IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*,

Defendants.

Case No. 1:12-cv-2542-BMC

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) PERMITTING IMMEDIATE APPEAL

INTRODUCTION

Events since defendants filed the pending motion lend further support to defendants' argument that plaintiffs' claims are not fit for review. First, on February 1, defendants issued a Notice of Proposed Rulemaking (NPRM) that would amend the contraceptive coverage requirement as it applies to plaintiffs, as well as other religious employers and eligible non-profit employers with religious objections to the contraceptive coverage requirement. The promulgation of the NPRM is the continuation of the regulatory process that began with the Advance Notice of Proposed Rulemaking (ANPRM) in March of last year and, as defendants promised, will be completed before the expiration of the enforcement safe harbor. Second, it has become clear that plaintiffs recognize that the current regulation is a dead letter and that they have no real interest in reaching the merits of their challenge to a regulation to which they will never be subject (and that is the only regulation at issue in this case). This explains why plaintiffs' counsel, in response to the Court's suggestion that they seek summary judgment expeditiously, told defendants' counsel in an email that it only "makes sense to further discuss the timing of summary judgment motions after the new regulation is promulgated and we have had a chance to analyze it with our clients."[1]

These developments only serve to underscore the points that defendants have made since this litigation commenced – that the current version of the regulations will *never* be enforced against plaintiffs; that, as a result, any alleged current injury or harm cannot be traced to the challenged regulations; and that any uncertainty facing plaintiffs is a result of the fact that new regulations are both imminent and inevitable, but that plaintiffs cannot challenge those unknown

[1] In addition, since defendants filed the pending motion four more courts have granted motions to dismiss in cases materially indistinguishable from this case, *see Most Reverend Lawrence T. Persico v. Sebelius*, 2013 WL 228200 (W.D. Pa. Jan. 22, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, 2013 WL 285599 (D.D.C. Jan. 25, 2013); *Archdiocese of St. Louis v. Sebelius*, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *R. Daniel Conlon, Bishop of the Roman Catholic Diocese of Joliet, Ill. v. Sebelius*, No. 1:12-cv-3932 (N.D. Ill. Feb. 8, 2013) (attached as Exhibit 1), bringing the total number of courts to have accepted defendants' jurisdictional arguments to fifteen. The contrary ruling in *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y-TRM (N.D. Tex. Jan. 31, 2013), is in error for many of the same reasons set forth in defendants' current motion in this case. It rests on the incorrect conclusion that "this is not a case where an enforcement action is only remotely possible." Slip op. at 11 (internal citation and quotation marks omitted), and completely fails to distinguish the vast majority of other similar cases that have granted motions to dismiss.

regulations now. Plaintiffs, of course, are free to challenge the new regulations once they are finalized if plaintiffs believe their concerns have not been adequately addressed, but nothing the Court does now could alleviate any such uncertainty, making any opinion on the merits of the challenge to the current regulations purely advisory and thus outside of the Court's jurisdiction.

Plaintiffs' actions in this case and their opposition to the pending motion leave little doubt that their real interest is in challenging the forthcoming regulations, and that their challenge to the *current* regulations is simply a placeholder. Nonetheless, they argue that the standard for reconsideration is not satisfied and that events since the Court issued its ruling are irrelevant. Plaintiffs are wrong on both counts. Reconsideration is warranted because the Court's ruling was based on its view that there was a "substantial possibility" that the government would not do what it has promised to do. But the NPRM – which was the product of a detailed evaluation of approximately 200,000 comments and extensive deliberation and effort aimed at developing a regulation that would, among other things, address the concerns of organizations like plaintiffs here – would not have issued had defendants even considered the possibility of doing nothing and maintaining the current regulations. Because defendants have repeatedly promised from the outset of this case that the current regulations will *never* be enforced against plaintiffs, and the NPRM buttresses that fact, the Court's ruling was in error – and thus the standard for reconsideration was satisfied – the moment it was issued. Continued assurances by defendants in every public forum that the current regulations will never be enforced against entities like plaintiffs make this error all the more apparent. The Court can and should consider these developments on reconsideration because they could not have been presented to the Court prior to its ruling on the motion to dismiss, and because they make it crystal clear that plaintiffs' claims are not ripe for review.

If the Court does not grant reconsideration, defendants ask the Court to certify its Order for immediate appeal to the Second Circuit pursuant to 28 U.S.C. § 1292(b). Plaintiffs' arguments against certification rest on misunderstandings of the prerequisites for certification, which are easily satisfied here. The question of law as to which certification is sought is purely

legal and unquestionably "controlling." Any differences in the factual allegations in this case as compared to those in other similar cases are both trivial and irrelevant. That fifteen other courts have granted motions to dismiss in virtually identical circumstances definitively establishes a "substantial ground for difference of opinion." And finally, certification "may materially advance the ultimate termination of this litigation" because a ruling in defendants' favor would bring plaintiffs' challenge to the current regulations – the only version of the regulations at issue in this case – to a close. It would also end the unduly burdensome and ultimately irrelevant discovery served on defendants, including a recently noticed deposition of Secretary of Health and Human Services (HHS) Sebelius, which requires an enormous waste of time and resources, especially in light of the NPRM and the moribund status of the current rule.

I. THE STANDARD FOR RECONSIDERATION IS SATISFIED, AND THE COURT CAN AND SHOULD CONSIDER RECENT DEVELOPMENTS

Plaintiffs spend a large portion of their brief in opposition to reconsideration asking the Court to ignore the overwhelming evidence before it – evidence that leaves no doubt that the current regulations will never be enforced against plaintiffs. But, although the standard for reconsideration is exacting, it is satisfied here. Defendants seek reconsideration to "correct a clear error" in the Court's ruling, *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *see also Anwar v. Fairfield Greenwich Ltd.*, 745 F. Supp. 2d 379, 382 (S.D.N.Y. 2010) (same) – the conclusion that there is a "substantial possibility" that the challenged regulations, in their current form, will be enforced by defendants against plaintiffs, Order at 28. Plaintiffs' suggestion that it does not matter "whether the Court believes that" the regulations "may take on some other form in the future," Pls.' Mem. of Law in Opp'n ("Pls.' Opp'n") at 7, ECF No. 43, is exactly wrong. Whether the Court accepts defendants' unflagging promise to change the current regulations ant to *never* enforce them against plaintiffs is precisely what matters. It is the Court's decision not to credit defendants' promises and accord the government the presumption of good faith to which it is entitled, *see, e.g., Colo. Christian Univ.*, 2013 WL 93188, at *5 (recognizing "good-faith presumption" to which defendants'

representations are entitled); *Notre Dame*, 2012 WL 6756332, at *3 (same), that underpins the Court's ruling and that defendants now respectfully ask this Court to reconsider.

Contrary to plaintiffs' assertions, *see* Pls.' Opp'n at 9-10, defendants' statements before the D.C. Circuit and other courts made since the Court issued its ruling are consistent with the commitment that defendants have made from the very beginning of this case. *See, e.g.*, Defs.' Mem. in Support of Motion to Reconsider ("Defs.' Mem.") at 4-6 n.2, ECF No. 41-1 (citing such commitments made in this case and elsewhere). Similarly, the NPRM simply reinforces what defendants have been saying all along. The proposed rules would amend the contraceptive coverage requirement as it applies to plaintiffs, as well as other religious employers and eligible non-profit employers with religious objections to the contraceptive coverage requirement, 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013), further buttressing defendants' promise that they will never enforce the current version of the challenged regulations against plaintiffs and further undermining plaintiffs' unfounded suggestions that the government will not follow through on its commitment. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) (holding that challenge to regulations was not ripe for review where agency issued NPRM that proposed amending the challenged regulations).[2]

Plaintiffs' argument that these recent developments should not be considered by this Court is wrong for two reasons.[3] First, plaintiffs contend that events that occurred after the Court issued its ruling on the motion to dismiss – such as the government's representations in *Wheaton College*, the D.C. Circuit's acceptance thereof, and the NPRM – were not brought to the Court's attention "in a timely fashion." *See* Pls.' Opp'n at 9-11. But these types of developments –

[2] Notably, defendants had promised in oral argument before the D.C. Circuit to issue the NPRM before the end of the first quarter of this year, *see Wheaton Coll.*, 2012 WL 6652505, at *1. The proposed rule was released two months ahead of schedule, and defendants are well on track to finalizing the new rule before the end of the temporary enforcement safe harbor. *See* 78 Fed. Reg. at 8459.

[3] Plaintiffs are correct on one point – Local Rule 6.3 does prohibit the submission of supporting affidavits unless permitted by the Court. Defendants regret the oversight and have no objection to the striking of the Declaration of Gary M. Cohen. Because the declaration simply reiterates what defendants have repeatedly stated in this litigation and in every other court and public forum – that the current regulations will never be enforced by defendants against plaintiffs – it is not necessary for this Court's consideration of the current motion.

which have been timely presented – are precisely the purpose of reconsideration. While "facts that were known or discoverable and presentable on the original motion, but were not, are not appropriate support for a motion to reconsider," *Nisanov v. Black & Decker (U.S.), Inc.*, 2008 WL 2185910, at *1, events that occurred subsequent to this Court's original decision could not have been brought to the Court's attention during briefing on the motion to dismiss and are appropriate for consideration now.[4]

Second, plaintiffs' attempt to dismiss defendants' more recent statements and actions as irrelevant to the pending motion is premised on a misunderstanding of the ripeness doctrine. "'[R]ipeness is peculiarly a question of timing,' and 'it is the situation now rather than the situation at the time of the [decision under review] that must govern.'" *Anderson v. Green*, 513 U.S. 557, 558 (1995) (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974)). Thus, even though the Court concluded this case was ripe for review at the time that the motion to dismiss was decided – a conclusion with which defendants respectfully disagree – the case must remain ripe throughout the life of the litigation, and the Court must consider recent developments in making that determination.

Because of defendants' consistent and unwavering commitment not to enforce the challenged rules against plaintiffs and similarly situated employers, *ever*, plaintiffs simply cannot show that they are being harmed by those rules. *See, e.g., Cephalon, Inc. v. Sebelius*, 796 F. Supp. 2d 212, 218 (D.D.C. 2011) ("Plaintiff cannot base an argument of undue burden from postponement of a judicial decision on its having to plan for a future event, as opposed to the actual event, if that event is too speculative in the first instance."). Instead, any uncertainty that plaintiffs face and any planning in which they are currently engaged is a result of the

[4] Plaintiffs – following the erroneous reasoning of *Diocese of Fort Worth* – also suggest that the representations made in oral argument to the D.C. Circuit in *Wheaton College* do not apply to this case. *See* Pls.' Opp'n at 6 n.3. This argument is specious. Those commitments, by their terms, apply equally to similarly situated plaintiffs outside the *Wheaton College* case in particular. Indeed, the D.C. Circuit explicitly described the commitments as applying to "appellants *or those similarly situated as regards contraceptive services*." *Wheaton Coll.*, 2012 WL 6652505, at *1 (emphasis added). And of course the NPRM is not designed to further the process of developing a rule for Wheaton College only. In any event, the government has specifically represented in *this* litigation that it will finalize new rules by August 2013 and that the current rules will never be enforced against plaintiffs.

forthcoming rules that will ensue from the NPRM. But as this Court has recognized, any such argument is far too speculative to provide this Court with jurisdiction. *See* Order at 27 n.9. And as defendants have explained, nothing the Court does now can alleviate any alleged burden currently facing plaintiffs. *See* Defs.' Mem. at 9; *see also, e.g., Colo. Christian Univ.*, 2013 WL 93188, at *8 n.10 ("Colorado Christian fails to convince the Court that any remedy the Court could offer would ameliorate its planning insecurities, as the content of the forthcoming amendment to the interim final rule can, at this point in time, only be guessed at."). Thus, any opinion on the merits with respect to the current regulations would be purely advisory.

Strikingly, plaintiffs appear to recognize that their real dispute is with the forthcoming regulations and that nothing the Court does now can resolve that dispute. As plaintiffs stated in their opposition:

> [E]ven if the Second Circuit were to reverse the Court's Order on appeal, it would not, as a practical matter, be dispositive of this dispute. If defendants in fact promulgate a revised Coverage Mandate before the safe harbor expires, as they represent they will, one of three things will happen: (i) the Coverage Mandate will not change materially in its application to these plaintiffs; (ii) plaintiffs will be wholly satisfied with the revised Coverage Mandate or conclude that there are no grounds for challenging it; or (iii) plaintiffs will assert claims with respect to the Coverage Mandate as revised. In any case, an order by the Second Circuit would not, as a practical matter, end the parties' dispute over the Coverage Mandate.

Pls.' Opp'n at 16-17. But none of plaintiffs' proffered scenarios provides *any* basis for this Court's jurisdiction over a challenge to the *current* regulations. Plaintiffs themselves clearly recognize the inevitability of new and different regulations that, after their promulgation, they will be free to challenge. But they clearly have no interest in resolving their challenge to the current regulations. That is why they rejected this Court's sensible suggestion to proceed directly to summary judgment briefing and limit the scope of discovery. In a January 15 email to defendants' counsel, plaintiffs' counsel stated that it only "makes sense to further discuss the timing of summary judgment motions after the new regulation is promulgated and we have had a chance to analyze it with our clients." But any subsequent summary judgment motion would, necessarily and by plaintiffs' own recognition, be based on the forthcoming regulations, not the

ones at issue here. Thus, the assertion that plaintiffs face any current injury or harm because of their need to prepare for the implementation of the *current* rules is simply fatuous.

II. THE PREREQUISITES FOR INTERLOCUTORY APPEAL ARE EASILY SATISFIED IN THIS CASE

Plaintiffs' arguments against certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) reflect a fundamental misunderstanding of the prerequisites for certification and an inaccurate portrayal of the posture of this case. They also demonstrate – albeit unwittingly – why interlocutory appeal is particularly warranted in this case in light of the NPRM and the extraordinarily burdensome discovery plaintiffs continue to demand.

First, there is no doubt that the question of law at issue in this case is "controlling," as "reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990); *see also In re Trace Int'l Holdings, Inc.*, 2009 WL 3398515, at *1 (S.D.N.Y. Oct. 21, 2009). Plaintiffs' contention that the Court's order is based on the application of "well-established" law to facts, Pls.' Opp'n at 12, is both wrong and misses the point. Defendants' disagreement with the Court's ruling is, ultimately, a purely legal one. The specific factual allegations offered by plaintiffs – and particularly the allegations of present injury and hardship that plaintiffs portray as critical to the Court's ruling – are irrelevant to the resolution of the operative legal question, which is whether any actual case or controversy exists that provides a basis for jurisdiction when plaintiffs challenge only regulations that are in the process of being (and definitely will be) changed, and will *never* be enforced against plaintiffs in their current form. The suggestion that the existence of jurisdiction here is "well-established" is belied by the rulings of the fifteen courts that have decided that "controlling question" the other way. Nor is such suggestion relevant to this prong of the inquiry, which asks only whether the question of law as to which certification is sought is "controlling."

Plaintiffs' argument that there is no "substantial ground for difference of opinion," Pls.' Opp'n at 13-14, fails for similar reasons. Plaintiffs rely exclusively on the contention that their allegations of present harm are more substantial than the allegations in the fifteen other cases

where courts have dismissed identical claims. *See id.* at 14. Even if this were true – which it is not[5] – it is entirely irrelevant for the reasons explained above. Again, no allegations of current harm – no matter how "concrete," *id.* (quoting Order at 34) – can be the basis for jurisdiction when they are tied to a future event (the enforcement of the challenged regulations) that simply will not occur. This is a purely legal question that does not turn on the particular facts of this case, and on this precise question fifteen other courts have reached a conclusion that directly conflict with this Court's ruling. *See, e.g.*, *Colo. Christian Univ.*, 2013 WL 93188, at *8 ("CCU's planning stems from its ongoing speculation that Defendants will fail to amend the interim final rule in a satisfactory manner. However, such speculation, regardless of the costs it entails, is insufficient to constitute a hardship that would outweigh the Court's determination on the fitness of the issues presented – especially because Defendants' stated intent is to amend the interim final rule so as to accommodate the concerns CCU raises here."). Only one other district court has held otherwise. *See Diocese of Fort Worth*, No. 4:12-cv-00314-Y-TRM. Thus, this prerequisite for certification is clearly satisfied. *See, e.g.*, Defs.' Mem. at 12-13 (citing cases); *In re Trace*, 2009 WL 3398515, at *3 (explaining that this requirement is satisfied where "there is conflicting authority on the issue").

Finally, plaintiffs undermine their own arguments in attempting to explain why, in their view, certification would not materially advance the termination of this litigation. Plaintiffs contend that "even if the Second Circuit were to reverse the Court's Order on appeal, it would not, as a practical matter, be dispositive of this dispute" because once defendants' issue a new regulation the jurisdictional issues will be "moot." Pls.' Opp'n at 16-17. This argument underscores why the Court lacks jurisdiction to proceed with the challenge to the *current* rule, which is the only challenge presented here. As plaintiffs implicitly acknowledge, their real

[5] In fact, the plaintiffs in many of the cases in which courts have granted identical motions to dismiss raised very similar claims of concrete present injury and hardship in pleadings and affidavits. *See, e.g.*, *Notre Dame*, Affleck-Graves Aff., ECF No. 23-1 (detailing alleged planning, budgeting, and other harms); *Zubik*, Rauscher Aff., Stewart Aff., McGannon Aff., ECF Nos. 27-2, 27-3, 27-4 (same); *Persico*, Maxwell Aff., Murphy Aff., ECF Nos. 24-2, 24-3 (same); *see also Archbishop of Washington*, 2013 WL 285599, at *3 (rejecting the plaintiffs' argument that case is distinguishable based on more concrete allegations of hardship).

challenge is to whatever as yet unseen regulations come out of the ongoing rulemaking process, which they baselessly assume will not address their religious concerns. When the new rule is finalized, plaintiffs will be free to challenge it if they believe their concerns are not adequately addressed. But that will be a different case, challenging a different rule, with a different administrative record, and involving different discovery, if any. A reversal of this Court's Order would bring the *current* case to a close, *see In re Trace*, 2009 WL 3398515, at *3; *In re Oxford Health Plans, Inc.*, 182 F.R.D. 51, 53 n.2 (S.D.N.Y. 1998), and thus certification "*may* materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (emphasis added). If, as plaintiffs argue, *see* Pls.' Opp'n at 14, the possibility that the party seeking certification would not prevail on appeal as to the controlling question of law were a basis to deny certification, then certification under § 1292(b) would *never* be granted.

Certification is warranted for yet another reason. This case is currently bogged down in meaningless and exceptionally burdensome discovery concerning rules that, as the NPRM makes clear, will soon be defunct. Plaintiffs' own actions demonstrate that they have no interest in having the court address the validity of the current rule at all, much less with alacrity. Instead, they continue to demand exceptionally broad and irrelevant discovery that will take many months to complete, and will require detailed review of potentially millions of pages of documents and an extraordinary expenditure of agency and counsel's time and resources, in an attempt to obtain irrelevant information about regulations that will be replaced before discovery concerning them could be put to any use. This Court will also be ensnared in wasteful discovery disputes. Plaintiffs have, for example, noticed a deposition of Secretary Sebelius herself, for which defendants will seek a protective order. Plaintiffs' other requests largely focus on the justification for and potential alternatives to the current regulations. But as defendants have promised, and the NPRM further shows, these alternatives will be the subject of comments on the NPRM and will be addressed in the final rule. Because of the breadth of the discovery that plaintiffs seek, document production will not be completed until June 7 at the earliest, and plaintiffs seek to depose Secretary Sebelius on June 26. By that time, defendants will either have

promulgated the new regulations or will be within weeks of doing so. Discovery in any challenge to those new rules – if any is appropriate – will be largely or wholly different from discovery in this case because it will involve an entirely different administrative process and record. Thus, all of the effort expended on discovery and inevitable discovery disputes by the parties and the Court will be for naught.

Contrary to plaintiffs' argument, this "protracted litigation," and the massive ongoing discovery burden and motions practice plaintiffs seek to foist on defendants and this Court, may be avoided – or at least mitigated – by an interlocutory appeal. *See Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996); *see also Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 2952929, at *3 (S.D.N.Y. July 18, 2012) ("[A]n interlocutory appeal is most appropriate where it will save the parties (and the court) from unnecessary, expensive, and protracted litigation."); *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv.*, 2011 WL 6057927, at *5 (S.D.N.Y. Dec. 6, 2011) ("[S]ection 1292(b) certification is limited to cases where review might avoid 'protracted and expensive litigation.'" (quoting *German v. Fed. Home Loan Mortg. Corp.*, 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995))); *In re Dynex Capital, Inc. Sec. Litig.*, 2006 WL 1517580, at *3 (S.D.N.Y. 2006) (certifying interlocutory appeal where "substantial resources may be expended in vain both by the parties and this Court if my initial conclusion proves incorrect"). If the Court certifies an appeal, the government would seek expedited review in the Second Circuit, and would plan to file a brief on the merits of the appeal simultaneously with the § 1292(b) petition. Furthermore, defendants do not believe that it would take the Second Circuit much time to consider the limited jurisdictional issues presented by the appeal. Indeed, it took the D.C. Circuit only *four* days after oral argument to reach its conclusion in *Wheaton College* that the case was not ripe for judicial review.[6]

In sum, the Court should certify its Order for appeal pursuant to 28 U.S.C. § 1292(b).

[6] The fact that "defendants waited a total of five weeks after the Court issued its Order to submit this motion," Pls.' Opp'n at 15, has no bearing on the question of whether certification is appropriate. As plaintiffs are well aware, that delay was unavoidable because a request for certification under § 1292(b) cannot be made without approval of the Solicitor General. *See* Letter, ECF No. 38 (Dec. 6, 2012). Now that the Solicitor General has approved an interlocutory appeal, no further delays of this type will be necessary.

Respectfully submitted this 8th day of February, 2013,

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