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January 25, 2013

VIA ECF

Hon. Frederick Block
U. S. District Court Senior Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Priests for Life v. Sebelius, et al.*, No. 1:12-cv-00753-FB-RER

Dear Judge Block:

Plaintiff Priests for Life ("Plaintiff") hereby respectfully submits this reply to the two "notice of supplemental authority" letters (Doc. Nos. 45 & 46) filed by Defendants on December 21, 2012 and January 10, 2013, respectively. Plaintiff further submits this letter to alert the court to new authority bearing on the *merits* of this case—which, in the process, also bears on the question of whether this case presents a justiciable case or controversy.

In *Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *10 (7th Cir. Dec. 28, 2012), the Seventh Circuit recently criticized *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec. 20, 2012), and made the following relevant observation regarding the substance of the claim at issue, which is identical to the religious liberty claim at issue in this case: "[W]e think [the reasoning in *Hobby Lobby*] misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps

more precisely, *not only*—in the later purchase or use of contraception or related services." In other words, the injury is caused by forcing an objecting party to provide *access* to contraceptive services through its healthcare plans.

This is important for the following reasons. Plaintiff filed its lawsuit on February 15, 2012 (Doc. No. 1), which was five days *after* the federal government announced its intention to modify the existing rule regarding the application of the contraception mandate to non-profit, religious organizations, such as Plaintiff. At this time, the government announced its intent to change the regulation in a manner that does not change the substantive claims at issue. So if we are to take the government at its word (as Defendants are asking here), then there will be no substantive change in the challenged regulation that will alter the legal relationship of the parties that existed at the time the lawsuit was filed and that continues today. Consequently, this case presents "a real and substantial controversy" between parties with "adverse legal interests," and this controversy can and should be resolved "through a decree of a conclusive character." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). In short, Plaintiff has standing to advance its ripe claims.

As set alleged in Plaintiff's amended complaint (which sets forth allegations addressing the proposed rule change) and as argued more fully in Plaintiff's opposition to Defendants' motion to dismiss, the only "promise" provided by the government is a proposed rule change that does nothing to remedy the constitutional and statutory violations at issue in this case. (*See* First Am. Compl. at ¶¶ 71-78 [Doc. No. 12]; Pl.'s Opp'n to Defs.' Mot. to Dismiss at 6-9 [Doc. No. 20]). According to the government, it is seeking "to develop alternative ways of providing contraceptive coverage" that would require "contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it." The government contends that there would "be no charge for the contraceptive coverage." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012); (*see also* Defs.' Ltr of Dec. 12, 2012 at n.3 [Doc. No. 37]). However, even under this *proposed* regulation, Plaintiff will still be purchasing a healthcare plan that provides "contraceptive coverage directly to [its] plan participants (and their beneficiaries)," which is unacceptable to Plaintiff. Consequently, Plaintiff will still be paying for a healthcare plan that provides these services "directly to" its employees in violation of Plaintiff's sincerely held religious beliefs. (First Am. Compl. at ¶ 73 [Doc. No. 12]).

Finally, none of the "new" cases cited by Defendants in support of their standing and ripeness arguments (*see* Doc. Nos. 45 & 46) can overcome the very persuasive opinion of Judge Cogan in *The Roman Catholic Archdiocese of N.Y. v. Sebelius,* No. 12 Civ. 2542 (BMC), 2012 U.S. Dist. LEXIS 172695 (E.D.N.Y. Dec. 5, 2012), which properly rejected these arguments.

In the final analysis, the current mandate is the law of the land. The proposed change to this mandate will not change the substantive legal claims at issue, as noted by the Seventh Circuit. Thus, there is no basis for this court to dismiss Plaintiff's complaint. At a minimum, and as Plaintiff has argued previously, the court should hold the case in abeyance until the new rule is announced in March (just a mere two months from now). At that time the court could then decide whether this case is moot, whether Plaintiff's complaint fairly embraces the proposed change, or whether Plaintiff should be permitted to amend its complaint to address any new *substantive* changes to the challenged mandate. This alternative approach would protect

Plaintiff's interests, cause no harm to Defendants since they claim they have no interest in enforcing the mandate against Plaintiff, and it will preserve resources by not requiring the re-filing, service, etc. of an entirely new lawsuit. In short, it is a prudential approach to addressing the standing and ripeness issues.

Respectfully submitted,

American Freedom Law Center

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cc: Opposing Counsel (*via* ECF)