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

ROMAN CATHOLIC DIOCESE OF FORT WORTH,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 4:12-cv-00314-Y (TRM)**
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION OR IMMEDIATE APPEAL UNDER 28 U.S.C. § 1292(b)

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SUMMARY

This Court correctly denied Defendants' motion to dismiss and Defendants have failed to provide a proper basis for reconsidering that decision. Defendants now regurgitate the same arguments that this Court has already considered, and rejected.

Defendants also try to change the Court's mind by convincing it that the government is now committed to never enforcing the Mandate against the Diocese. This argument, which the Defendants never made in their motion to dismiss, is insufficient for two reasons: (1) it is wrong—the government has avoided entering into such a binding stipulation with the Diocese, and (2) it is irrelevant—a commitment made after the filing of this lawsuit cannot affect standing, because standing is determined as of the time the suit is filed. (Order Denying Motion to Dismiss (Doc. 43) at 7.) This alleged commitment is not a proper basis for reconsidering the Court's decision.

Defendants are also not entitled to their requested alternative relief—an interlocutory appeal. Defendants have not pointed out a "controlling question of law" that would be the subject of the appeal; instead, Defendants seek to appeal this Court's application of well-settled law to the facts, which would violate section 1292(b)'s requirement for an immediate appeal.

ARGUMENT

A. Defendants have failed to establish a proper basis for reconsideration

This Court should deny Defendants' motion for reconsideration. As Defendants concede, Relief under Rule 59(e) is appropriate only if (1) new evidence is available, (2) there exists a manifest error of law or fact, (3) it is necessary to prevent manifest injury, or (4) the controlling law has changed. (Doc. 47 at 4.) Apparently seeking to fit under the "manifest error of law or fact" prong of Rule 59(e), Defendants accuse the Court of reaching "the plainly erroneous

conclusion that the regulations might be enforced by defendants against plaintiff in their current form." (Doc. 47 at 4.) But as shown below, it is the government, not this Court, that is in error.

1. The Court properly refused the Defendants' invitation to "trust us"

Defendants complain that this Court failed to credit the government for allegedly having "repeatedly made clear that it will *never* enforce the current regulations against plaintiff in this case." [Doc. 47 at p. 4 (emphasis in original)]. At the outset, it is worth noting that the government alleges it made these representations in pleadings *after* this lawsuit is filed. As this Court recognized in its order, standing is determined as of the time the suit is filed, making the government's post-filing representations irrelevant. (Order Denying Motion to Dismiss (Doc. 43) at 7.) In order to affect standing, the government would have had to have made the representations before the lawsuit was filed.

Moreover, the government has made no such representations—prior to this Court's order, the government dodged every opportunity to stipulate that the regulations would not be enforced against the Diocese.

First, Defendants refused to enter a stipulation along these lines when approached by the Diocese. In January, before this Court issued its order, the Diocese asked the government to stipulate to not enforcing the regulations against the Diocese and other plaintiffs. *See* January 16, 2013 Letter of Paul M. Pohl to Bradley P. Humphreys (Attached as Exhibit 1). The government refused to do so.

Second, Defendants refused to make such a commitment in their motion to dismiss. Because Defendants filed a 12(b)(1) motion, they could have introduced evidence to raise a standing challenge. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (stating that district court ruling on a 12(b)(1) motion may consider and resolve disputed facts). Defendants could have, for example, attached evidence, if any existed, to prove that the Diocese would never be

subject to an enforcement action under the regulations. Because no such evidence existed, Defendants opted for a weaker, facial challenge to the pleadings, and additionally tried to distract this Court from focusing on the currently enacted regulations, pointing the Court instead to the safe harbor and the promise of future regulations. This tactic has, admittedly, worked with several courts, but this Court and the district court in New York properly focused on the present regulations.

In fact, this Court's ruling on standing was also in accord with the ruling of its sister court in the Northern District and with the D.C. Court of Appeals. Judge Boyle in the Northern District of Texas, Dallas Division, agreed with this Court that a Roman Catholic diocese had standing notwithstanding the new rulemaking, because standing is measured as of the time the lawsuit is filed. *Roman Catholic Diocese of Dallas v. Sebelius*, No. 3:12-cv-1589-B, 2013 WL 687080 (N.D. Tex. Feb 26, 2013) (finding the Diocese of Dallas has standing, but that the claims are unripe). The D.C. Circuit Court of Appeals rejected the government's standing challenge in *Wheaton* on the same grounds. *Wheaton College v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012). Thus, although the Defendants labor to paint this Court's order as an aberration, this Court's reasoning on standing is, to the contrary, consistent with that of two other district courts (the Dallas Division in this district and the New York district court), as well as the only Court of Appeals to consider the issue.

Further straining their credibility, the Defendants now claim that their motion to dismiss contained binding representations to this Court, and Defendants cite the following pages in support: pages 2, 9, 10, 12, and 13 of the motion to dismiss. (Doc. 47 at 7.) The government cites to these pages to support the following statement in their motion for reconsideration: "[D]efendants 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." (Doc. 47 at 6 (emphasis omitted).) But those pages from the motion to dismiss contain no such representation.

In those pages of the motion to dismiss, Defendants merely noted that they had issued the ANPRM, that they intended to amend the regulations before the end of the safe harbor, and that there was "no reason to suspect" that Plaintiff would have to provide objectionable services:

- Page 2: Defendants argue that the safe harbor "provides that defendants will not bring any enforcement action against such organizations that meet certain criteria (and associated group health plans and issuers) during the safe harbor period." Defendants make no promises about what occurs after the safe harbor period.
- Page 9-10: Defendants note that by the time the safe harbor expires, they expect to have made significant changes: "By that time, defendants expect that significant changes to the preventive services coverage regulations will have altered the landscape with respect to certain religious organizations by providing them with further accommodations." Defendants further note that these changes "will establish alternative means of providing contraceptive coverage without cost-sharing while also accommodating non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services." Finally, Defendants note that they intend "to finalize the amendments to the regulations such that they are effective before the end of the temporary enforcement safe harbor."
- Page 12-13: Defendants argue that the ANPRM is "promising imminent regulatory amendments." Therefore, Defendants conclude, "In light of the forthcoming amendments, and the opportunity the rulemaking process provides for plaintiff to help shape those amendments, there is no reason to suspect that plaintiff will be required to sponsor a health plan that covers contraceptive services in contravention of its religious beliefs once the enforcement safe harbor expires."

(*See* Motion to Dismiss (Doc. 12) at 2, 9-10, 12-13.) Notably lacking from these pages is a governmental representation that the regulations would *never* be enforced against the Diocese. To the contrary, Defendants carefully, and in a very lawyerly manner, avoided making any such

promises in their motion to dismiss—leaving the option open to enforce the regulations against Plaintiff.

The government's coy refusal to forswear enforcement further supports the Diocese's standing. In a pre-enforcement challenge, a plaintiff has a credible threat of enforcement when the government "fails to affirmatively indicate that it will not enforce the statute." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998) (citing *Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 393 (1988)). For example, in *ACLU v. Alvarez*, the Seventh Circuit rejected a standing challenge because the state had not "foresworn the possibility" of enforcing a statute against the plaintiff. 679 F.3d 583, 593 (7th Cir. 2012). Similarly here, when the government moved to dismiss the case, it failed to affirmatively indicate to this Court that the current regulations will not be enforced against Plaintiff. The government instead pointed to statements in other cases and raised speculation about future changes, which are irrelevant to standing.

But in concluding that the Diocese had standing and ripe claims, this Court was entitled to rely on the government's statements in its motion to dismiss, on the existence of final regulations, and on the Plaintiff's allegations. Another federal judge also carefully considered similar facts and concluded that a similarly situated diocese had standing and a ripe dispute. *Catholic Archdiocese of N.Y. v. Sebelius*, 12-civ-2542, 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012). Like the district judge in New York, this Court carefully analyzed the parties' briefs and supplemental authority, concluding that the Diocese had standing and that its claims were ripe. The Court's conclusion was correct and the government has failed to identify any manifest error of law or fact in this Court's order.

2. The issuance of the NPRM is not a proper basis for reconsideration

The Notice of Proposed Rulemaking (NPRM) was an anticipated development and its issuance does not require reconsideration of the Court's order. While it is true that the Defendants finally issued the NPRM just after this Court's ruling, this event was anticipated by the Court.

Prior to this Court's ruling, the parties had briefed the Court on the fact that the Defendants had issued the Advanced Notice of Proposed Rulemaking (ANPRM), which anticipated the NPRM. This Court expressly considered and dismissed the Defendants' arguments that the accommodations previewed by the ANPRM affected the plaintiff's standing and the case's ripeness. The Court found that Defendants' standing arguments were irrelevant because "'[s]tanding is determined as of the time that suit is filed.'" (Doc. 43 at 7 (quoting *Energy Mgmt. Corp. v. City of Shreveport,* 397 F.3d 297, 302 n.3 (5th Cir. 2005)).) Similarly, the Court rejected Defendants' ripeness arguments because the Diocese's claims challenged "a final rule with a definitive effective date" and that a prompt ruling on Diocese's claim would "add clarity to the constitutional issues presented by the Mandate." (Doc. 43 at 9-10.) The issuance of the NPRM, therefore, is not a reason for reconsidering the Court's order.

Nor is the plaintiff's proposed discovery plan related to the NPRM, despite the government's insinuations. (Doc. 47 at 11.) The Diocese believes discovery will uncover evidence that the government intentionally targeted Catholic entities in promulgating the existing regulations, further supporting the Diocese's claims and anticipated summary judgment. The Diocese picked an October 15, 2013 discovery cut-off because it anticipated the government would be resistant to discovery, and the Diocese built in time to account for the government's expected objections and motion practice. If the government cooperates and the Diocese is able to complete its discovery early, the Diocese can file a summary judgment earlier. But in the

Rule 26(f) conference, the government refused to propose its own dates for discovery, taking the position that no discovery should be conducted in this case, confirming the Diocese's concern that the government will resist all discovery attempts.[1]

3. The government's statements in *Wheaton* are not controlling

The government's hollow promise that the *Wheaton* statement "extends, by its express terms, to the plaintiff in this case as well" further exemplifies the undisciplined approach of the government to interpreting other cases. The government's statement in *Wheaton* does not expressly extend to the Diocese. The statement that the government cites is: "[The government] represented to the Court that it would never enforce [the Mandate] in its current form against appellants or those similarly situated as regards contraceptive services. There will, the government said, be a different rule for entities like the appellants, and we take that as a binding commitment." *Wheaton College v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (citations omitted). The appellants in *Wheaton* were Wheaton College, a protestant college, and Belmont Abbey College, a Roman Catholic college. Thus, the government has left itself wiggle room in the statement "entities like the appellants." Neither this Court, nor the Diocese, has any assurance that there will be "a different rule" for the Diocese, which is a litigant that is differently situated than colleges and universities. Moreover, neither this Court, nor the Diocese, could enforce the government's promises in the *Wheaton* case—only the D.C. Circuit Court could do that.

[1] The government incorrectly claims that the plaintiffs in the Archdiocese of New York are uninterested in challenging the currently operative regulations. After inquiring, our understanding is that the New York plaintiffs are planning to move for summary judgment at the appropriate time, in accordance with their court's suggestion, and are in the meantime conducting discovery on the operative regulations in accordance with a court-ordered schedule. Similarly here, the Diocese should be allowed to conduct discovery to support its anticipated motion for summary judgment.

In the instant case, the Defendants fall short of making a binding commitment, opting instead to file a declaration that concludes at page 4 that the "defendants will never enforce" the Mandate, while phrasing this conclusion as a logical inference that must be drawn from the existence of the safe harbor and the new rulemaking, and not as a firm commitment to this Court. (Doc. 47-1 at 4.) Defendants could, but refuse to, file a binding stipulation in this case. Defendants' refusal to file a stipulation speaks louder than their words.

Finally, even the *Wheaton* court did not find the government's statements sufficient to justify dismissal; the court instead held the appeal in abeyance, pending regular status reports by the government. This Court therefore correctly refused to rely on the *Wheaton* statements in ruling on Defendants' motion here.

B. Defendant's reliance on *Clapper* is misplaced

The Supreme Court's decision in *Clapper v. Amnesty International USA*, 568 U.S. __, 2013 WL 673253 (Feb. 26, 2013), does not support Defendants' motion. In *Clapper*, the Supreme Court rejected the Second Circuit's application of a relaxed standard for determining standing. Under that standard, the plaintiffs in *Clapper* had to show only an "objectively reasonable likelihood" of future harm, instead of a "certainly impending" injury.

This relaxed standard had allowed the plaintiffs, who were attorneys and human rights, labor, legal, and media organizations, to claim standing to challenge provisions of the Foreign Intelligence Surveillance Act (FISA). Their argument was that FISA might "at some point in the future" allow the Government to intercept the plaintiffs' communications with foreign individuals, thus causing the plaintiffs injury. In addition, the plaintiffs argued that the risk of surveillance was forcing them to take costly and burdensome measures that was presently injuring them and was fairly traceable to FISA. The Supreme Court's reasoning in rejecting these theories highlights why the Diocese here has standing, as this Court properly held.

The Supreme Court rejected the "objectively reasonable likelihood" standard because it is at odds with the standing requirement that the "threatened injury must be certainly impending." *Id*. at *8 (quotation and citation omitted). The *Clapper* plaintiffs asserted a "speculative chain of contingencies" that might lead to their being unwittingly surveilled pursuant to FISA. *See id*. at *8-11. The Court pointed to a five-step, "highly attenuated chain of possibilities" that would *all* have to be realized for the plaintiffs to sustain any injury. Those inferences included:

> (i) plaintiffs' "highly speculative" view that the Government would target their communications, despite the fact that the law may not target U.S. persons and the plaintiffs had no knowledge of the Government's targeting practices with respect to foreign individuals;
> (ii) assuming the plaintiffs could show that their foreign contacts would be surveilled, they could only speculate as to whether FISA would be the mechanism the Government employed;
> (iii) assuming the Government sought to use FISA for surveillance, the plaintiffs could only speculate that a FISA court would grant the Government surveillance authority over the contacts;
> (iv) assuming the Government received such authorization, it was "unclear" whether it would actually acquire the targeted communications; and
> (v) even if the Government did acquire the contacts' communications, the plaintiffs could "only speculate" whether their communications would be incidentally acquired.

See id. at *8-10. In these circumstances, the Court held, the plaintiffs could not establish that their potential injury from FISA-authorized surveillance was "certainly impending" or "fairly traceable" to the challenged law. *Id*. at *11.

The Supreme Court's holding does not undermine this Court's order. In denying the Defendants' motion to dismiss, this Court relied on the proper standard. This Court quoted the Fifth Circuit's standard for standing, which requires that the injury be "'an injury in fact which is a concrete and particularized invasion of a legally protected interest'" and further requires the injury to be "'fairly traceable to the challenged action of the defendant.'" (Doc. 43 at 6.) This Court did not rely on the Second Circuit's "objectively reasonable likelihood," of which the Supreme Court disapproved in *Clapper*.

Further distinguishing this case from *Clapper,* this Court relied on the Diocese's allegations of *present* harm, not "a highly-attenuated chain of possibilities." (Doc. 43 at 6-7 ("The Diocese further alleges that the looming effective date of the Mandate imposes present costs and other harms upon the Diocese as it prepares for the Mandate's enforcement.").) Far from the speculative chain of inferences that would have to be realized for the *Clapper* plaintiffs to be impacted by FISA, the Diocese here is faced with present injuries and certainly impending future injuries because the Mandate is a final rule, to which the Diocese is subject, notwithstanding the NPRM. Unlike FISA, which was not directed at the plaintiffs, but at unknown foreign individuals, with whom the *Clapper* plaintiffs might or might never contact, there is no question that the Mandate is intended to apply to U.S. employers like the Diocese and that if the Diocese is not exempted from the Mandate, it will be injured.

Thus, unlike the plaintiffs in *Clapper*, who asserted standing "based on costs they incurred in response to a speculative threat," 2013 WL 673253, at *11, the present burdens incurred by the Diocese here are not "simply the result of their desire to prepare for contingencies," but instead are a necessary and appropriate response to the impending effectiveness of the Mandate. As the Eastern District of New York explained in denying a similar motion by Defendants, "the practical realities of administering health care coverage for large numbers of employees—which defendants' recognize—require plaintiffs to incur these costs in advance of the impending effectiveness of the Coverage Mandate." *Id.* at 33-34. It requires no speculation to review the Affordable Care Act and the Mandate and conclude, as this Court has, that the Diocese is subject to the Act and the Mandate and will be injured to the extent the Mandate violates the Diocese's sincerely held beliefs.

This case is more akin to *Clinton v. City of New York,* 524 U.S. 417, 430-31 (1998), because the Diocese already offers a group health plan that is subject to the Mandate, and the only contingency is whether the government will issue an exemption and deem the Diocese exempt. In *City of New York*, the Supreme Court rejected the government's argument that HHS's failure to grant or deny a request renders an injury too speculative to support standing. *Id.* Similarly, the government's failure here to affirmatively grant or deny the Diocese an exemption does not deprive the Diocese of standing.

In sum, this Court's ruling has not been undermined in any manner by the Supreme Court's decision in *Clapper*. There is no basis for seeking reconsideration of the Order or permission for an interlocutory appeal in light of this new decision.

C. This Court's order is not subject to an interlocutory appeal under § 1292(b)

The Court's order is not the appropriate subject of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The decision to permit an interlocutory appeal is "firmly within the district court's discretion." *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006). A district court may certify an order for interlocutory appeal only if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). This procedure is reserved for "exceptional circumstances," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). This case does not present one of those exceptional circumstances that would justify an immediate appeal.

Defendants' request fails at the outset because they have not identified a "controlling question of law." In its order denying the motion to dismiss, this Court relied on well-established principles of standing and ripeness and applied them to the facts of this case. The Defendants do not challenge the Court's understanding of this well-settled law. Instead,

Defendants assail this Court for allegedly not giving enough weight to Defendants' representations concerning their intent, claiming that this Court "mistakenly believed that the government's representations do not apply to the specific plaintiff here." (Doc. 47 at 1.)

Further demonstrating that the Defendants' challenge is a factual challenge, not a legal one, Defendants spend most of their motion complaining that the Court drew the incorrect inferences from the facts relating to the ANPRM, the NPRM, and the government's statements made in various pleadings and in the *Wheaton* case. But these are all fact issues. The Court of Appeals could not reweigh this Court's understanding of the facts in an interlocutory appeal.

Defendants try to dress up the factual dispute as a legal question, claiming that their motion presents the following question of law for appeal: "[W]hether 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." (Doc. 47 at 17.) Defendant are thus challenging whether this Court has correctly understood the facts about the government's alleged "commitment" on enforcement and the impact of the NPRM. In other words, Defendants are challenging the Court's application of well-settled law of standing and ripeness to the disputed fact of whether the Diocese will be subject to the Mandate, given the government's statements and the pending NPRM. But the application of settled law to disputed facts does not qualify as a "question of law" for the purpose of an interlocutory appeal. *McFarlin v. Conseco Serv., LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004).

Further proving that Defendants are disguising a factual dispute as a question of law, Defendants felt the need to file a declaration in support of their motion. (Doc. 47-1.) The declaration of Teresa Miller seeks to dispute the allegations of the Diocese about its injuries and

its being subject to the Mandate, all in an effort to buttress Defendants' motion. After surveying the various facts about the ANPRM, the Diocese, and the NPRM, the declaration concludes "defendants will never enforce the contraceptive coverage requirement in its current form against plaintiff . . . ." (Doc. 47-1 at 4.) Of course, this factual conclusion is also a key phrase in Defendants' alleged "question of law" that Defendants recite in their brief at page 17: "[D]efendants' 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* . . . " (Doc. 47 at 17 (emphasis added).) If this were truly a question of law, Defendants would have supported it with legal precedent. Instead, Defendants filed a four-page declaration filled with factual averments.

As the declaration proves, Defendants are not seeking to review a controlling issue of law. Rather, they are seeking to correct what they believe is a factual error in this Court's order. This is, however, an inappropriate use of the interlocutory-appeal statute, which is not supposed to serve as "a vehicle to question the correctness of a district court's ruling or to obtain a second, more favorable opinion." *Ryan*, 444 F. Supp. 23 at 722 (citing *McFarlin v. Conseco Serv., LLC*, 381 F.3d 1251, 1256 (11th Cir. 2004)). Because Defendants do not seek to challenge a controlling question of law, but rather seek to correct a perceived error in the Court's application of well-settled law to disputed facts, this Court should deny Defendants' application for a certification pursuant to § 1292(b).

CONCLUSION

Defendants have not met their burden. They have not provided an appropriate basis for reconsidering this Court's order. They have not identified a controlling question of law that is appropriate for interlocutory review. The Diocese therefore respectfully asks this Court to deny Defendants' motion.

Respectfully submitted, this the 21st day of March, 2013.

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CERTIFICATE OF SERVICE

I certify that on March 21, 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/ Basheer Y. Ghorayeb
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