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March 14, 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 two "notice of supplemental authority" letters (Doc. Nos. 48 & 49) filed by Defendants on February 8, 2013 and February 19, 2013, respectively.

As this court is acutely aware, there are multiple lawsuits challenging the federal government's contraceptive coverage mandate—indeed, too many to list. Consequently, this case, like many others, has evolved (or devolved, depending upon one's perspective) into a battle of supplemental authority letters. Plaintiff hopes to end that skirmish here.

As this court is also aware, oral argument on Defendants' motion to dismiss on standing and ripeness grounds is currently scheduled for April 11, 2013. As the court indicated to counsel during our last hearing in December, this date was chosen, in large part, because counsel for the government indicated that we would have better clarity by then on the "new" rule that the

government promised would be forthcoming—the much anticipated rule that would allegedly protect religious liberty and thus resolve Plaintiff's legal claims. It was this promise that has served as the very justification for Defendants' pending motion in the first instance—a justification that Judge Brian M. Cogan properly rejected in *The Roman Catholic Archdiocese of N.Y. v. Sebelius,* No. 12 Civ. 2542 (BMC), 2012 U.S. Dist. LEXIS 172695, at *59 (E.D.N.Y. Dec. 5, 2012) ("There is no, 'Trust us, changes are coming' clause in the Constitution.").

Indeed, the parties knew last February 2012 (prior to the filing of this current lawsuit), that the government intended to make some changes as to how it would *implement* its broad, contraceptive services coverage mandate (the government certainly *never* promised to remove this requirement from the new healthcare law, which would have truly resolved the legal issues). However, as Plaintiff alleged in its complaint, those promised changes would not cure the constitutional or statutory defects of the mandate. (*See* First Am. Compl. at ¶¶ 71-78 [Doc. No. 12]; *see also* Pl.'s Opp'n to Defs.' Mot. to Dismiss at 6-9 [Doc. No. 20]). And Plaintiff is correct.

In their February 8, 2013, letter to this court (Doc. No. 48), Defendants cite the much anticipated new rule (NPRM), but there is nothing substantively new about it. Indeed, this NPRM does essentially two things, *see* 78 Fed. Reg. 8456, 8458 (Feb. 6, 2013) ("The proposed rules would make two principal changes to the preventive services coverage rules to provide women contraceptive coverage . . . ."), neither of which resolves the legal issues presented by this case. These changes are discussed in greater detail below.

First, the NPRM changes the definition of "religious employer" for purposes of the *only* exemption from the mandate that provides meaningful protection for religious liberty and the right of conscience (*i.e*., it exempts the organization from having to provide *any* offending coverage). While the proposed change does eliminate three criteria from the current definition of "religious employer" for purposes of this exemption,[1] it ultimately adopts a definition that includes *only* those organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. at 8461 ("Under this proposal, an employer that is organized and operates as a nonprofit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the Code would be considered a religious employer for purposes of the religious employer exemption."). These organizations are essentially churches and religious orders—a very narrow class of nonprofit organizations that are not required to file tax returns. Plaintiff, while a nonprofit religious organization, does *not* qualify for this narrow exemption.[2] Consequently, the government revised the religious employer exemption by *not expanding* it for organizations such as Plaintiff, but by *excluding* such organizations altogether. This should end the

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[1] To qualify as a "religious employer" and thus be eligible for the exemption, the previous definition required the employer to meet the following criteria (1) have the inculcation of religious values as its purpose; (2) primarily employ persons who share its religious tenets; and (3) primarily serve persons who share its religious tenets. *See* 76 Fed. Reg. 46621 (Aug. 3, 2011).

[2] The earlier definition at least included nonprofit organizations described in section 6033(a)(1) of the Code, which includes religious organizations such as Plaintiff. However, Plaintiff was not eligible for the earlier exemption because of the other criteria that are now removed by this NPRM. As noted above, because this NPRM removed organizations described under section 6033(a)(1), Plaintiff remains ineligible for the only acceptable exemption from the mandate.

standing/ripeness inquiry in favor of Plaintiff. Indeed, the government's promise to protect religious liberty was, as anticipated, an empty promise. If the government truly intended to "*never*" enforce the contraception coverage mandate against _any_ religious employer (or non-religious employer that objects on religious grounds to the mandate for that matter) (*see, e.g.,* Defs.' Ltr. of Feb. 8, 2013 at 2 ["Defendants have stated on numerous occasions . . . that the regulations in their current form will *never* be enforced against employers like plaintiff . . . ."] [Doc. No. 48]), it would have included them in the only exemption to providing such coverage, _*but it didn't*_.

Second, the NPRM provides what the government incorrectly believes to be an acceptable "accommodation" for other nonprofit religious organizations that oppose the mandated contraceptive services, such as Plaintiff. *See* 78 Fed. Reg. at 8462 (defining "eligible organizations"). However, even the NPRM acknowledges that "eligible organizations with religious objections to contraceptive coverage . . . . [must still] comply with the requirement to provide coverage for contraceptive services." *Id.* According to the government's new application of the mandate, these nonprofit organizations "would not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds." *Id.* Instead, the "issuer" [*i.e.*, the insurance company] of the organization's healthcare plan would be required to provide separate individual health insurance policies "_*for plan participants and beneficiaries*_ [*i.e.*, Plaintiff's employees] without cost sharing, premium, fee, or other charge." *Id.* (emphasis added). "The issuer would automatically enroll _*plan participants and beneficiaries*_ in a separate individual health insurance policy _*that covers recommended contraceptive services*_." *Id.* at 8463. (emphasis added). The government claims that this is "cost neutral because they [insurance companies] would be insuring the same set of individuals under both polices and would experience lower costs from improvements in women's health and fewer childbirths." *Id.* at 8463.

In sum, by virtue of the fact that Plaintiff provides health insurance for its employees, its employees will now have insurance that covers contraception, sterilization, and abortifacients.[3] Consequently, the federal government is still forcing Plaintiff to "cooperate with evil." The "contraceptive services" at issue are not morally neutral, as the government seems to think. Plaintiff does not just "accept" these services—it morally _*opposes*_ them. The government is thus forcing Plaintiff into a moral predicament that violates its rights protected by both the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. If Plaintiff wants to have health insurance, then it must also provide contraceptive services coverage to its employees by order of the federal government. There is no way to avoid this conclusion, which is unacceptable morally and legally. *See, e.g., Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *10 (7th Cir. Dec. 28, 2012) ("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."); *see also Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713, 717-718 (1981) (holding that by denying employment benefits because

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[3] It is nonsense to think that this will not affect premiums. Nonetheless, the gravamen of Plaintiff's objection to the mandate is not the cost of providing morally objectionable services—it is the fact that the government is forcing Plaintiff to participate in this moral evil.

the employee refused, on religious grounds, to work in a plant that produced armaments, the government imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs," noting that "[w]hile the compulsion may be ***indirect***, the infringement upon free exercise is nonetheless substantial") (emphasis added).

In conclusion, the current mandate is the law of the land. *See* 42 U.S.C. § 300gg-13(a)(4). The government's most recent articulation of *how* that mandate will apply to Plaintiff does not change the substantive legal claims at issue in this case. Indeed, the allegations in the current complaint address this very outcome. Consequently, Plaintiff has standing to advance this ripe challenge to the mandate. Nonetheless, should Defendants disagree, Plaintiff would respectfully seek leave from this court to amend its complaint to remove all lingering doubts. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."). This matter could be taken up with the court during the hearing on April 11. Moreover, by way of notice, Plaintiff intends to renew its motion for a preliminary injunction since the mandate will apply against it come January 1, 2014, the date of its new plan year. Since this case involves largely legal questions, it would be appropriate for this court to consolidate Plaintiff's anticipated motion for a preliminary injunction with a ruling on the merits pursuant to Rule 65 of the Federal Rules of Civil Procedure in order to expedite the case. Fed. R. Civ. P. 65 (a)(2). Once again, this matter could be taken up with the court during the next hearing in April.

Respectfully submitted,

American Freedom Law Center

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cc: Opposing Counsel (*via* ECF)