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

THE ROMAN CATHOLIC DIOCESE OF DALLAS,	)	
	)	
Plaintiff,	)	
v.	)	**Civil Action No. 3:12-cv-01589-B (JJB)**
	)	
KATHLEEN SEBELIUS, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S SUPPLEMENTAL BRIEFING PURSUANT TO THIS COURT'S JANUARY 28, 2013 ORDER

The Court has correctly identified one of Plaintiff's frustrations with the government's position. The Diocese, which for over a hundred years has been a "religious employer," under the common sense meaning of the term, is unable to determine whether the government will agree that the Diocese meets the government's artificial definition of "religious employer."

We emphasize that Diocese is not just playing dumb about the exemption—the government itself does not know whether Catholic institutions would be covered. That is why the government's new proposed rules, issued on January 30, 2013, suggest eliminating several elements of the religious-employer definition so that "there no longer would be any question as to whether group health plans of houses of worship that provide educational, charitable, or social services to their communities qualify for the exemption." 78 Fed. Reg. 8456, 8461 (February 6, 2013). This statement is an explicit admission by the government that there is a valid question as to whether the currently enacted regulations exempt Roman Catholic institutions that provide educational, charitable, or social services to their community. Further adding to the uncertainty on this issue, the government has failed to take a position in this lawsuit about whether the Diocese is exempt under the current exemption.

Contrast this uncertainty about the exemption with the certainty that the Mandate requires non-exempt entities to provide services that are contrary to the Diocese's Catholic faith. Because the Diocese is threatened with a certain violation of its rights under the First Amendment and the Religious Freedom Restoration Act, the Diocese has standing to bring its challenge, notwithstanding the uncertain prospect of the government conceding that the Diocese is exempt.

I. NOTE ABOUT THE NEW PROPOSED RULES

Shortly after the Court's January 28, 2013 Order, the Defendants issued a Notice of Proposed Rulemaking proposing certain modifications to the Mandate. 78 Fed. Reg. 8456, 8461 (February 6, 2013). The comment period on these proposed rules extends until April 8, 2013.

The Diocese will not analyze the new proposal's effect on this lawsuit because (1) these proposed rules are still speculative, and not final, (2) a plaintiff's standing is determined as of the date of filing and cannot be destroyed by the government's post-filing actions, and (3) this Court's Order instructs the Parties to assume no further changes in the rules and to focus on the currently existing regulations.

II. RESPONSES TO THE COURT'S THREE QUESTIONS

COURT'S FIRST QUESTION: Whether an entity must apply to qualify for the religious employer exemption under the current version of 45 C.F.R. § 147.130(a)(1)(iv)(B) in order to be exempt from the preventive services coverage requirements, or whether an entity may designate itself as an exempt religious employer and operate according to that self-designation (subject, of course, to later government review).

RESPONSE: The Court correctly notes that the existing regulations fail to address a fundamental issue—how will the exemption be invoked? Plaintiff will be interested to see whether the government, in responding to this Court's question, clarifies the application process for the exemption.

Regardless of the government's answer, the Diocese's standing will not be affected. While giving a government bureaucrat discretion to decide whether the Diocese is a "religious entity" would probably constitute an additional constitutional violation, the Diocese has sufficiently alleged that the current Mandate and exemption are unconstitutional no matter how the exemption is administered. The currently enacted exemption violates the First Amendment by using a definition that excludes Catholic institutions that engage in charitable, social, and educational ministries. (Complaint at ¶ 69.) It is immaterial whether the government chooses to require the Diocese to submit an application that the government reviews before granting an exemption, or whether the government requires dioceses to use self-certifications that the government audits at a later time. Either way, the government will be intruding into the Diocese's business in an unconstitutional and offensive manner. (Complaint at ¶ 70.)

COURT'S SECOND QUESTION: Whether the possibility that Plaintiff could be deemed an exempt religious employer under the current version of 45 C.F.R. § 147.130(a)(1)(iv)(B) affects the standing inquiry with respect to each claim.

RESPONSE: The Diocese's standing is not affected by the mere possibility that the government might deem the Diocese exempt. There are three reasons why the possibility raised by this Court should not affect the Diocese's standing.

1. Plaintiff's standing is not affected by the possibility of future exempt status

First, post-filing contingencies do not destroy standing. It is irrelevant to standing whether the government might deem the Diocese exempt at some point in the future. Standing is determined at the time that the suit is filed. *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 870 (5th Cir. 2000). Judge Means relied on this well-established precedent last week when he denied a nearly identical motion to dismiss in a case brought by the Roman Catholic Diocese of Fort Worth. *Roman Catholic Diocese of Fort Worth v. Sebelius*, 4:12-cv-314 (N.D. Tex. Jan. 31,

2013) (filed with this Court as Docket Entry No. 45). And as the Diocese has informed this Court through a supplemental notice [Docket No. 35], the D.C. Circuit used similar reasoning in denying the government's standing arguments in a case brought by religious universities to challenge the Mandate. *Wheaton College v. Sebelius*, Nos. 12-5273 & 12-5291, 2012 WL 6652505, at *1 (D.C. Cir. Dec. 18, 2012).

The reasoning of the Fort Worth and Wheaton College cases, which focused on the ANPRM, is equally applicable to this Court's question about the exemption. At the time that the Diocese filed this lawsuit, the government had not declared the Diocese exempt. Any subsequent clarity, or the subsequent possibility of the exemption applying, is irrelevant.

Nor is the Diocese's standing undermined by the fact that the Diocese's injury is contingent on the government's decision on whether to exempt the Diocese. *Clinton v. City of New York,* 524 U.S. 417, 430-31 (1998). In *City of New York*, the Supreme Court rejected the government's argument that HHS's failure to grant or deny a request renders an injury too speculative to support standing. *Id.* Similarly, the government's failure to affirmatively grant or deny the Diocese an exemption does not deprive the Diocese of standing. As this Court has noted in its Order, the Fifth Circuit addressed this contingent liability issue in *Comsat v. FCC*, in which the Fifth Circuit held that Comsat had no standing to challenge the contingent liability of paying into the universal service fund because Comsat was prevented by other FCC regulations "unrelated to the challenged rule" from ever growing its services to the point where it would be required to make those payments. 250 F.3d. 931, 936. The Diocese's lawsuit, however, is more akin to *City of New York* than *Comsat*, because here the Diocese already offers a group health plan that may violate the Mandate, and now the only contingency is whether the government will deem the Diocese exempt. By contrast, in *Comsat*, the plaintiff was not even providing services

that would trigger the challenged regulation and could not provide them. *Comsat*, 250 F.3d at 936.

2. Standing is confirmed by the government's failure to foreswear enforcement

Moreover, the Diocese is not required to establish that enforcement is certain; rather, this Court can assume that the government will enforce the law, absent an affirmative declaration by the government otherwise. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."). Thus, the Diocese merely has to plead the possibility of enforcement, which, in the absence of the government's affirmatively stipulating that it will not enforce the statute, is sufficient to confer standing. *ACLU v. Alvarez*, 679 F.3d 583, 593 (7th Cir. 2012) (the government's failure to eliminate the "possibility" of enforcement is a factor supporting the existing of a credible threat of prosecution and thus standing).

In fact, the government had two opportunities to demonstrate that the regulations will not be enforced.

First, the Defendants could have used their motion to demonstrate that the Diocese was exempt or otherwise not subject to the existing regulations at the time of the lawsuit being filed. Since the Defendants filed a 12(b)(1) motion, they could have introduced evidence to raise a standing challenge. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (stating that district court ruling on a 12(b)(1) motion may consider and resolve disputed facts). Defendants could have, for example, attached evidence, if any existed, to prove that the Diocese would never be subject to an enforcement action under the regulations. Because no such evidence existed, Defendants opted for a weaker, facial challenge to the pleadings, and additionally tried to distract this Court from focusing on the currently enacted regulations by focusing on the safe harbor and

the promise of future regulations. This tactic has, admittedly, worked with several courts, but at least two courts have properly focused on the present regulations, as this Court is doing with its questions to the parties. *Catholic Archdiocese of N.Y. v. Sebelius*, 12-civ-2542, 2012 WL 6042864 (E.D. N.Y. Dec. 4, 2012) (filed with this Court as Docket Entry No. 30); *Roman Catholic Diocese of Fort Worth v. Sebelius*, 12-cv-314 (N.D. Tex. Jan. 31, 2013) (filed with this Court as Docket Entry No. 45); *but see* Defendants' Notices of Supplemental Authority [Docket Nos. 20, 23, 41, and 48].

Second, after the filing of this lawsuit, the government could have tried to moot the case by entering a stipulation with the Diocese. In fact, the Diocese asked the government to stipulate to not enforcing the regulations against the Diocese and other plaintiffs. *See* January 16, 2013 Letter of Paul M. Pohl to Bradley P. Humphreys (Attached as Exhibit 1). The government did not respond.

The government has made binding representations in other cases involving the Mandate. For example, in the *Wheaton College* case, the D.C. Circuit found that the plaintiffs had standing, but agreed nonetheless to abate the case in reliance on the government's binding representations not to enforce the Mandate against the plaintiff and to issue a new final rule before August 2013. *See* Plaintiff's Notice of Supplemental Authority [Docket No. 35]. The government, however, has not made any binding representations to this Court about enforcing the regulations against the Diocese.

The government's silence on enforcement further supports the Diocese's standing. In a pre-enforcement challenge, a plaintiff has a credible threat of enforcement when the government "fails to affirmatively indicate that it will not enforce the statute." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998) (citing *Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 393 (1988)). For example, in *ACLU v. Alvarez*, the

Seventh Circuit rejected a standing challenge because the state had not "foresworn the possibility" of enforcing a statute against the plaintiff. 679 F.3d 583, 593 (7th Cir. 2012). Similarly here, the government has not affirmatively indicated to this Court that the current regulations will not be enforced against Plaintiff. The government has instead raised speculation about future changes, which are irrelevant to standing, which is measured on the facts existing at the time of filing.

3. Even if the Diocese could be deemed exempt, it would still have standing

Third, even if the Diocese is deemed exempt for some particular insurance-plan years, the exemption could unconstitutionally violate the Diocese's religious liberty by restricting the Diocese's ability to extend its ministries in future years. The Diocese might feel pressured to restrict its religious ministries, for fear that it would fall outside the narrow exemption when the government re-analyzes the Diocese in subsequent years. This harm is analogous to the harm of self-censorship, where plaintiffs are coerced to self-censor themselves even in the absence of actual enforcement by the government. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.").

COURT'S THIRD QUESTION: Similarly, whether Plaintiff's failure to plead whether it qualifies as a religious employer under the current version of 45 C.F.R. § 147.130(a)(1)(iv)(B) affects the standing inquiry with respect to each claim.

RESPONSE: The Diocese's failure to plead its status under the exemption is caused by the government, which intentionally obfuscated the meaning and process for obtaining the exemption. This failure to plead should not affect the Diocese's standing for two reasons.

1. The government cannot escape review with unclear definitions

First, the government cannot avoid judicial review of an unconstitutional law by including a vague exemption. Because of the way the exemption is worded, relying on concepts

such as "primarily" and "inculcate," neither this Court nor the Diocese can guess whether the government considers the Diocese to be exempt under the current regulations.

In fact, the vagueness of the exemption strengthens the Diocese's challenge, because it is a vague law that "abut[s] upon sensitive areas of basic First Amendment freedoms," and uncertainty may chill the Diocese's exercise of a First Amendment right by causing the Diocese to overcompensate in an attempt to avoid unlawful conduct. *Baggett v. Bullitt*, 377 U.S. 360, 371-72 (1964). Because the Mandate is mandatory and imposes stiff penalties, the chilling effect on the Diocese's exercise of its First Amendment is not merely subjective, but arises from an "objectively justified fear of real consequences" and thus creates a cognizable injury. *D.L.S. v. Utah,* 374 F.3d 971, 975 (10th Cir. 2004).

It is unfair to ask the Diocese to plead with certainty how the exemption applies to it when the government itself does not know the answer. The government could have explained in its motion to dismiss whether the Diocese or Catholic churches in general qualify for the exemption. The government pointedly refused to do so, though the government had every incentive to strengthen its motion to dismiss by affirmatively pleading that the Diocese was exempt at the time of the lawsuit's filing.

As further evidence of the confusion surrounding the exemption, the government has opted to propose changing the definition of religious employer in its latest proposed rules, conceding that the current definition has raised a question about whether certain churches are exempt if they engage in charitable, social, and educational work. 78 Fed. Reg. 8456, 8461 (February 6, 2013).

Given that any failure to plead the status of the Diocese was caused by the government's rush to promulgate a flawed definition, this Court should allow the parties to flesh out the possibility through discovery, rather than dismiss this case at the outset.

2. The Diocese should not be required to plead whether it meets the exemption

Second, it would be fundamentally unfair to require a litigant to subject itself to an unconstitutional regulation before allowing the litigant to establish standing. The Diocese has challenged not only the Mandate, but also the religious-employer exemption. (Complaint at ¶13 ("The U.S. Government Mandate, including the exemption . . . is irreconcilable with the First Amendment, the Religious Freedom Restoration Act, and other laws.")) The Diocese's Counts I, II, III, IV and V challenge the exemption under the First Amendment and the RFRA. The Diocese's ability to seek redress from this Court should not be preconditioned on the Diocese applying to itself the government's inappropriate concepts of what makes a church religious.

After all, the Diocese's point is that even being required to submit to an examination as to whether it meets the exemption is itself a significant injury. (*See* Complaint at ¶ 40 ("Regardless of outcome, the Diocese strongly objects to such an intrusive and misguided governmental investigation into its religious mission."); *see also* Complaint at ¶¶ 11, 39-41, 70.) Analyzing a church's activities under the four-pronged definition would require an unconstitutionally invasive inquiry into what a church believes its purpose is, who it employs, and who it serves. (*Id*. at ¶ 70.) These factors are none of the government's business and fail to include religiously-inspired service to the poor and needy.

For example, the government has crafted an exemption that, on its face, defines as irreligious any activity that helps the poor and needy, if those people have a different religion than the person providing the charity. But a Catholic church's services to the poor are ministries of the church; they are inspired—indeed *mandated*—by Catholic teachings and beliefs. Running a soup kitchen or shelter is no less an expression of a church's Catholic mission than the offering of a catechism class.

A church should not have to justify these activities to government, any more than it has to justify the performance of sacraments. Whether the Diocese has to analyze itself in an application to the government or in a complaint filed with this Court, the damage would be done. The Diocese would have been subjected to the type of government interference that the First Amendment was intended to prevent. (*See e.g.*, Counts I-V of the Complaint.)

To properly safeguard the Diocese's right to religious liberty, the current exemption and regulations must either be struck down by a court or repealed voluntarily by the Defendants. The government has it within its power, if it so wills, to promulgate a constitutional regulation, one that contains either a conscience clause or an exemption that is as broad as a conscience clause. The government's current half-measure—the religious-employer exemption—should not serve as an obstacle to the Diocese's prosecution of this lawsuit.

CONCLUSION

While the Defendants are content to tell this Court, "Trust us, change is coming," they have not sworn to this Court that they will never enforce the regulations against the Diocese. Nor have the Defendants agreed to stipulate that they will not enforce the regulations. The currently existing regulations thus present a real, and not theoretical, threat to the Diocese.

At this stage of the case, it would be unfair to dismiss this case because the Diocese cannot plead more specifically its status under the vague exemption. Any uncertainty about how and whether the exemption applies to the Diocese does not raise a question about standing; rather, it raises a question for the government about how the exemption works, a question that must be answered in discovery.

Respectfully submitted, this the 8th day of February, 2013.

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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/ Basheer Y. Ghorayeb
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