IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROMAN CATHOLIC DIOCESE OF DALLAS, Plaintiff, v. KATHLEEN SEBELIUS, *et al.* Defendants.	Case No. 3:12-cv-01589-B (JJB) DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE RELIGIOUS EMPLOYER EXEMPTION

INTRODUCTION

The government respectfully submits this response to the Court's request for supplemental briefing regarding the religious employer exemption. As discussed below, that exemption does not require an employer to apply for the exemption, nor does it require an employer to self-certify that it meets the definition of a religious employer. Rather, the group health plan of an employer that meets the definition of a religious employer (along with any associated group health insurance coverage) is simply exempt from the requirement to provide coverage for contraceptive services. In part for this reason, plaintiff's failure to plead that it does not qualify for the religious employer exemption is fatal to its claims.[1] As this Court has recognized, plaintiff bears the burden of establishing subject matter jurisdiction and therefore must plead facts showing that it will actually be subject to the regulations that it challenges.

Moreover, the government wishes to inform this Court that the Departments of Health and Human Services, Labor, and the Treasury issued a Notice of Proposed Rulemaking ("NPRM") on February 1, 2013. The NPRM would amend the contraceptive coverage requirement as it applies to plaintiff and similarly situated non-profit religious employers with religious objections to the contraceptive coverage requirement. Most relevant here, the NPRM would amend the religious employer exemption to eliminate the requirements that the inculcation of religious values be the purpose of the organization, that the organization primarily employ persons who share the religious tenets of the organization, and that the organization primarily serve person who share its religious tenets. Even if plaintiff would not qualify as a religious employer under the current version of the religious employer exemption, the revised regulations

[1] Even if the Diocese of Dallas does not qualify for the religious employer exemption, the Diocese lacks standing and its claims are unripe because of the enforcement safe harbor and the forthcoming accommodations.

leave little doubt that plaintiff would qualify for a exemption as a religious employer if the final rules to be promulgated by August 2013 do not vary from the NPRM in this respect.

ARGUMENT

I. An employer need not apply to the government to qualify for the religious employer exemption

To qualify under the religious employer exemption in its current form, an employer must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B). The sections of the Internal Revenue Code referenced in the fourth criterion refer to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," that are exempt from taxation under 26 U.S.C. § 501(a). 26 U.S.C. § 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii).

The religious employer exemption does not require an employer to apply to the government to qualify. Nor, in contrast to the temporary enforcement safe harbor, does the exemption even require an employer to self-certify that it meets the definition of a religious employer. Rather, the group health plan of an employer that meets the definition of a religious employer (along with any associated group health insurance coverage) is simply exempt. The government's interpretation of its own regulations is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See Chase Bank v. McCoy*, 131 S. Ct. 871, 880 (2011) ("Under *Auer* . . .

we defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is plainly erroneous or inconsistent with the regulation.") (internal citation and quotation marks omitted).

II. Plaintiff's failure to plead that it does not qualify for the religious employer exemption is an additional reason why plaintiff lacks standing

In addition to the temporary enforcement safe harbor and the certainty that the challenged regulations will change and that the government will never enforce them in their current form against the plaintiff here, the Diocese's failure to even allege that it does not qualify for the religious employer exemption is fatal to its claims. As "[p]laintiff[] bear[s] the burden of establishing subject-matter jurisdiction," *In re FEMA Trailer Formaldehyde Prods. Liability Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (citation omitted), it is plaintiff's responsibility to plead the facts necessary to show that it will be subject to the regulations that it challenges. Plaintiff has not done so. The group health plan of an employer that qualifies as a religious employer (along with any associated group health insurance coverage) is categorically exempt from the requirement to cover contraceptive services. Thus, if plaintiff is a religious employer, it has suffered no injury in fact and this Court lacks jurisdiction.

Rather than attempt to show that it does not qualify for an exemption as a religious employer, plaintiff asserts that it "does not know whether the Government will conclude that it satisfies the definition of a 'religious employer.'" Compl. ¶ 11. Plaintiff believes that, "in order . . . to learn whether or not it qualifies, [plaintiff] must submit to an intrusive and potentially costly governmental investigation into whether, in the Government's view, the Plaintiff's 'purpose' is the 'inculcation of religious values'; whether it 'primarily' employs 'persons who share [its] religious tenets,' even though it hires many Catholics and non-Catholics; and whether

it 'primarily' serves such people." *Id.* But plaintiff's view is fundamentally mistaken. As discussed above, plaintiff need not submit to any sort of "governmental investigation" to determine whether plaintiff qualifies for an exemption as a religious employer; if plaintiff meets the definition of a religious employer, its group health plan (along with any associated group health insurance coverage) is categorically exempt and plaintiff need not preview its own conclusion for the government. Moreover, even if plaintiff believes that it qualifies for an exemption as a religious employer and that belief turns out to be incorrect, plaintiff would be protected by the temporary enforcement safe harbor from enforcement by defendants. No matter whether plaintiff qualifies for an exemption as a religious employer, it lacks standing.

III. The Departments' February 1, 2013 Notice of Proposed Rulemaking that proposes changes to the religious employer exemption underscores why plaintiff lacks standing and its claims are unripe

The government recognizes that this Court's supplemental briefing order asked the parties to assume for the sake of argument that the challenged regulations will not be amended, and the discussion above is based upon that assumption. Nevertheless, the government wishes to inform this Court that the Departments of Health and Human Services, Labor, and the Treasury issued a Notice of Proposed Rulemaking on February 1, 2013. The NPRM would amend the contraceptive coverage requirement as it applies to plaintiff and similarly situated non-profit religious employers with religious objections to contraceptive coverage.

As relevant to this Court's supplemental briefing order, the NPRM would amend the religious employer exemption in a way that would almost certainly encompass employers like plaintiff. Specifically, the NPRM would "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer

serves or hires people of different religious faiths." 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013). It would so by eliminating the first three prongs of the current religious employer exemption and clarifying the application of the fourth. Thus, under the NPRM's proposal, "an employer that is organized and operates as a nonprofit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code" would qualify for an exemption as a religious employer. 78 Fed. Reg. at 8461. Based on plaintiff's own allegations, *see* Compl. ¶ 15, ECF No. 1, the revised regulations leave little doubt that plaintiff would qualify for an exemption as a religious employer.

The NPRM's proposed changes to the religious employer exemption therefore further confirm that the Court lacks jurisdiction to review *any* of plaintiffs' claims, including those claims pertaining to the religious employer exemption. Plaintiff has argued that the religious employer exemption is ripe for review because it was adopted in final regulations. Pl.'s Opp'n Mot. to Dismiss 4, ECF No. 13. This argument had no merit prior to the release of the NPRM, *see e.g.*, *Wheaton Coll.*, 2012 WL 3637162, at *8 ("[T]he fact that defendants may have settled on a definition of the "religious employers" that will be exempted from certain of the preventive services requirements is irrelevant given that the requirements themselves are anything but final."); *see also Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *12 (W.D. Pa. Nov. 27, 2012); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200, at *17-18 (W.D. Pa. Jan. 22, 2013), and that is even more apparent now. The NPRM establishes defendants' intent, subject to consideration of forthcoming comments on the NPRM, to amend the religious employer exemption to ensure that it encompasses entities like plaintiff, about which there may be a question as to whether they are entitled to the exemption under the language in the current rules (which, again, defendants are not currently enforcing against entities like plaintiff in any

event). Thus, plaintiff's claims regarding the religious employer exemption suffer from the same shortcoming as all of its other claims – it challenges regulations that are certain to change and are in fact in the process of changing. *See Am. Petroleum Inst. v. Envtl. Prot. Agency*, 683 F.3d 382 (D.C. Cir. 2012) (holding that challenge to regulations was not ripe for review where agency issued NPRM that would amend the challenged regulations).

Even if it were not clear that plaintiff would definitively qualify for an exemption as a religious employer if the NRPM's definition of religious employer is adopted in the soon-to-be promulgated final rules, plaintiff would still be eligible for the NPRM's proposed "accommodations for health coverage established or maintained by eligible organizations [such as plaintiff] . . . with religious objections to contraceptive coverage." 78 Fed. Reg. at 8459. Defendants have stated on numerous occasions – in this litigation, other litigation, and the Federal Register, and elsewhere – that the regulations in their current form will *never* be enforced against religious employers like plaintiff, their group health plans, or any associated group health insurance coverage. Defendants have unequivocally committed to amending the regulations as applied to both categories of employers before the safe harbor expires. To that end, defendants published an Advance Notice of Proposed Rulemaking ("ANPRM") in March of last year, which presented potential approaches to accommodating the religious concerns of religious employers like plaintiff, and other religious non-profit employers, and solicited comments. *See* 77 Fed. Reg. 16501 (Mar. 21, 2012). Thus, even if plaintiff did not fall within the religious employer exemption, defendants would not enforce the current regulations against plaintiff.

The promulgation of the NPRM was the next step in the process of amending the challenged regulations. While defendants' prior assurances and concrete steps towards

accommodating employers like plaintiff and other eligible religious non-profit employers – the ANPRM, the enforcement safe harbor, and the government's repeated statements committing to the timely establishment of the new accommodations – are sufficient by themselves to establish that plaintiff lacks standing and its claims are not ripe for review, *see, e.g.*, *Zubik*, 2012 WL 5932977, at *8-9; *Belmont Abbey College v. Sebelius*, 878 F. Supp. 2d 25, 36-37 (D.D.C. 2012); *Colo. Christian Univ. v. Sebelius*, No. 1:11-cv-03350-CMA-BNB, 2013 WL 93188, at *5; *Wheaton College v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162, at *8 (D.D.C. Aug. 24, 2012) *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-0253-RLM-CAN, 2012 WL 6756332, at *3-4 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-01276-JES-BGC, 2013 WL 74240, at *5 (C.D. Ill. Jan. 4, 2013), the NPRM further buttresses defendants' promise that they will never enforce the current version of the challenged regulations against plaintiff, further shows concrete action to change those regulations, and further undermines plaintiff's unfounded suggestions that the government will not follow through on its commitment or is not acting in good faith. Notably, defendants had promised to issue the NPRM before the end of the first quarter of this year, *see Wheaton Coll. v. Sebelius*, Nos. 12-5273, 12-5291, 2012 WL 6652505, at *1, but released the proposed rules two months ahead of schedule, and defendants are well on track to finalizing the new rules before the end of the enforcement safe harbor. *See* 78 Fed. Reg. at 8459.[2]

CONCLUSION

This case should be dismissed in its entirety for lack of jurisdiction.

[2] The government recognizes that this discussion of the NPRM may go beyond the scope of the Court's supplemental briefing order. The NPRM, however, was issued on February 1, 2013, and this supplemental brief appears to be the most efficient way to bring the new development to this Court's attention. If plaintiff wishes to respond to this discussion, the government does not object to a response.

Dated: February 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 8, 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.

/s/ Bradley P. Humphreys
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