



U.S. Department of Justice

Civil Division

Washington, DC 20530

Via Electronic Filing

August 23, 2017

The Honorable Susan Richard Nelson
United States District Court
774 Federal Building
316 N. Robert Street
St. Paul, MN 55101

Re: *Thrivent Financial for Lutherans v. R. Alexander Acosta, Secretary of Labor and U.S. Department of Labor*, Court File No. 0:16-cv-03289-SRN-DTS

Dear Judge Nelson:

We write to respond to Plaintiff's letter dated August 21, 2017. Plaintiff declined our invitation to submit a joint letter to the Court addressing the parties' efforts pursuant to the Court's instruction that we meet and confer regarding "the possibility of a nonenforcement agreement that gives Thrivent complete relief from the threat of enforcement." Hr'g Tr. at 34-35, Aug. 10, 2017. Counsel for the parties conferred twice by telephone. The Department of Labor ("Department") considered Plaintiff's proposals, explained its reasons for not favoring those proposals, and suggested an alternative approach that could address Plaintiff's concerns. While the Department does not perceive a need to address the merits of the arguments contained in Plaintiff's letter at this time, we suggest a manner in which to proceed in this matter.

The Department continues to believe—and Plaintiff's proposal of additional motion practice only confirms this—that a stay of the litigation is the most efficient way to address this claim regarding a provision that is not currently applicable to Plaintiff and which will likely be mooted in the near future. Plaintiff instead proposes to burden the Court and the parties with additional motion practice. The Department expects to oppose Plaintiff's contemplated motion for a preliminary injunction. While of course we have not yet seen Plaintiff's presentation on such a motion, the Department doubts Plaintiff will be able to carry its substantial burden to justify injunctive relief. Moreover, such a motion would be a waste of resources when summary

judgment is fully briefed and the Court is primarily concerned about its own jurisdiction. Not least, this motion will likely provoke the intervention motions suggested by amicus, which will require more briefing. While the Department is willing to address mootness in the context of Plaintiff's planned new motion, we propose that it would be far more efficient to provide the Court with limited briefs addressing the question as to which the Court expressed particular concern at the recent hearing in this matter: mootness. If the Court is satisfied of its jurisdiction, it should then decide the pending motion for a stay and, if necessary, the motion for summary judgment.

In furtherance of this proposal, we suggest a briefing schedule on the mootness question under which only two briefs would be filed: Defendants' brief by September 8, 2017 (in which we could also address any developments that would relate to mootness and our pending stay motion—such as a specific non-enforcement policy) and Plaintiff's brief by September 22, 2017. Should the Court decide to allow briefing on other motions, such as one for preliminary relief or for intervention, we respectfully request the opportunity to propose a different schedule.

Sincerely,

/s/ Galen N. Thorp

Galen N. Thorp

cc via ECF: Mark Johnson
Andrew Kay
Emily Newton