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April 30, 2012

VIA ECF
The Honorable Frederic Block
United States District Judge
Eastern District of New York
United States Courthouse
225 Camden Plaza East
Brooklyn, NY 11201

Re: *Priests for Life v. Sebelius, et al.,* Case No. 12-cv-00753 FB-RER

Dear Judge Block:

This letter is Plaintiff Priests for Life's response to the government's notice of its intent to file a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and request that the court hold a status conference in connection with the anticipated motion. (Doc. No. 10). As noted below, the government's arguments are without merit. Nonetheless, to ensure that this case is decided on the merits of its constitutional claims and not simply on standing and ripeness grounds, Priests for Life anticipates filing an amended complaint in response to the government's proposed motion as permitted by Rule 15 of the Federal Rules of Civil Procedure.

As stated by the government and as set forth in the Complaint (Doc. No. 1), Priests for Life, an international, pro-life, Catholic organization, is challenging the implementing regulations of the Patient Protection and Affordable Care Act ("Affordable Care Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), that require it, as an organization, to provide coverage for "contraceptive methods," which include abortifacients, and "sterilization procedures" in its health care plans in direct violation of the First Amendment's guaranteed right to the free exercise of religion and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *est. seq.*, which prohibits the federal government from imposing such burdens on this fundamental right. (Compl. at ¶¶ 68-94); *see McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is . . . well understood.").

Moreover, as the government acknowledges, the challenged governmental mandate not only requires Priests for Life to provide services that violate its deeply held religious convictions, but the mandate also requires Priests for Life to provide "patient education and counseling" that promotes such illicit medical procedures. This aspect of the mandate compels speech in violation of the First Amendment. (Compl. at ¶¶ 95-104); *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (holding that the government cannot compel speech and noting that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'") (citation omitted).

In sum, the government's proposed motion seeks to dismiss this case without reaching the merits of the important constitutional issues presented, claiming that this court lacks subject matter jurisdiction to hear and decide these issues. As demonstrated further below, the government is mistaken.

The government's jurisdictional argument is essentially this. First, the government argues that Priests for Life lacks standing because the challenged regulations "do not apply to grandfathered plans" as set forth in various statutes and regulations. (*See* Defs.' Ltr. at 2 [citing 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140]). The government then concludes that "Plaintiff makes no effort to show that its health insurance plan is not grandfathered." (Defs.' Ltr. at 2). As an initial matter and as the Complaint alleges, these regulations do adversely affect Priests for Life in that they require this Catholic organization to provide those services under its current healthcare plan (*i.e.,* Priests for Life's health care plan is not a "grandfathered" plan). (*See, e.g.,* Compl. at ¶¶ 1, 2, 4, 68-104). Nonetheless, to ensure that there is no question about this factual matter, Priests for Life intends to file, as a matter of right, an amended complaint setting forth in detail additional factual allegations to support its standing claim. *See* Fed. R. Civ. P. 15 ("A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.").

Next, the government argues that Priests for Life's claims are not ripe as a result of "a temporary enforcement safe harbor" that was recently announced by the government and as a result of "forthcoming regulations." According to the government, "Because plaintiff alleges that its plan year begins January 1, the earliest any enforcement action could be taken against it by the government is January 1, 2014. . . . And because of forthcoming changes to the preventive services coverage regulations, it is likely that plaintiff's objections will be addressed before the safe harbor period expires." (Defs.' Ltr. at 2-3). According to the government, these "intended changes, which were first announced when defendants *finalized the religious employer exemption*, will establish alternative means of providing contraceptive coverage without cost-sharing while also accommodating non-exempt, non-grandfathered religious organizations' religious objections covering contraceptive services." (Defs.' Ltr. at 3) (emphasis added). What the government refers to here is the alleged "compromise" that was announced by President Obama—a compromise that is a distinction without a difference and that does not remedy the constitutional defects of the mandate. (Compl. at ¶¶ 46-49). Indeed, the government has no intentions whatsoever, as it tacitly concedes here and as Priests for Life demonstrated in its Complaint (*see* Compl. at ¶¶ 27, 28, 34, 42), to change the "finalized employer exemption"—an exemption to which Priests for Life does not qualify, (Compl. at ¶¶ 36, 37), and which was the

genesis for all of the controversy (and litigation) surrounding the mandate. Consequently, the inevitable action causing harm—the imposition of the mandate without an adequate "employer exemption" that protects religious liberty—has arrived. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985). The challenged mandate, which was promulgated pursuant to the Affordable Care Act, is federal law—there is no condition precedent necessary, nor is there any subsequent regulation required to make it so. *See Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that a regulation "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such in advance of the imposition of sanctions upon any particular individual"). And because the enforcement penalties might apply in the future does not alter the fact that Priests for Life must now consider, plan for, and take actions to protect its religious freedom from the proscriptions of the mandate.[1] *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). Indeed, absent the government rescinding the mandate or substantively changing the "finalized employer exemption"—neither of which the government intends to do—it is *inevitable* that Priests for Life will be regulated by the mandate in the future. Consequently, Priests for Life need not wait for the imposition of a penalty to seek relief from this court. *Thomas*, 473 U.S. at 581 ("One does not have to await the consummation of threatened injury to obtain preventive relief."); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925); *New York v. United States*, 505 U.S. 144, 176-77 (1992).

Moreover, a case that presents purely legal issues, such as the challenge at issue here, is unquestionably a case fit for judicial resolution and thus ripe for review. *See Thomas*, 473 U.S. at 581 (holding challenge ripe where the issue presented was "purely legal, and will not be clarified by further factual development"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (same). Indeed, in the vast majority of cases challenging the individual mandate provision of the Affordable Care Act—a provision that does not go into effect until January 2014—the courts found that the challengers had standing and that their claims were ripe for review. *See Florida v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1244 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604, (holding that the plaintiffs had standing and stating, "this case is justiciable, and we are permitted, indeed *we are obliged*, to address the merits of each") (emphasis added); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 537-39 (6th Cir. 2011) (finding standing and noting that "[i]n settings like this one, the Supreme Court has permitted plaintiffs to challenge laws well before their effective date"). No different here: Priests for Life has standing, its claims are ripe for review, and this court is "obliged" to address the merits of each.

Respectfully submitted,

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/s/ Robert J. Muise	/s/ Charles S. LiMandri
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[1] Priests for Life also intends to add additional facts to its amended complaint to further demonstrate the hardship that will be caused should judicial review be denied.