IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH, Plaintiff, v. KATHLEEN SEBELIUS, *et al.*, Defendants.	Case No. 4:12-cv-00314-Y (TRM) DEFENDANTS' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION UNDER 28 U.S.C. § 1292(B) PERMITTING IMMEDIATE APPEAL AND BRIEF IN SUPPORT

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INTRODUCTION

The government respectfully asks this Court to reconsider its January 31, 2013 Order denying the government's motion to dismiss. In the alternative, if the Court denies the government's motion for reconsideration, the government asks this Court to certify the Order for immediate appeal to the Fifth Circuit under 28 U.S.C. § 1292(b).

Of the eighteen courts to have considered the jurisdictional issues presented in this case, this Court is only the second to allow such claims to proceed.[1] The courts that have found jurisdiction lacking have relied on the government's repeated and consistent representations that it will not enforce the challenged regulations in their current form against employers like the one in this case. In denying defendants' motion to dismiss, however, this Court mistakenly believed that the government's representations do not apply to the specific plaintiff here. That was manifest error. The government has stated in filings *in this case* – and elsewhere – that it will

[1] In the most recent of these decisions, another court in this District dismissed an identical challenge to the preventive services coverage regulations brought by the Roman Catholic Diocese of Dallas for lack of jurisdiction. *See Roman Catholic Diocese of Dallas v. Sebelius*, No. 3:12-cv-1589-B, 2013 WL 687080 (N.D. Tex. Feb. 26, 2013) (concluding the plaintiff's claims are not ripe); *see also Conlon v. Sebelius*, No. 12-cv-3932, 2013 WL 500835 (N.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924-JAR, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 12-cv-0815 (ABJ), 2013 WL 285599 (D.D.C. Jan. 25, 2013); *Persico v. Sebelius*, No. 1:12-cv-00123-SJM, 2013 WL 228200 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius* ("*CCU*"), No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 12-cv-01276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-00523-RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012), *appeal noticed* (3d Cir. Jan. 23, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, No. 13-1093 (6th Cir. Jan. 24, 2013); *Nebraska v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777 (D. Neb. 2012), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012); *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (affirming in part and holding in abeyance appeals in *Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162 (D.D.C. Aug. 24, 2012), and *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012)).

never enforce the current regulations against this specific plaintiff, the Roman Catholic Diocese of Fort Worth.

Instead, by August of this year, there will be new and different rules in place for plaintiff, and other nonprofit religious employers with religious objections to the contraceptive coverage requirement. One day after this Court denied defendants' motion to dismiss, the government issued a Notice of Proposed Rulemaking ("NPRM") that, if adopted without change, would almost certainly ensure that plaintiff is exempt from the contraceptive coverage requirement. And, even in the highly unlikely event that plaintiff is not exempt under the amended regulations, the accommodations proposed in the NPRM for nonprofit religious organizations will resolve any dispute or at least present different legal questions from those that plaintiff has raised regarding the current regulations.

In a decision handed down just two days ago, the Supreme Court reaffirmed the rationale underpinning the government's position that this Court lacks jurisdiction over plaintiff's challenge to the current regulations. *See Clapper v. Amnesty Int'l USA*, 568 U.S. __, 2013 WL 673253 (Feb. 26, 2013). In *Clapper*, the Supreme Court confirmed that standing cannot be based on a speculative future injury that is not "certainly impending." *Id*. at *7-11. Plaintiff's claim of injury from enforcement of regulations the government has committed *never* to enforce against plaintiff is not "certainly impending." As the Court also reiterated in *Clapper*, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id*. at *11. Thus, in *Clapper*, the Court rejected as a basis for standing present "costs" the plaintiffs alleged to have incurred "as a reasonable reaction to a risk of [future] harm." *Id*. Similarly here, any costs allegedly incurred by plaintiff in preparation for the enforcement of a regulation the government has committed *not*

to enforce against plaintiff do not confer standing. *Clapper* is controlling and requires dismissal of this case.

If the Court does not grant reconsideration, defendants ask the Court to certify its Order for immediate appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b). The prerequisites for certification are easily satisfied here. The Court's Order involves a "controlling question of law," 28 U.S.C. § 1292(b), as reversal of the Order would result in dismissal of this action for lack of jurisdiction. The fact that sixteen other courts, including a court of appeals, have found jurisdiction lacking in virtually identical circumstances definitively establishes a "substantial ground for difference of opinion." *Id*. And, certification "may materially advance the ultimate termination of this litigation," *id*., because a ruling in defendants' favor would bring plaintiff's challenge to the current regulations – the only version of the regulations at issue in this case – to a close.

For these reasons and those articulated below, the Court should reconsider its Order or, at the very least, certify an interlocutory appeal to the Fifth Circuit.

ARGUMENT

I. THE COURT SHOULD RECONSIDER ITS ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

The government respectfully moves under Federal Rule of Civil Procedure 59(e) for reconsideration of this Court's order denying defendants' motion to dismiss. "While the Federal Rules of Civil Procedure do not provide for a motion for reconsideration, such a motion may be considered either a Rule 59(e) motion to alter or amend judgment or a Rule 60(b) motion for relief from judgment or order." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328 n.1 (5th Cir. 2004); *see also Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). "Rule 54(b) allows a court to revise an interlocutory order any time prior to the entry of

judgment adjudicating all the claims and all the parties' rights and liabilities. A denial of a motion to dismiss is an interlocutory order. Motions for reconsideration from interlocutory orders are governed by the standards for Rule 59(e) motions." *WesternGeco LLC v. Ion Geophysical Corp.*, No. 4:09-CV-1827, 2011 WL 3608382, at *4 (S.D. Tex. Aug. 16, 2011). *See also Thakkar v. Balasuriya*, Civil Action No. H-09-0841, 2009 WL 2996727, at *1 (S.D. Tex. Sept. 9, 2009). Relief under Rule 59(e) is appropriate when "(1) new evidence has become available; (2) it is necessary to correct manifest errors of law or fact upon which the judgment is based; (3) it is necessary to prevent manifest injustice; or (4) the[re] exist[s] [] an intervening change in the controlling law." *Johnson v. Buentello*, No. 3:09-CV-1023-B, 2010 WL 727752, at *1 (N.D. Tex. Mar. 2, 2010); *see also Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005); *Schiller v. Physicians Res. Grp.*, 342 F.3d 563, 567 (5th Cir. 2003).

Reconsideration is warranted here because the Court's Order was based on the plainly erroneous conclusion that the challenged regulations might be enforced by defendants against plaintiff in their current form. The government, however, has repeatedly made clear that it will *never* enforce the current regulations against plaintiff in this case. Instead, the government is amending the challenged regulations and it is beyond doubt that by August 2013 there will be new rules applicable to plaintiff. Indeed, the government has taken additional concrete steps since the Court issued its Order to amend the challenged regulations. On February 1, 2013, the government issued an NPRM that proposes specific, material revisions to the current regulations and reiterates the government's unwavering commitment to finalize the new rules by August 2013. Proposed amendments to the religious employer exemption, if adopted without change, would almost certainly ensure that plaintiff here is exempt from the contraceptive coverage requirement. And, even in the highly unlikely event that plaintiff is not exempt under the

amended regulations, it is clear that plaintiff would still be eligible for the NPRM's proposed accommodations for nonprofit religious organizations with religious objections to contraceptive coverage. In short, any argument that there will be no change at all with respect to the specific plaintiff in this case lacks credibility. Finally, the Supreme Court's recent decision in *Clapper* makes crystal clear – if it was not already clear – that neither plaintiff's allegations of speculative future injury nor plaintiff's allegations of present injury based on the need to prepare for a speculative future event (and the government's enforcement of the current regulations against plaintiff does not even rise to the level of speculative) is sufficient to provide this Court with jurisdiction. In light of these factors – taken either independently or together – the Court should reconsider its Order.

A. The Court's Order Is Based On The Manifestly Erroneous Conclusion That The Current Regulations Might Be Enforced By Defendants Against Plaintiff

This Court's determination that it has jurisdiction over plaintiff's challenge to the current regulations rests on the proposition that those regulations might be enforced by defendants against plaintiff. Specifically, in concluding that plaintiff has alleged an injury in fact for purposes of standing, the Court relied on plaintiff's allegation that "the looming effective date of the [challenged regulations] imposes present costs and other harms upon [plaintiff] *as it prepares for the [challenged regulations'] enforcement*." Order at 7, Jan. 31, 2013, ECF No. 43 (emphasis added). The Court also noted that, once the challenged regulations are enforced, they will require plaintiff to provide health coverage that it has asserted violates its religious beliefs. *Id*. The Court concluded that these asserted harms, which both stem from a presumption of enforcement or intended future enforcement of the challenged regulations, would be redressed by a favorable decision. *Id*. With respect to ripeness, the Court stated that "this is not a case where an enforcement action is only remotely possible," *id*. at 11 (citation omitted), and distinguished

this case from *Wheaton College*, in which the D.C. Circuit determined that a nearly identical challenge was not ripe, by noting that the government had not represented to this Court that it would never enforce the challenged regulations in their current form against the specific plaintiff here, as it had done with the plaintiffs in *Wheaton College*, *id*. at 11 n.6. The Court concluded that plaintiff would face hardship absent a ruling on the lawfulness of the current regulations because plaintiff must make plans for coming into compliance with the regulations or budget for the imposition of penalties for non-compliance. *Id*. at 10.

All of these conclusions, which are essential to the Court's finding of jurisdiction, should be reconsidered because they rest on the Court's plainly erroneous assumption that the challenged regulations might be enforced by defendants against plaintiff in their current form. The government, however, has repeatedly stated that that is not the case. As defendants did with respect to the plaintiffs in *Wheaton College*, defendants have represented *in this case* that they will *never* enforce the regulations in their current form against *this specific plaintiff, the Roman Catholic Diocese of Fort Worth*. *See* Notice of Supplemental Authority at 3, Dec. 20, 2012, ECF No. 36 ("Defendants have stated on numerous occasions – in the context of this litigation and elsewhere – that defendants will *never* enforce the regulations in their current form against entities like plaintiffs."); *id*. at 6 ("[B]ecause defendants will never enforce the regulations in their current form against plaintiffs in this case . . . – and it is not yet certain what form the amended regulations will take – there is nothing for such plaintiffs to plan for and no costs for them to reasonably incur at this stage."); *id*. ("[T]he regulations in their current form will never be enforced by defendants against plaintiffs like those in *Archdiocese of New York* and this case[.]"); *id*. at 7 ("[A]s it relates to plaintiffs like those in *Archdiocese of New York* and this case . . . [the] final rules are not now and will never be enforced in their present form by

defendants[.]"); *see also* Defs.' Mem. in Supp. of Mot. to Dismiss at 2, 9, 10, 12, 13, Aug. 6, 2012, ECF No. 12; Defs.' Reply in Supp. of Mot. to Dismiss at 1, 3-11, Sept. 24, 2012, ECF No. 19.[2]

Furthermore, as if the representations made *in this case* were not sufficient, the commitment made by the government at oral argument in *Wheaton College* clearly extends, by its express terms, to the plaintiff in this case as well. This Court itself quoted the portion of the *Wheaton College* decision indicating that the government's commitment applies not only to Wheaton College, but to all "similarly situated" entities, such as plaintiff here.[3] Order at 11 n.6. Moreover, even prior to the oral argument in *Wheaton College*, the government stated on numerous occasions – in the context of litigation and in the Federal Register – that the regulations in their current form will *never* be enforced against entities like plaintiff, and defendants specifically pointed to those representations in support of their motion to dismiss in this case. *See* Notice of Supplemental Authority at 3 n.3 (quoting numerous statements). Finally, if there were any need to remove any possible doubt, the government has restated these

[2] This Court referenced the government's statement regarding non-enforcement in response to a question at oral argument in *Wheaton College*. Order at 11 n.6. Had this Court held oral argument in this case, defendants would have made the same statements here, as they have repeatedly in their filings in this case.

[3] Like the government's non-enforcement commitment, the representation that defendants would publish an NPRM in the first quarter of 2013 (which they did) and that they would finalize the new rules before August 2013 is not a commitment specific to the plaintiffs in *Wheaton College*. The NPRM is not an adjudication involving only the plaintiffs in *Wheaton College*; it is a proposed rule of general applicability that, when finalized, will apply to all similarly situated entities. *See Wheaton Coll.*, 703 F.3d at 552 ("There will, the government said, be a different rule *for entities like the appellants*, . . . and we take that as a binding commitment." (emphasis added)). Thus, there is absolutely no basis to conclude that the government's commitments at the *Wheaton College* oral argument, which the government has in any event repeated here, *see supra* pp. 6-7; Resp. to Pl.'s Notice of Supp. Auth. at 1-2, Jan. 15, 2013, ECF No. 41, somehow apply only in *Wheaton College*.

guarantees in the attached Declaration of Theresa Miller. *See* Decl. of Theresa Miller ¶ 5 (Feb. 26, 2013).

In the face of these repeated, consistent, and case-specific representations that the government will never enforce the regulations in their current form against plaintiff in this case, it was manifest error for this Court to ground its finding of jurisdiction over plaintiff's challenge to the current regulations on the possibility of enforcement of those regulations by defendants against plaintiff or plaintiff's purported need to plan for such enforcement. *See e.g.*, *Wheaton Coll.*, 703 F.3d at 552 (taking "the government at its word" and considering its assurances to be "binding commitment[s]"); *CCU*, 2013 WL 93188, at *5 (recognizing the "good-faith presumption" to which defendants' representations are entitled); *Notre Dame*, 2012 WL 6756332, at *3 ("The government is entitled to a presumption of good faith in such promises."); *Zubik*, 2012 WL 5932977, at *9; *Bowden v. Wilemon*, No. 4:11-CV-711-A, 2012 WL 426638, at *5 (N.D. Tex. Feb 9, 2012) ("The good faith of government officials is presumed, and the burden of proof of establishing lack of good faith is upon the complaining party."). Indeed, as this Court's "but see" citation, *see* Order at 11-12, implicitly recognizes, nearly every other court to have considered defendants' jurisdictional arguments has found defendants' assurances – along with the concrete steps defendants have taken to amend the challenged regulations, including the Advance Notice of Proposed Rulemaking ("ANPRM") and NPRM – to be sufficient to conclude that the regulations in their current form will never be enforced by defendants against entities like plaintiff. Because the government will never enforce the current regulations against plaintiff – and it is not yet certain what form the amended regulations will take – there is nothing for plaintiff to plan for and no costs for it to reasonably incur at this stage. Money and time spent planning for implementation of the current regulations – which will never be enforced by

defendants against plaintiff – is money and time wasted, and planning for as yet unknown future regulations is a self-inflicted injury. Accordingly, plaintiff lacks standing, its challenge to the current regulations is not ripe, and this Court should reconsider its Order to the contrary.[4]

B. The Notice of Proposed Rulemaking Issued By Defendants After This Court's Order Further Demonstrates That The Court Lacks Jurisdiction

The day after this Court denied defendants' motion to dismiss, defendants issued an NPRM that would materially amend the contraceptive coverage requirement as it applies to plaintiff, as well as other nonprofit religious employers with religious objections to providing contraceptive coverage. *See* 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013). Issuance of the NPRM – a new development that occurred after this Court's decision – also warrants reconsideration of the Court's Order. *See Johnson*, 2010 WL 727752, at *1; *see also Roman Catholic Diocese of Dallas*, 2013 WL 687080, at *15 ("The promulgation of the NPRM . . . urges the undeniable conclusion that the case is not ripe"). Although defendants' prior assurances and concrete steps toward amending the regulations to accommodate employers like plaintiff – the ANPRM, the enforcement safe harbor, and the government's repeated statements committing to the timely establishment of the new accommodations – are sufficient by themselves to establish that

[4] This Court's conclusion that defendants' intent to amend the regulations is irrelevant for purposes of standing, Order at 7, is also plainly erroneous. Although standing is determined at the time suit is filed, *id*., defendants had announced their intent to amend the regulations to address religious concerns more than three months *before* plaintiff filed this action, in the preamble to the very rules plaintiff challenges. *See* 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012). The government also had already established the enforcement safe harbor, and it was clear at the time plaintiff filed suit that it was protected by the safe harbor. *See* Compl. ¶ 80. Therefore, unlike in *Wheaton College*, where the plaintiffs filed suit before the government established the safe harbor or clarified that it applied to the plaintiffs in that case, plaintiff here lacked any cognizable injury at the time it filed suit.

Nonetheless, even if the Court is unwilling to reconsider this aspect of its Order, the Court's reasoning does not extend to the question of ripeness. *See Anderson v. Green*, 513 U.S. 557, 558 (1995) ("[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." (quotations omitted)).

plaintiff lacks standing and its claims are not ripe for review, *see supra* p. 1 n.1 (citing cases), the NPRM further buttresses defendants' commitment to amend the challenged regulations and underscores the impropriety (as well as the absurdity) of proceeding with a legal challenge to the current regulations.

The NPRM would amend the religious employer exemption in a way that would almost certainly ensure that employers like plaintiff are exempt. Under the NPRM's 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 [Internal Revenue] Code" would qualify for an exemption as a religious employer. 78 Fed. Reg. at 8461; *see* 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (referring to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order). Based on plaintiff's own allegations, *see* Compl. ¶ 14, May 21, 2012, ECF No. 1, it would almost certainly be assured of qualifing for the exemption and thus would almost certainly be under no obligation to provide contraceptive coverage.[5] The NPRM therefore further demonstrates why deciding the legality of the current regulations would "entangl[e the Court] in abstract disagreements over administrative policies," *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003), and result in the Court deciding issues that will very likely never arise, *Texas v. United States*, 523 U.S. 296, 300 (1998).

Even if it were not clear that plaintiff would almost certainly be assured of qualifying for an exemption as a religious employer if the NRPM's definition of religious employer is adopted in the soon-to-be promulgated final rules, it is clear that plaintiff would still be eligible for the NPRM's proposed accommodations for nonprofit religious organizations with religious

[5] And plaintiff, of course, is not subject to enforcement by defendants now as defendants are not enforcing the current regulations against plaintiff or other entities like it. *See supra*.

objections to contraceptive coverage. 78 Fed. Reg. at 8459. The proposed accommodations would provide employees of eligible organizations with contraceptive coverage without cost sharing "while insulating their employers . . . from contracting, arranging, paying, or referring for such coverage." 78 Fed. Reg. at 8462. Even if for some reason plaintiff is not satisfied with the accommodations (and no one can know whether it will be until the amended regulations are finalized by August of this year), the accommodations will present different legal questions than the current regulations. *See, e.g.*, *Roman Cathoic Diocese of Dallas*, 2013 WL 687080, at *15 ("The proposed amendments, if adopted, spill into every aspect of the present case and constitute reversal of course on [the agency's] part that, if adopted, would necessitate substantively different legal analysis and would likely moot the analysis we could undertake if deciding the case now." (quotation omitted)).

In short, it will serve absolutely no purpose whatsoever for this Court to render a decision on the legality of the current regulations because the regulations will be different come August 2013 and, in the meantime, the current regulations will never be enforced by defendants against plaintiff. Indeed, plaintiff's proposed discovery plan for this case demonstrates that plaintiff really has no desire to pursue its challenge to the current regulations, which is not surprising in light of the fact that those regulations are not now and never will be enforced by defendants against plaintiff. Plaintiff has proposed a discovery period that extends until October 15, 2013,[6]

[6] The parties conducted a Rule 26(f) Conference on February 19, 2013, during which plaintiff proposed that fact discovery extend until June 1, 2013 and expert discovery extend until October 15, 2013. Plaintiff also indicated that it anticipates seeking discovery regarding, *inter alia*, third party interaction with the U.S. Department of Health and Human Services or roles played in the creation of the challenged regulations; defendants' processes and procedures regarding the religious employer exemption; and internal memos, and scientific and statistical materials considered by defendants. The parties intend to file their Joint Rule 26(f) Report by the March 15, 2013 deadline set by the Court.

but by then the current regulations will have changed as to plaintiff and plaintiff's current challenge will be moot (even assuming it were justiciable to begin with, which it is not).[7] Engaging is such a futile exercise – particularly where the only possible outcome could be an advisory opinion about the legality of regulations that are currently being amended and will never be enforced by defendants against plaintiff – is precisely what the ripeness doctrine is intended to avoid. *See, e.g.*, *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 683 F.3d 382, 388 (D.C. Cir. 2012) ("It would hardly be sound stewardship of judicial resources to decide this case now . . . given that an already published proposed rule, if enacted, would dispense with the need for such an opinion in a matter of months.").

Issuance of the NPRM also further highlights the Court's error in relying on a technical conception of finality. The Supreme Court has instructed lower courts to apply the finality requirement in a "flexible" and "pragmatic" manner. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967). In concluding that the current regulations are fit for judicial review, however, this Court relied exclusively on the fact that the challenged regulations are "final rule[s]" that are "on the books." Order at 9. This mechanical application of the finality requirement improperly elevates form over substance and ignores the reality of the regulatory and enforcement landscape

[7] The plaintiffs in *Archdiocese of New York*, who are represented by the same law firm that represents plaintiff here, have charted a similar course. The plaintiffs in that case rejected the court's suggestion to proceed directly to summary judgment briefing and limit the scope of discovery. Instead, the 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 the plaintiffs' own recognition, be based on the forthcoming regulations, not the ones at issue in that case or here. And any discovery regarding the current regulations cannot possibly be relevant to the validity of the forthcoming regulations. Like the plaintiffs' rejection of summary judgment briefing on the current regulations in *Archdiocese in New York*, plaintiff's proposed discovery plan in this case demonstrates that plaintiff's assertion that it faces current injury or harm because of its need to prepare for the implementation of the current regulations is simply fatuous.

as it relates to plaintiff. *See, e.g.*, *Abbott Labs.*, 387 U.S. at 151 (inquiring whether final rule was nonetheless "tentative" and whether "compliance was expected" in assessing ripeness); *Roman Cathoic Diocese of Dallas*, 2013 WL 687080, at *15-16; *CCU*, 2013 WL 93188, at *7; *Notre Dame*, 2012 WL 6756332, at *3; *Catholic Diocese of Biloxi*, 2012 WL 6831407, at *7; *Belmont Abbey Coll.*, 878 F. Supp. 2d at 38-39. Even if the ANPRM, the enforcement safe harbor, and defendants' repeated commitments not to enforce the current regulations against plaintiff and to amend the regulations to address religious concerns like those raised by plaintiff were not sufficient to demonstrate that the government's position is tentative (and they are sufficient, *see, e.g.*, *CCU*, 2013 WL 93188, at *7), the NPRM – which proposes specific amendments that would almost certainly ensure the exemption of, or at the very least accommodate, plaintiff – is. *See, e.g.*, *Am. Petroleum Inst.*, 683 F.3d 382; *Tex. Indep. Producers and Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483-84 (5th Cir. 2005); *Lake Pilots Ass'n, Inc. v. U.S. Coast Guard*, 257 F. Supp. 2d 148, 160-62 (D.D.C. 2003). Accordingly, this Court should reconsider its Order.

C. The Supreme Court's Decision In *Clapper v. Amnesty International USA* – Handed Down Two Days Ago – Is Controlling

On February 26, 2013, the Supreme Court issued a ruling in *Clapper v. Amnesty Int'l USA*, 568 U.S. __, 2013 WL 673253 (Feb. 26, 2013), that underscores the errors in this Court's Order and controls the disposition of the jurisdictional analysis in this case. This recent development in the controlling law also warrants reconsideration. *See Johnson*, 2010 WL 727752, at *1 (N.D. Tex. 2010).

The plaintiffs in *Clapper* – "attorneys and human rights, labor, legal, and media organizations" – challenged Section 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1881a, on the grounds that they frequently communicate with individuals who are likely targets of surveillance. 2013 WL 673253, at *3, 6. The plaintiffs – like plaintiff here – advanced

two theories of standing: first, that *future* harm was likely because of the "reasonable likelihood" that their communications would be the subject of surveillance; and second, that they had suffered *present* injury to attempt to avoid that likely future harm. *Id*. at *3, 6. With respect to the latter, plaintiffs alleged that they had "take[n] costly and burdensome measures to protect the confidentiality of their communications," such as travelling abroad to have in-person conversations and ceasing to engage in certain telephone and e-mail conversations. *Id*. at *7, 16.

The Supreme Court rejected both theories. First, the Court emphasized that, for a possible future injury to convey standing, the injury must be "certainly impending." *Id*. at *7. In so holding, the Court rejected the "objectively reasonable likelihood" of injury standard that the Second Circuit had applied. *Id*. at *8. The Court concluded that because the future event that the plaintiffs feared was speculative, the threatened injury was not certainly impending. *Id*. at *8-11.

Second, the Court rejected the plaintiffs' argument that they had standing as a result of present injury or harm incurred in preparation for the speculative future event. *Id*. at *11. The Court's reasoned:

> The Second Circuit's analysis improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not "fanciful, paranoid, or otherwise unreasonable." [*Amnesty Int'l USA v. Clapper*, 638 F.3d at 134]. This improperly waters down the fundamental requirements of Article III. Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing – because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. . . . Any ongoing injuries that respondents are suffering are not fairly traceable to § 1881a.
>
> If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear. As Judge Raggi accurately noted, under the Second Circuit panel's reasoning, respondents could, "for the price of a plane ticket, . . .

> transform their standing burden from one requiring a showing of actual or imminent . . . interception to one requiring a showing that their subjective fear of such interception is not fanciful, irrational, or clearly unreasonable." [*Amnesty Int'l*,] 667 F.3d at 180 (internal quotation marks omitted). Thus, allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of respondents' first failed theory of standing.

Id. (internal citations omitted).

While the particular facts of *Clapper* are, of course, different from the facts here, the Court's analysis is directly on point. Like the plaintiffs in *Clapper*, plaintiff here bases its argument for standing on a speculative future injury that is not certainly impending. In fact, the threatened future event in *Clapper* – the surveillance of the plaintiffs' communications – was *far* more likely to occur than the purportedly threatened future event in this case – defendants' enforcement of the current regulations against plaintiff – which, the government has repeatedly stated, will never occur. And, like the plaintiffs in *Clapper*, plaintiff here alleges that it is suffering *present* harm to prepare for this speculative future event – allegations on which this Court's standing and ripeness analyses largely rested. *See* Order at 7 (finding standing based on costs incurred by plaintiff as it prepares for the current regulations' enforcement); *id.* at 10 (concluding plaintiff's purported need to budget and plan for future enforcement of challenged regulations constitutes hardship for purposes of ripeness). But the Supreme Court has now made it abundantly clear that such allegations are not sufficient to provide this Court with Article III jurisdiction where the underlying threatened event for which plaintiff is planning is, as is indisputably the case here, not certainly impending. In light of the Supreme Court's controlling decision in *Clapper* – which was handed down after this Court's decision – this Court should reconsider its Order.

II. IF THE COURT DENIES DEFENDANTS' MOTION FOR RECONSIDERATION, IT SHOULD CERTIFY ITS ORDER FOR INTERLOCUTORY APPEAL

In the event that the Court denies defendants' motion for reconsideration, defendants ask the Court to certify the Order denying defendants' motion to dismiss for immediate appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b). Section 1292(b) allows a district court to certify an order for interlocutory appeal when the order (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Although the decision whether to certify an order for interlocutory appeal is within the district court's discretion, *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006), all of the 1292(b) factors are easily satisfied in this case.

First, there is no doubt that the question of law at issue here is "controlling," as "reversal of the district court's opinion would result in dismissal of the action." *Id.* at 723 (quotation omitted); *see also Tesco Corp. v. Weatherford Intern., Inc.*, 722 F. Supp. 2d 755, 766 (S.D. Tex. 2010) ("[I]t is clear that a question of law is controlling' if reversal of the [order] would terminate the action." (quotation omitted)). Indeed, numerous courts have recognized that subject matter jurisdiction is an appropriate issue for certification of an interlocutory appeal. *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *U.S. ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984); *Schwendimann v. Arkwright Advanced Coating, Inc.*, Civil No. 11-820ADM/JSM, 2012 WL 5389674, at *3 (D. Minn. Nov. 2, 2012); *In re Mounce*, No. 03-55022-1mc, 2008 WL 2714423, at *5 (Bankr. W.D. Tex. July 10, 2008) ("[C]ertainly subject matter jurisdiction counts as a controlling question of law."); *Meche v. Richard*, Civil Action No. 05-0385, 2007 WL 3129583, at *1 (W.D. La. Oct. 22, 2007). Nor would resolution of the jurisdictional questions require a heavily fact-based analysis. *See*

Ryan, 444 F. Supp. 2d at 722. To the contrary, defendants' jurisdictional challenge presents a question of law: whether a court has jurisdiction over a plaintiff's challenge to regulations despite the government's commitment to never enforce those regulations in their current form against the plaintiff and the existence of an ongoing rulemaking designed to amend those regulations to address the plaintiff's concerns. The appeals court will not need "to go hunting through the record" to discern the relevant facts, *id.* (quotation omitted), because this Court's decision relied on the facts alleged in plaintiff's complaint, Order at 6 n.5. Moreover, plaintiff's allegations of injury and hardship are largely irrelevant to the resolution of the operative legal questions, as defendants' arguments are based not on a rejection of such factual allegations, but instead on the legal truism that any injury or hardship cannot stem from the current regulations because those regulations will never be enforced by defendants against plaintiff.

Second, it is abundantly clear that there is substantial ground for difference of opinion on the jurisdictional questions at issue in this case. As previously noted, this Court's Order is in conflict with the rulings of sixteen other courts, including a court of appeals – that alone is easily sufficient to satisfy this prerequisite for certification. *See, e.g.*, *Castellanos–Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 399 (5th Cir. 2010) (accepting jurisdiction of interlocutory appeal that presented "a question about which reasonable jurists can . . . debate"); *Louisiana Generating, LLC v. Illinois Union Ins. Co.*, Civil Action No. 10-516-JJB-SCR, 2012 WL 1752685, at *2 (M.D. La. May 16, 2012) (finding substantial ground for difference of opinion where "other district courts . . . have reached different conclusions when confronted with . . . question[]"); *Aspen Specialty Ins. Co. v. Muniz Eng'g Inc.*, Civil Action No. H-05-0277, 2006 WL 1663732, at *3 (S.D. Tex. June 15, 2006) (explaining that requirement is satisfied when there are "conflicting rulings on [the] issue" or a "contrary ruling by [a] federal district court in

another state"). This is so even if this Court believes that it is unlikely that the Fifth Circuit will reverse its Order. *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, No. 11-cv-5994(CM), 2012 WL 2952929, at *8 (S.D.N.Y. July 18, 2012) ("[I]f a district court had to believe that her decision was likely to be reversed before certifying a question under 28 U.S.C. § 1292(b), there would be no such certifications. Probability of reversal is not the standard. The standard is whether there is 'substantial ground for disagreement.'").

Finally, certification may materially advance the ultimate termination of the litigation. Quite simply, a reversal of this Court's Order "would not only 'materially advance' the ultimate disposition of 'the litigation,' it would terminate it altogether." *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963); *see also Gautier v. Plains Pipeline, LP*, Civil Action No. 12-1064, 2012 WL 4483003, at *3 (E.D. La. Sept. 28, 2012) (concluding interlocutory appeal could materially advance litigation "by potentially avoiding litigation of [plaintiff's] case in district court only to discover later on that there was no subject matter jurisdiction over [its] claims"). Moreover, allowing such an appeal would "avoid protracted and expensive litigation," *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 884 (S.D. Tex. 1969), including litigation concerning discovery that plaintiff has indicated it intends to seek, "thereby saving time and expense for the court and the litigants," *Ryan*, 444 F. Supp. 2d at 723. *See also Ex parte Tokio Marine*, 322 F.2d at 115 ("[T]o require the parties to go through a trial before a court lacking jurisdiction would be both expensive and senseless for no matter what facts were developed on the trial, the Constitution would forbid the adjudication there."). Although this Court has determined that "[plaintiff's] claims present purely legal issues, and further factual development is not necessary to resolve them," Order at 9, plaintiff has indicated that it nonetheless intends to seek very broad discovery and has proposed a discovery period that extends until October 15,

2013. *See supra* n.6. The government's experience in the *Archdiocese of New York* case – the only other case in which a court has found jurisdiction and a case in which the plaintiffs are represented by the same law firm that represents plaintiff here – has made clear, such discovery, if the Court permits it, will be extraordinarily burdensome, take many months to complete, and require detailed review of potentially millions of pages of documents and significant expenditure of agency and counsel's time and resources.[8] It is also likely that any discovery will engender motions practice as to the scope of permissible discovery, privilege issues, and the like, necessitating further expenditure of the Court's and the parties' time and resources. It is defendants' position that any discovery serves no useful purpose, particularly given the moribund nature of the current regulations as applied to plaintiff, but plaintiff has nonetheless stated that it intends to move forward with discovery requests. A ruling in defendants' favor would obviate the need for any discovery and end this case. *See Thompson v. Shaw Group, Inc.*, Civil Action No. 04-1685, 2006 WL 2038025, at *1 (E.D. La. July 19, 2006) (concluding requirement was met where interlocutory appeal may "render years of discovery, enormous expenses incurred by the parties, and a trial on the merits unnecessary" and "conserve judicial resources"); *In re Dynex Capital, Inc. Sec. Litig.*, No. 05-cv-1897(HB), 2006 WL 1517580, at *3 (S.D.N.Y. June 2, 2006) (certifying for interlocutory appeal where "substantial resources may be expended in vain both by the parties and this Court if my initial conclusion proves incorrect"); *Rogers v. City of San Antonio*, No. Civ. A. SA-99-CA-1110, 2003 WL 1571550, at *3 (W.D. Tex. Mar. 24, 2003). Of course, once the amended regulations are issued, plaintiff will be free to challenge them if it believes that its concerns have not been adequately addressed – but that case, and any attendant discovery, would, of course, be different.

[8] The government has also filed a motion for reconsideration or, in the alternative, for certification under 28 U.S.C. § 1292(b) in *Archdiocese of New York*.

In sum, the Court's Order is an ideal candidate for certification pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted this 28th day of February, 2013.

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CERTIFICATE OF SERVICE

I certify that on February 28, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS

CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1(a) and (b), I certify that, on February 28, 2013, I conferred with Basheer Ghorayeb, counsel for plaintiff, regarding Defendants' Motion for Reconsideration or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b) Permitting Immediate Appeal. Mr. Ghorayeb indicated that plaintiff opposes this motion.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS