IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., et al., ***Plaintiffs*,** **v.** **KATHLEEN SEBELIUS, et al.,** ***Defendants.***	**Case No. 1:12-cv-159-JD-RBC**

JOINT REPORT CONCERNING A STAY OF THE CASE

Pursuant to the Court's Order dated March 14, 2013 (Doc. No. 61), Plaintiffs and Defendants conferred regarding whether this case should be stayed pending resolution of the appeal in *University of Notre Dame v. Sebelius*, No. 3:12-cv-253-RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012), *appeal docketed*, No. 13-1479 (7th Cir. Mar. 5, 2013), and in light of the recently issued Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8456 (Feb. 6, 2013). The parties were unable to reach an agreement on this issue, and their positions are stated below.

I. Plaintiffs' Position

Based on the recently issued NPRM, and for the reasons set forth herein, Plaintiffs agree with the Court that this case should be held in abeyance until July 1, 2013, or such time that Defendants adopt new final rules, which is similar to the outcome ordered by the D.C. Circuit in the consolidated cases *Wheaton College v. Kathleen Sebelius*, No. 12-5273, and *Belmont Abbey College v. Kathleen Sebelius*, No. 12-5291. 2012 WL 6652505, at *2 (D.C. Cir. Dec. 18, 2012) (ordering the cases be held in abeyance until new regulations are finalized).

Plaintiffs respectfully disagree that this case should be stayed pending resolution of the *Notre Dame* appeal. Unlike the parallel proceedings at issue in *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 897-98 (7th Cir. 1999), the parties to this case are not the same as the parties to the *Notre Dame* case, and the issues raised in the two cases are not the same. While this case does involve a Catholic university, it also involves the Diocese and other entities that are insured through the Diocesan plan and thus presents legal and factual issues that are distinct from the *Notre Dame* case. Because the parties and issues raised in this case are not identical to those raised in the *Notre Dame* case, the possible hardships to the parties stemming from delay must be weighed and balanced against the competing interests in judicial economy. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).[1]

Plaintiffs nonetheless recognize that Defendants are considering changes to the final regulations implementing the Mandate and thus do not now oppose a stay for a short period of time to allow Defendants the opportunity to complete that process. A short stay will, as the Court pointed out, promote judicial economy by allowing the Court to consider the simplified definition of "religious employer" as well as the accommodation proposed in the NPRM if, in fact, the proposed rules are ultimately adopted. (Doc. No. 61, Order at 3.) Plaintiffs respectfully request that the Court limit the stay to such time that any new regulations are finalized or until July 1, 2013 in the event that no new regulations are finalized prior to that date, to allow Plaintiffs time to seek relief from the present Mandate (and any changes to the Mandate) prior to the expiration of the temporary enforcement safe harbor on August 1, 2013. Plaintiff Our Sunday Visitor's health plan renews in October 2013. (*Id.* at 1.) Lifting the stay on July 1, 2013

[1] Moreover, as Defendants acknowledge *infra* at 7, the appeal in *Notre Dame* has been suspended at present. *See* No. 13-1479, Doc. 6 (7th Cir. Mar. 27, 2013).

will allow Our Sunday Visitor reasonable time to seek relief from this Court if the Mandate continues to require it to violate its religious rights as of October 1.

Defendants, by contrast, view the Court's request for a joint report regarding a stay as an opportunity to reargue their pending Motion to Dismiss. *See generally infra* Section II. As the Court noted in its Order, Defendants' Motion is fully briefed. (*See* Doc. No. 61, Order at 1-2.) Plaintiffs refer to their Response in Opposition to Defendants' Motion to Dismiss (Doc. No. 30), which addresses the reasons why Plaintiffs have standing and their claims are ripe for review. For all the reasons described in Plaintiffs' Opposition, Plaintiffs' challenge to Defendants' final regulation is a prototypical example of an action that is fit for review. (*See generally* Doc. No. 30, Pls.' Opp. at 14-18.) As Plaintiffs previously explained, proposed changes to a *final, codified* regulation may *moot* a claim, but they do not render such a claim *unripe*. (*See id.* at 16-18.)

Furthermore, the rules proposed in the NPRM, if finalized, will not moot this case, because they do not cure the injuries to Plaintiffs resulting from the Mandate. (*See id.* at 5-7, 9-11.) The NPRM restricts the "religious employer" exemption to entities that fall within certain categories of Section 6033 of the Internal Revenue Code, which primarily includes churches and their integrated auxiliaries. *See* 78 Fed. Reg. at 8461; 26 U.S.C. §§ 6033(a)(1), 6033(a)(3)(A)(i), (iii). Indeed, the Government concedes that its proposed rules "would *not* expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. at 8461 (emphasis added).[2] For nonprofit religious organizations that

[2] In fact, the proposed rules would, if finalized, significantly reduce the number of religious institutions that the Government will treat as "religious employers." Under the NPRM, if an organization does not itself meet the religious employer definition, it will no longer receive the benefit of the religious employer exemption by virtue of participating in the plan of an affiliated religious employer, as is the case under the current rule. *Compare* 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012) *with* 78 Fed. Reg. at 8467 ("[E]ach employer would have to independently meet the definition of . . . religious employer in order to take advantage of . . . the religious employer exemption with respect to its employees and their covered dependents.").

do not meet the Government's restrictive definition of "religious employer," the NPRM offers only a purported "accommodation" rather than an exemption from the Mandate.

Plaintiffs view this accommodation, however, as little more than an accounting gimmick that fails to address the Mandate's violations of their religious beliefs. For fully insured religious employers, such as Plaintiff Franciscan University, the "accommodation" requires the employer to pay for a group health plan that excludes abortifacients, sterilization, contraception, and related education and counseling, which will trigger a requirement that the organization's insurer issue a separate policy covering these objectionable services for plan participants. 78 Fed. Reg. at 8462-63. But the separate policy is funded by the religious entity's premiums, a result that continues to require the entity to fund and facilitate services it finds morally and religiously objectionable. *See id.*[3] Self-insured entities, such as Plaintiff St. Anne's Home, fair no better as a result of Defendants' "accommodation." Indeed, the NPRM fails even to propose regulatory language to address these entities' concerns, but suggests several "alternative approaches" under "consider[ation]." 78 Fed. Reg. at 8463. Under these proposals, a self-insured entity would provide a certification to a third-party administrator who would then arrange coverage for the objectionable services on behalf of the religious entity. *Id.* at 8463-64.

In short, the "accommodation" fails to relieve Plaintiffs from the Mandate's legal requirement that they facilitate services to which they have religious objections, and still requires them to undertake conduct that they view as violating their religious beliefs on threat of onerous fines. *See generally* Comments of the Roman Catholic Diocese of Pittsburgh at 8-10 (Apr. 8, 2013) (attached as Exhibit A).

[3] It makes no difference that the resulting plan may be "cost neutral" for Plaintiffs. 78 Fed. Reg. at 8463. Defendants do not dispute that religious organizations and their employees will directly fund the plan that covers the objectionable services, a result that is prohibited by Plaintiffs' religious beliefs.

Defendants cite *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-cv-440, 2013 WL 1189854, at *5 (S.D. Ohio Mar. 22, 2013), for the proposition that the harm Plaintiffs allege is "virtually certain not to occur." *See infra* at 7. The *Franciscan* Court, however, requested no briefing on the NPRM, and openly admitted that "Plaintiffs have not made arguments to this Court with regard to the amended regulations." *Id.* Moreover, the Court's dicta on the NPRM was wrong, as even Defendants must concede. In stating that no harm would come to Plaintiffs as a result of the NPRM, the Court reasoned that the "definition of 'religious employer' in the ANPRM . . . has been significantly broadened so that non-profit religious organizations such as Plaintiffs" are exempted from the Mandate. *Id.* That is simply not the case. As discussed above, the NPRM does not *expand* the availability of the religious employer exemption but rather significantly *narrows* the range of religious organizations that may benefit from the exemption. *See supra* at 3, n.2; 78 Fed. Reg. at 8461 (conceding that the definition change "would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules").

Plaintiff Catholic Charities provides a real example of the way in which Defendants' proposed rules would be more burdensome to religious organizations than the present regulations. While Catholic Charities may have previously benefitted from the Diocese's exemption from the Mandate by offering its employees insurance through the Diocesan plan, this option is foreclosed by the NPRM. *See supra* at 3, n.2; (Doc. No. 1, Compl. ¶ 64).[4]

[4] Contrary to Defendants' claim, *see infra* at 8, Plaintiffs offer this analysis of the proposed rules not because Plaintiffs "understand that the challenged regulations will never be enforced against them in their current form," but because, as Plaintiffs discussed in their Opposition to Defendants' Motion to Dismiss (*see* Doc. 30 Pls.' Opp. at 16-18), the legal doctrine applicable in this situation is *mootness* not *ripeness*. Now that the Court and the parties have the benefit of Defendants' proposed regulatory changes, Plaintiffs offer this analysis to demonstrate that Defendants' proposal does not moot this case or affect the jurisdiction of the Court as Defendants claim.

The NPRM only serves to illustrate precisely why Plaintiffs' claims should, at least, be held in abeyance. Since the time that Defendants issued the regulations that motivated this lawsuit, Defendants have been assuring the public and the Courts that they will take action to address conscientious and religious objections to the Mandate. (*See, e.g.,* Doc. No. 27, Defs.' Mot. to Dismiss at 18.) But Defendants have failed to live up to their promises, instead "restricting exemption [from the Mandate] primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders," and refusing to allow an exemption for other religious institutions that carry out the charitable works of the Catholic Church. *See* 78 Fed. Reg. at 8461. If Plaintiffs' claims are dismissed now, Plaintiffs will almost certainly be before this Court again in a matter of months seeking immediate, emergency relief from the Mandate's imminent enforcement. That result is in no one's interest.

In conclusion, Plaintiffs agree with the Court that a brief stay is warranted in the interest of judicial economy to give Defendants an opportunity to finalize proposed changes to the regulations. Plaintiffs respectfully request that the stay last only until such time that Defendants finalize their proposed rules or July 1, 2013, whichever date comes first.

II. Defendants' Position

Defendants recognize and respect the Court's inherent authority to manage its own docket in whatever way it sees fit. Therefore, if the Court believes that the interests of judicial

(continued…)

Even applying the standing and ripeness doctrines Defendants urge this Court to apply, however, the Court continues to have jurisdiction to hear this case. There is no guarantee that the rules proposed in the NPRM will be finalized. And, even if they are finalized, the proposed rules do not offer an accommodation from the Mandate for self-insured employers like Plaintiff St. Anne's Home. *See supra* at 4. Thus, even taking Defendants at their word that they will finalize the proposed rules, Plaintiffs have standing to challenge the law that is *currently* in place.

economy weigh in favor of a stay at this time, defendants will not object. However, for the reasons articulated below, defendants believe that a stay is not appropriate at this time and that, in fact, the position that plaintiffs take in this Joint Report makes it even clearer that immediate dismissal of this case is the proper course.

When this Court issued its Order temporarily staying this case and seeking the parties' views concerning a longer stay, *see* Order, ECF No. 61, an appeal of *Notre Dame* was moving forward before the Seventh Circuit, *see* No. 13-1479 (7th Cir. Mar. 5, 2013). Were that still the case, defendants would likely agree that a stay would be appropriate because "the issues presented in the *Notre Dame* case are nearly indistinguishable from the issues raised in the present case," and "[t]hus, the outcome of the appeal in the *Notre Dame* case would most certainly affect the outcome of this case by narrowing the issues and assisting in a determination of the questions of law involved." Order at 2, ECF No. 61. However, since the Court issued its Order, the appeal in *Notre Dame* has been suspended. *See* Order, No. 13-1479, ECF No. 6 (7th Cir. Mar. 27, 2013). Therefore, it no longer serves as a basis for staying this case.

Nor should this case be stayed in light of the NPRM. Indeed, far from justifying a stay, the promulgation of the NPRM makes it clear that this case should immediately be dismissed for lack of jurisdiction. *See, e.g.*, *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-cv-440, 2013 WL 1189854, at *5 (S.D. Ohio Mar. 22, 2013) ("Defendants' subsequent promulgation of amendments to the ACA in the NPRM, however, demonstrates they are acting in good faith to address Plaintiffs' concerns. In fact, due to the NPRM's amendments, the alleged harm [stemming from the current regulations] is virtually certain not to occur."). The NPRM further illustrates what defendants have promised all along in this case and elsewhere – that the current version of the regulations, the only version that plaintiffs can possibly challenge at this stage,

will *never* be enforced by defendants against plaintiffs; and that, as a result, plaintiffs lack standing and their claims are not ripe. The overwhelming majority of courts (21 out of 23 district courts) to have considered these circumstances have agreed with defendants' standing and/or ripeness arguments and have granted motions to dismiss.[5] Ironically, the position that plaintiffs take here – that this case should be stayed in light of the NPRM – serves only to emphasize that this case should also be dismissed. It is clear that plaintiffs understand that the challenged regulations will never be enforced against them in their current form, and thus that they suffer no injury or hardship stemming from the challenged regulations. *See id.* at *6. That is why plaintiffs spend the entirety of their section of this Joint Report arguing that the forthcoming *new* regulations will not address their concerns. But the only regulations that plaintiffs can possibly challenge at this stage are the *current* contraceptive coverage regulations. *See, e.g.*, *Persico v. Sebelius*, __ F. Supp. 2d __, 2013 WL 228200, at *19 (W.D. Pa. Jan. 22,

[5] *See The Criswell College v. Sebelius*, No. 3:12-cv-4409-N (N.D. Tex. Apr. 9, 2013); *Ave Maria Univ. v. Sebelius*, No. 2:12-cv-88, 2013 WL 1326638 (M.D. Fla. Mar. 29, 2013); *Eternal Word Television Network, Inc. v. Sebelius*, No. 2:12-cv-00501-SLB, 2013 WL 1278956 (N.D. Ala. Mar. 25, 2013); *Franciscan Univ.*, 2013 WL 1189854; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Most Reverend Wenski v. Sebelius*, Case No. 12-cv-23820, slip op. (S.D. Fla. Mar. 5, 2013); *Roman Catholic Diocese of Dallas v. Sebelius*, No. 3:12-cv-01589-B, 2013 WL 687080 (N.D. Tex. Feb. 26, 2013); *Conlon v. Sebelius*, No. 1:12-cv-3932, 2013 WL 500835 (N.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924-JAR, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815 (ABJ), 2013 WL 285599 (D.D.C. Jan. 25, 2013), *appeal noticed* (D.C. Cir. Mar. 25, 2013); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-01276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Notre Dame*, 2012 WL 6756332; *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-00158, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012), *mot. to alter or amend j. denied*, 2013 WL 690990 (S.D. Miss. Feb. 15, 2013); *Most Reverend David A. Zubik v. Sebelius*, No. 2:12-cv-676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012*), appeal docketed*, No. 13-1228 (3d Cir. Jan. 25, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:12-cv-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Legatus v. Sebelius*, No. 12-cv-12061, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, Nos. 13-1093, 13-1092 (6th Cir. Jan. 24, 2013); *Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-3035, 2012 WL 2913402 (D. Neb. July 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012); *Wheaton Coll. v. Sebelius*, No. 12-5273, 2012 WL 6652505 (D.C. Cir. Dec. 18, 2012) (affirming in part and holding in abeyance appeals in *Wheaton Coll. v. Sebelius*, No. 12-cv-1169, 2012 WL 3637162 (D.D.C. Aug. 24, 2012), and *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012)). *But see Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y-TRM (N.D. Tex. Jan. 31, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-cv-2542(BMC), 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012).

2013) ("[A]ny attempt by this Court to adjudicate possible future amendments to the Mandate would be too speculative to yield meaningful review. It would also defeat one of the rationales of the ripeness doctrine—specifically, 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013) ("[T]the fact remains that Defendants' proposal was just that – a proposed solution subject to comment and alteration. . . . If [the plaintiff] is unsatisfied with the amendment, after it takes shape and is finalized, [the plaintiff] may file suit again. In the meantime, however, the Court declines [the plaintiff's] implicit invitation to issue an advisory opinion on the potential solutions Defendants might propose as it proceeds to further amend the interim final rule." (internal citations omitted)); *see also, e.g.*, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-00523, 2012 WL 6756332, at *4 (N.D. Ind. Dec. 31, 2012); *Wheaton College v. Sebelius*, __ F. Supp. 2d __, 2012 WL 3637162, at *8 (D.D.C. Aug. 24, 2012); *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 40 (D.D.C. 2012). The fact that plaintiffs apparently have no interest in doing so illustrates why this case is not ripe and why they lack standing.

Because the Court lacks jurisdiction, a stay is inappropriate and all that remains for the Court is to simply dismiss the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Dismissal of a nonjusticiable case is "the customary practice," and plaintiff has offered no reason for this Court to deviate from that customary practice here. *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *8 (D. Colo. Jan. 7, 2013) (citing 15 James WM. Moore et al., Moore's Federal Practice § 108.81 (3d ed. 2011) ("if a necessary

component of jurisdiction, such as ripeness, is found to be lacking, the court has no choice but to dismiss the action")); *see also Roman Catholic Diocese of Dallas v. Sebelius*, No. 3:12-cv-01589-B, 2013 WL 687080, at *17 (N.D. Tex. Feb. 26, 2013) ("Dismissal is the appropriate action where a claim is not ripe."); *Persico v. Sebelius*, No. 1:12–cv–123–SJM, 2013 WL 228200, at *14 n.10 (W.D. Pa. Jan. 22, 2013); *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-00158, 2013 WL 690990 (S.D. Miss. Feb. 15, 2013). Though the D.C. Circuit has held an appeal in a similar case in abeyance *after* it had decided that the case was not ripe for review (demonstrating that jurisdiction was lacking), *Wheaton Coll. v. Sebelius*, No. 12-5273, 2012 WL 6652505, at *2 (D.C. Cir. Dec. 18, 2012), it too "offered no compelling reason for doing so." *Colo. Christian Univ.*, 2013 WL 93188, at *8. And, importantly, the D.C. Circuit in *Wheaton* did not hold that the district courts erred in dismissing the suits and that the district courts were, instead, required to hold the cases in abeyance; it merely held the *appeals* in abeyance. The government fully expects that the appeals will simply be dismissed once the new regulations are issued – and the same can be said for the appeal in *Notre Dame*. In fact, a district court within the D.C. Circuit dismissed a similar case in its entirety, rather than issue a stay or hold it in abeyance, finding that the D.C. Circuit's disposition did not require it to do the same and noting that "courts in this circuit regularly dismiss cases for the absence of a ripe case or controversy." *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815 (ABJ), 2013 WL 285599, at *4 (D.D.C. Jan. 25, 2013) (collecting cases), *appeal noticed* (D.C. Cir. Mar. 25, 2013).

Of course, dismissal does not prevent plaintiffs from filing a "new and different" challenge in the future if it is unsatisfied with the new regulations or "in the unlikely" – indeed impossible – "event that the government does not keep its word" to issue those new regulations.

Id.[6] But any such challenge would truly be "new and different" because it would be a challenge to regulations that do not yet exist. At bottom, plaintiffs ask this Court to stay *this* unripe challenge so that they can more easily mount a *different* challenge to *different* regulations that do not now exist when such a challenge may ripen in the future. A stay of this suit would have no impact on the issues plaintiffs may raise in some future hypothetical challenge to some future regulations, and would only reward plaintiffs for having brought an unripe lawsuit. The Court should not exercise its discretion to assist plaintiffs that tilt at windmills in their speculative quest to develop jurisdiction at some time in the future. Simply put, because plaintiffs lack standing and their suit is unripe now, the proper course is to dismiss this case in its entirety.

Respectfully submitted, this 12th day of April, 2013.

[6] Defendants respectfully submit that, due to defendants' repeated assurances, and the traditional presumption of good faith to which the government is entitled, this Court can be assured of defendants' commitments to never enforce the regulations in their current form against plaintiffs and to amend the regulations, in an effort to accommodate the concerns of entities like plaintiffs, before the expiration of the enforcement safe harbor.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2013, I electronically filed the foregoing Joint Report Concerning a Stay of the Case with the Clerk of the United States District Court for the Northern District of Indiana using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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