*

[3] *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012); *see also, e.g.*, *Franciscan*, 2013 WL 1189854, at *5; *Geneva Coll.*, 2013 WL 838238, at *14; *Roman Catholic Archbishop of Wash. v. Sebelius*, 2013 WL 285599, at *3 (D.D.C. Jan. 25, 2013); *Colo. Christian Univ. v. Sebelius* ("*CCU*"), 2013 WL 93188, at *5 (D. Colo. Jan. 7, 2013); *Univ. of Notre Dame v. Sebelius*, 2012 WL 6756332, at *3-4 (N.D. Ind. Dec. 31, 2012)*; Zubik v. Sebelius*, 2012 WL 5932977, at *9 (W.D. Pa. Nov. 27, 2012).

[4] Nine cases in which a diocese or archdiocese was a plaintiff have been dismissed based, at least in part, on the government's non-enforcement commitment. *See* Defs.' Mot. at 1 n.1; *supra* n.1. It is absurd to suggest that the government committed to non-enforcement as to objecting non-profit religious colleges while leaving open the door to enforcement as to the Roman Catholic Diocese of Fort Worth (or any other diocese).

that its non-enforcement commitment extends to similarly situated entities like the Diocese, the government has made that crystal clear in its filings in this very case. *See infra* p. 3.

Plaintiff also distorts the truth when it contends that the government has refused to stipulate that it will never enforce the current regulations against plaintiff. The proposed stipulation to which plaintiff refers is not, in any sense of the words, a stipulation never to enforce the current regulations against plaintiff. It is instead a proposed stipulation regarding a statement made by Vice President Biden during the vice presidential debate (which is entirely irrelevant to any of plaintiff's claims in this case) and purports to bind defendants' ability to enforce the forthcoming amended regulations, which do not yet exist. Pl.'s Resp., Ex. 1, Attach. at ¶¶ 1-3, 5, 7, ECF No. 52-1. In an attempt to appease plaintiff's concerns – irrational though they are – defendants submitted a declaration in support of their motion for reconsideration in which the declarant attests *under penalty of perjury* that defendants will never enforce the current regulations against plaintiff. Miller Decl. ¶ 5. Incredibly, plaintiff claims this, too, is not a sufficiently "firm commitment." Pl.'s Resp. at 8. Plaintiff, however, cannot establish jurisdiction through willful blindness or obstinacy.

Not that it is necessary or will satisfy plaintiff (which appears content to turn a deaf ear in its attempt to manufacture jurisdiction), but, to put the matter to rest, the government hereby states, in a brief signed by Department of Justice counsel (as all defendants' briefs and notices of supplemental authority have been), as follows:

> The government will never enforce the regulations in their current form against plaintiff Roman Catholic Diocese of Fort Worth. There will be new and different rules applicable to plaintiff. Those new rules will be finalized by August 2013.

This Court must accord the government the good faith presumption to which it is entitled and take the government at its word. In light of the government's repeated representations that it will

never enforce the current regulations against plaintiff, the Court's conclusion that the current regulations might nevertheless be enforced against plaintiff by defendants is manifest error.

Plaintiff also maintains that, even if the Court credits the government's non-enforcement commitment, the Court properly found standing because standing is assessed at the time of filing and the government did not commit to never enforcing the current regulations against plaintiff until after plaintiff filed suit. Pl.'s Resp. at 1, 2. Defendants explained in their opening brief that this assertion is wrong because, at the time plaintiff filed suit, it was clear that plaintiff was protected by the enforcement safe harbor and the government had begun the process of amending the regulations to address plaintiff's concerns – a process the government committed to completing before the expiration of the safe harbor. Defs.' Mot. at 9 n.4.

Setting standing aside, conspicuously absent from plaintiff's response is any real attempt to defend this Court's ripeness analysis. Plaintiff does not refute the principle, cited in defendants' opening brief, that "ripeness is peculiarly a question of timing, and it is the situation now rather than the situation at the time of the [decision under review or the filing of plaintiff's complaint] that must govern." *Id*. (quoting *Anderson*, 513 U.S. at 558); *see also Roman Catholic Diocese of Dallas v. Sebelius*, 2013 WL 687080, at *13 (N.D. Tex. Feb. 26, 2013) (dismissing case for lack of ripeness based on consideration of events that occurred after the filing of the complaint). Therefore, even if this Court believes that the government's commitment never to enforce the current regulations against plaintiff was not sufficiently clear until after plaintiff filed suit – indeed, even if the Court believes it is only clear now (points defendants dispute) – the Court must take that commitment into account in assessing ripeness. And, as twenty courts, including another court in this District, have found,[5] plaintiff's challenge to the current

[5] The court in *Legatus v. Sebelius*, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), found it unnecessary to address ripeness after concluding that the non-profit plaintiff lacked standing.

regulations cannot possibly be ripe in light of the government's non-enforcement commitment and the ongoing process to amend the regulations to address plaintiff's concerns.[6]

The recently issued NPRM also provides a proper basis for reconsideration. Plaintiff argues that the NPRM, which was issued the day after this Court's Order, is nothing new because it "was anticipated by the Court" when it ruled on defendants' motion to dismiss. Pl.'s Resp. at 6. Ironically, in this instance (but not with respect to the government's non-enforcement commitment), plaintiff has chosen to credit the government's representations that it would issue an NPRM followed by new and different final rules. It is not clear, however, that this Court anticipated the NPRM. The only place where the Court mentions the NPRM in its Order suggests that the Court believed (erroneously, as defendants have explained, *see* Defs.' Mot. at 7 n.3) that the forthcoming new rules would apply only to the plaintiffs in *Wheaton* and would not affect plaintiff here. *See* Order at 11 n.6, Jan. 31, 2013, ECF No. 43.

Nonetheless, even if the Court anticipated the NPRM, the Court did not anticipate – and indeed could not have anticipated – the specific content of the NPRM, particularly the proposed amendments to the religious employer exemption, which were not suggested in the ANPRM. *Compare* 77 Fed. Reg. 16,501 (Mar. 21, 2012) *with* 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). In their opening brief, defendants explained that, if the amendments to the religious employer exemption proposed in the NPRM are adopted without change, then "[b]ased on plaintiff's own allegations, it would almost certainly be assured of qualifying for the exemption and thus would almost certainly be under no obligation to provide contraceptive coverage." Defs.' Mot. at 10.

[6] Plaintiff also contends that *Wheaton* does not support defendants' position because the D.C. Circuit held the appeal in abeyance instead of dismissing it. *See* Pl.'s Resp. at 8. But every district court to consider the "unique historical practice" utilized in *Wheaton* has rejected it and determined that dismissal is the proper course when a case is not ripe. *Diocese of Dallas*, 2013 WL 687080, at *17; *see Archbishop of Wash.*, 2013 WL 285599, at *4; *CCU*, 2013 WL 93188, at *8 (noting that D.C. Circuit "offered no compelling reason" for holding cases in abeyance and "adher[ing] to the customary practice of dismissing an unripe case in its entirety"); *Catholic Diocese of Biloxi v. Sebelius*, 2013 WL 690990 (S.D. Miss. Feb. 15, 2013).

Plaintiff makes absolutely no attempt to refute this assertion in its response. Thus, it should be taken as conceded that plaintiff believes it would be exempt from the contraception coverage requirement if the proposed rules are finalized without change. *See, e.g.*, *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982) ("Failure to brief and argue an issue is grounds for finding that the issue has been abandoned.").

This new development, which the Court could not have foreseen at the time it issued its Order, demonstrates that no purpose whatsoever would be served by reaching the merits of the current regulations. Those regulations will be different come August 2013, and plaintiff does not dispute that, if the proposed amendments to the religious employer exemption are finalized, it will be entirely exempt under the new regulations. In the meantime and for all time, the current regulations will not be enforced by defendants against plaintiff.[7]

Plaintiff's attempt to distinguish *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (Feb. 26, 2013), is also unavailing, as it is based entirely on the backward presumption that the government might enforce the current regulations against plaintiff thus necessitating present planning by plaintiff. Contrary to plaintiff's suggestion (Pl.'s Resp. 9), there is no application anywhere in this Court's Order of the "certainly impending" standard confirmed in *Clapper*, and any attempt to say that this case meets that standard would be clear legal error. The Court's Order, moreover, contradicts *Clapper*'s central holding: Where a threatened future injury is contingent on events that might not occur, the "certainly impending" standard is not satisfied. *See id.* at 1147-50. This certainly impending standard is also a requirement of ripeness. *Coal.*

[7] Plaintiff completely misunderstands defendants' argument regarding discovery. *See* Pl.'s Resp. at 6-7. Defendants are not suggesting that plaintiff's discovery requests will relate to the NPRM; indeed, they could not, as this case is a challenge to the current regulations, not any future amendments to those regulations. Defendants' point, instead, is that plaintiff's proposed discovery schedule, which extends until October 2013, well after defendants have promised to finalize the new rules, demonstrates that plaintiff has no desire to pursue a challenge to the current regulations – a challenge that will be moot when the new rules are promulgated. Plaintiff's lack of urgency in having its claims adjudicated belies any contention that it is being harmed by the current regulations.

for Responsible Regulation, Inc. v. E.P.A., 684 F.3d 102, 130 (D.C. Cir. 2012). Here, there is no conceivable basis on which enforcement of the current regulations against plaintiff by defendants can be characterized as "certainly impending" given that defendants have consistently promised to *never* enforce those regulations against plaintiff.

Clapper also made clear that a plaintiff cannot manufacture jurisdiction by alleging present injury as a result of costs incurred preparing for a future event that is certain not to occur. Yet that is exactly what plaintiff attempts to do here. Plaintiff argues that it needs to plan for future enforcement of the current regulations, but, as the government has made abundantly clear, it will never enforce the current regulations against plaintiff. "A plaintiff cannot injure itself while fleeing a phantom specter spawned by the plaintiff's own unsubstantiated fears and then claim the defendant caused the injury." *Franciscan*, 2013 WL 1189854, at *6. Accordingly, the Court should reconsider its Order and dismiss this case for lack of ripeness and/or standing.

II. THE PREREQUISITES FOR INTERLOCUTORY APPEAL ARE EASILY SATISFIED

Plaintiff does not dispute that the Court's January 31, 2013 Order involves a controlling question as to which there is substantial ground for difference of opinion or that an immediate appeal may materially advance the ultimate termination of the litigation. Instead, in opposing certification under 28 U.S.C. § 1292(b), plaintiff relies solely on its contention that the Court's Order is based not on a question of law, but rather on the application of well-settled law to disputed facts. Pl.'s Resp. at 11. The Court's Order itself, however, belies this contention. The Court explained that it was adjudicating a "facial challenge" based on the allegations in "the Diocese's complaint" and did not need to "resol[ve] [any] disputed facts." Order at 6 n.5.

Moreover, although plaintiff tries mightily to manufacture a factual dispute where there is none, defendants' disagreement with the Court's ruling is a purely legal one. Defendants

contend that the Court committed legal error when it failed to accord the government the presumption of good faith to which it is entitled by accepting the government's representations that it will never enforce the current regulations against plaintiff. Defendants also contend that the Court committed legal error by viewing the current regulations as final merely because they are "on the books" instead of applying the flexible and pragmatic notion of finality that legal precedent requires and thereby recognizing that the regulations are in fact in the process of being amended to address plaintiff's concerns. These and other legal errors in the Court's Order led it to mistakenly conclude, as a matter of law, that it has subject matter jurisdiction over a challenge to regulations that are in the process of being changed and that the government has committed never to enforce against plaintiff in their current form. That the legal conclusions in this case – like most legal conclusions – are set against a factual backdrop does not alter the fact that they are legal questions, not resolutions of disputed facts. It is the resolution of these questions of law that led twenty-one other courts to conclude that they lack jurisdiction over nearly identical cases. And it is these questions of law that defendants seek to appeal to the Fifth Circuit.[8]

Furthermore, even if the government's non-enforcement commitment could be seen as a factual issue that is in dispute (and it cannot for the reasons explained above), appellate review of this Court's Order would not require the sort of heavily fact-based analysis that is improper for certification. *See Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006). The Fifth Circuit would not need "to go hunting through the record" to discern the relevant facts. It need look no further than the complaint, the rulemaking documents, and the government's statements. Accordingly, the Court should certify its Order for appeal under 28 U.S.C. § 1292(b).

[8] Contrary to plaintiff's assertion (Pl.'s Resp. at 13), defendants supported their motion to dismiss, and the instant motion, with copious legal precedent. Defs.' Mot. at 1 n.1, 8-10, 12-13; *see generally* Defs.' Mot. to Dismiss & Br. in Supp., Aug. 6, 2012, ECF No. 12; Defs.' Reply in Supp. of Their Mot. to Dismiss, Sept. 24, 2012, ECF No. 19.

Respectfully submitted this 4th day of April, 2013.

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CERTIFICATE OF SERVICE

I certify that on April 4, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

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