Washington, D.C. Offices:
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006

New York Offices:
640 Eastern Parkway
Suite 4C
Brooklyn, New York 11213

Michigan Offices:
P.O. Box 131098
Ann Arbor, Michigan 48113

California Offices:
21731 Ventura Boulevard
Suite 180
Woodland Hills, California 91364

Arizona Offices:
123 W. Chandler Heights Road, #11277
Chandler, Arizona 85248-11277

Main Tel: (855) 835-AFLC (2352)
FAX: (801) 760-3901
Email: rmuise@americanfreedomlawcenter.org

Writer's Direct Tel: (734) 635-3756

David Yerushalmi, Esq.: Licensed in Washington, D.C., New York, California & Arizona
Robert J. Muise, Esq.: Licensed in Michigan

April 8, 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 response to the letter filed by Defendants on March 29, 2013 [Doc. No. 52].[1]

During the hearing in December, Defendants confidently assured Plaintiff (and this court) that the government would have a "new" rule by March 2013 which would then add clarity to the question of whether the government's "contraceptive services" mandate harms Plaintiff.[2] The

[1] Plaintiff has also attached to this letter the district court decision in *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-TRM (N.D. Tex. Jan. 31, 2013), which, relying in part on *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), held that the plaintiff had standing to challenge the mandate and that its challenge was ripe for review.

[2] As Plaintiff has argued throughout, the "contraceptive services" mandate is currently the law of the land—and it was the law of the land when Plaintiff filed this lawsuit. *See* 42 U.S.C. § 300gg-13(a)(4); *see also* n.4, *infra*.

promulgation of this "new" rule would then bear directly on whether Plaintiff has standing to challenge the mandate and whether its challenge was ripe for review. In light of this assurance (and, as the court noted, for practical reasons), the court scheduled a hearing on Defendants' motion to dismiss for April 11, 2013. Now, it appears that the government has resumed its tactic of delaying the inevitable and then arguing that this delay is grounds for dismissing this legal challenge.[3] The court should not allow it.

It cannot be denied that the current mandate is the law of the land.[4] *See* 42 U.S.C. § 300gg-13(a)(4).[5] And it further cannot be denied that the government has no intention of *exempting* organization such as Priests for Life from its requirements. *See* 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (acknowledging that "eligible organizations with religious objections to contraceptive coverage . . . . [must still] comply with the requirement to provide coverage for contraceptive services"). And whether the forced compliance comes by way of direct or indirect compulsion does not matter for purposes of the free exercise claims at issue here. *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713, 717-718 (1981) (holding that "[w]hile the [government's] compulsion may be *indirect*, the infringement upon free exercise is nonetheless substantial") (emphasis added).

To date, the government has not exempted Plaintiff from the unconstitutional requirements of the mandate. Instead, what has happened since the passage of the mandate (*i.e.*, 42 U.S.C. § 300gg-13(a)(4)) is that the government has engaged in a shell game that is being employed to temporarily fend off litigation by religious organizations. As Plaintiff has argued from the beginning, because the mandate is extant, the jurisdiction issue is best viewed in terms of whether Plaintiff's claims will become moot *if* the government actually exempts it from the mandate. Indeed, the government's tactic of postponing what is inevitable by making an incredible (and demonstrably false) plea of repentance and reform so as to avoid a legal challenge is frowned upon by the courts, and for good reason: the government could always

---

[3] Defendants once again claim that "[t]he government has made it abundantly clear that it will *never* enforce the current regulations against plaintiff (or other similarly situated entities)." (Defs.' Ltr. at 2 [Doc. No. 52]). But we know that is not true in light of the "new" rule the government recently proposed, which still requires organizations such as Plaintiff to comply with the mandate. *See* 78 Fed. Reg. at 8462. Indeed, the government has had ample opportunity to exempt all religious objectors, including Plaintiff, from the current mandate and has repeatedly *refused* to do so.

[4] *See Roman Catholic Archdiocese of N.Y.*, 2012 U.S. Dist. LEXIS 172695, at *46-*47 ("Despite defendants' attempt to characterize the ANPRM as a binding promise not to enforce the Coverage Mandate, the fact is that the ANPRM does not prevent the Coverage Mandate, as it currently exists, from going into effect. It is not a change in policy; it merely seeks input to allow the Departments to consider possible revisions to the Coverage Mandate. The Departments need not make any changes to the Coverage Mandate to accommodate religious groups at all.").

[5] The contraception mandate provides as follows: "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). "[P]reventive care" includes coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (First Am. Compl. at ¶ 32 [Doc. No. 12]).

avoid legal challenges by momentarily ceasing the illegal conduct (*e.g.*, providing a "*temporary* enforcement safe harbor" or making a false promise and creating a false hope that change is coming) and then once the legal challenge is dismissed, return to its old ways. Consequently, the Supreme Court has long recognized that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Court noted, not only is a defendant "free to return to his old ways," but also the public has an interest "in having the legality of the practices settled." *Id.* Consequently, the party that ceased the unlawful conduct (or promises to cease the unlawful conduct in the near future) bears the burden of showing that "'(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events *have completely and irrevocably eradicated* the effects of the alleged violation.'" *N.Y. Civ. Liberties Union v. Grandeau*, 453 F. Supp. 2d 800, 805 (S.D.N.Y. 2006) (quoting *Lamar Adver. v. Town of Orchard Park*, 356 F.3d 365, 375 (2d Cir. 2004)) (emphasis added). Here, the government has done nothing to "completely and irrevocably eradicate" the unlawful effects of the mandate upon Plaintiff. Thus, the question of whether the federal government can compel Plaintiff—directly or indirectly—to provide insurance coverage for contraceptive services is squarely before this court. Plaintiff—and the public—have an interest in having the legality of this practice settled.

Furthermore, this case is distinguishable from the litany of other cases cited by Defendants involving religious organizations in that Plaintiff did not qualify for the temporary enforcement safe harbor provision at the inception of this litigation. Indeed, it is only by way of a stipulation (in lieu of an injunction) that was entered into pursuant to *this* litigation and *this* court's *jurisdiction* that Plaintiff is *currently* free from the unconstitutional burdens of the mandate. (*See* Stip. of Parties [Doc. No. 43]). And this stipulation expires at the end of Plaintiff's plan year (*i.e.,* December 31, 2013).

Moreover, as Defendants stated in their motion to dismiss (and as the regulations themselves provide), the temporary enforcement safe harbor "will be in effect *until* the first plan year that begins on or after August 1, 2013." (Defs.' Mot. at 2 [Doc. No. 19]) (emphasis added). That is, the safe harbor will expire for Plaintiff on January 1, 2014—the date of its new plan year. Consequently, even if this temporary provision applies in this case, we are now just eight months away from the mandate taking effect and causing direct harm to Plaintiff.[6]

As noted previously (Doc. No. 40), the U.S. Court of Appeals for the D.C. Circuit in *Wheaton Coll. v. Sebelius*, which was consolidated with *Belmont Abbey Coll. v. Sebelius,* held the cases "in abeyance, subject to regular status reports to be filed by the government with this court every 60 days from the date of this order," (Op. at 3 [Doc. No. 40-1]) (citing *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 390 (D.C. Cir. 2012)), rather than dismiss them on standing and ripeness grounds. This, at a minimum, is a prudential approach this court should consider if it does not intend to deny Defendants' motion outright.[7] Otherwise, within the next eight months—when

[6] In their motion, Defendants claimed that the government was "commit[ted] to amending the preventive services coverage regulations *well before* January 2014," (Defs.' Mot. at 2 [Doc. No. 19]), which is now approximately eight months away. And yet there is still *no* sign of an exemption on the horizon. Indeed, the stipulation in this case expires at the end of this year. Thus, the harm caused by the unconstitutional mandate is indeed imminent.

[7] Plaintiff would also require either an injunction or an extension of the stipulation protecting its interests

the stipulation and safe harbor are set to expire—Plaintiff will be forced to file a new civil cause of action and then seek an immediate Temporary Restraining Order to halt the enforcement of the mandate. This last alternative would be a needless and monumental waste of time and resources.

Respectfully submitted,

American Freedom Law Center

/s/ Robert J. Muise
Robert J. Muise, Esq.
David Yerushalmi, Esq.

Law Offices of Charles S. LiMandri, APC

/s/ Charles S. LiMandri
Charles S. LiMandri, Esq.
Teresa Mendoza, Esq.

Attachment

cc: Opposing Counsel (*via* ECF) w/ attachment

beyond December 31, 2013, should the government not issue its "final" rule in a timely fashion.