UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THRIVENT FINANCIAL FOR LUTHERANS,

Plaintiff,

v.

R. ALEXANDER ACOSTA, sued in his official capacity, Secretary, United States Department of Labor, and UNITED STATES DEPARTMENT OF LABOR,

Defendants.

Case No. 0:16-cv-03289-SRN-DTS

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

In opposition to Thrivent's preliminary injunction motion, Defendants Secretary R. Alexander Acosta of the United States Department of Labor and the United States Department of Labor (collectively, "DOL") concede the crucial element of likelihood of success on the merits. That concession is not surprising in light of DOL's prior representations—i.e., that the challenged anti-arbitration condition that is part of the BIC Exemption to DOL's Fiduciary Rule is unlawful. But that does not lessen its significance in supporting Thrivent's entitlement to temporary injunctive relief. Beyond that, DOL's opposition brief (ECF No. 107, "Opp.") fails to identify *any* harm to DOL, nor *anything* contrary to the public interest that would result from the Court granting Thrivent's motion. (Section B, *infra*.) Indeed, it is difficult to imagine how the public interest could counsel *against* temporarily enjoining the anti-arbitration condition while any regulatory steps, initiated by DOL in part to address its own determination that the anti-arbitration condition is unlawful, play out.

Instead, DOL spends almost the entirety of the opposition attempting to convince the Court that the harm currently sustained by Thrivent, and the further harm that Thrivent will incur when the anti-arbitration condition becomes applicable, is not *really* real. With respect to that harm, Thrivent's opening brief details the numerous ways in which the anti-arbitration condition (1) currently and irreparably harms Thrivent, and (2) will further harm Thrivent if and when it becomes applicable. The anti-arbitration condition is part of an existing regulation that is looming over Thrivent and is currently set to apply in less than two and a half months. Thrivent's opening brief explains how, as a responsible corporate citizen, Thrivent filed this lawsuit and the instant preliminary injunction motion in an

attempt to secure clarity and *certainty*, so that it can know what it must do to comply with federal law and conform its business practices accordingly.

DOL's opposition boils down to an assertion that DOL ***knows better than Thrivent*** what Thrivent needs to do in the face of a highly uncertain regulatory landscape. In sum, DOL contends that Thrivent should ignore the fact that there is currently a regulation on the books that impacts and harms Thrivent, and that Thrivent should do ***nothing*** other than sit back and let the new rulemaking process proceed to conclusion. According to DOL, Thrivent's compliance efforts are unnecessary and irrelevant, and this entire lawsuit is a waste of time and resources that should be stayed without providing Thrivent any certainty regarding its regulatory obligations. DOL thus proclaims that Thrivent's assertions of harm are too "speculative" and uncertain to constitute the likelihood of irreparable harm required for a preliminary injunction. In essence, DOL contends that a preliminary injunction would do nothing to protect Thrivent or provide Thrivent with any more certainty than does the current muddled regulatory landscape. That is an incredible and untenable contention.

In truth, there is nothing *speculative* about DOL's unlawful anti-arbitration condition; the rule exits, it was promulgated through the APA process, it is set to become applicable on January 1, 2018, and it currently harms and will continue to harm Thrivent. Nothing in DOL's opposition brief (or in any of its other briefs or statements to this Court) changes these facts. The existing rule will continue to harm Thrivent unless and until the Court either grants Thrivent's request for a preliminary injunction or decides Thrivent's motion for summary judgment in Thrivent's favor. What *is* purely speculative at this point is whether and when DOL will ever take final action to remove the unlawful anti-arbitration

condition. And DOL has once again highlighted this ongoing uncertainty by repeatedly qualifying in speculative terms its assertions about what it might do to ameliorate ongoing harm to Thrivent.[1]

Thrivent is presently being irreparably harmed by the existence of DOL's unlawful anti-arbitration condition, and that harm will only get worse if DOL's speculative predictions do not come to fruition. Thrivent should not have to operate its business uncertain as to which regulations it must follow—and certainly not when those regulations require dramatic changes to Thrivent's business and its relationship with its members. And while Thrivent agrees with DOL that this case can be resolved by the Court issuing a ruling on Thrivent's pending summary judgment motion, issuing the requested preliminary injunction in the interim is a necessary and appropriate way to minimize harm to Thrivent.

ARGUMENT

As Thrivent explained in its opening brief, *all four factors* identified by the Eighth Circuit in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)) *weigh heavily in favor* of granting Thrivent's motion. (Mem. 8–20.) DOL

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[1] *See, e.g.*, Opp. at 2 (DOL's "pending administrative actions . . . are *likely* to address the challenged provision before it becomes applicable to Plaintiff"); *id.* at 5 ("the Department has *proposed* to extend the January 1, 2018 applicability date by eighteen months"); *id*. (DOL "*has every intention* of issuing a [new] final rule . . . well in advance of the applicability date"); *id.* (DOL's "*objective* is to complete its review . . . and propose and finalize any changes to the [Fiduciary Rule] sufficiently before the delayed applicability date," internal notes and quotations removed); *id.* at 6 (DOL "*is likely* to adopt a significant extension of the applicability date"); *id.* at 7 ("the *possibility remains* that [DOL] will extend the applicability date or the Court will resolve the case before that date arrives," internal quotations removed). (emphases added to each quote above.)

expressly "do[es] not contest [Thrivent's] likelihood of success on the merits" (Opp. at 2)—which the Eighth Circuit states is the "most significant" of the four *Dataphase* factors (*Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013).)[2] Nor could DOL do so with a straight face, given that DOL *agrees* with Thrivent on the merits. With respect to the other three *Dataphase* factors—(i) the threat of irreparable harm to the movant, (ii) the balance of the equities between the parties, and (iii) whether an injunction is in the public interest—DOL spends most of its opposition addressing irreparable harm to Thrivent (Opp. at 4–13) before making a half-hearted attempt to address the other two. (Opp. at 13-16.) As explained below (and in Thrivent's opening brief), DOL's arguments with respect to each of these factors fail to hold water.

A. Thrivent Has Established Irreparable Harm

Thrivent's opening brief explained (1) how Thrivent is presently suffering irreparable harm as a result of the anti-arbitration condition (ECF No. 104, Thrivent Memorandum ("Mem.") at 14–17); and (2) how Thrivent would suffer additional irreparable harm if and when the anti-arbitration condition becomes applicable (Mem. at 12–14). In response, DOL simply asserts that it knows better than Thrivent how Thrivent should operate its business, and that Thrivent should rely on the fact that new regulatory

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[2] Notably, *Barrett* was decided *after* the Supreme Court decided *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), which DOL cites for the proposition that "that an injunction 'does not follow from success on the merits as a matter of course.'" (Opp. at 13.) Thrivent does not suggest that the Court's inquiry should end with an assessment of likelihood of success on the merits, but it is certainly pertinent that both sides agree on the merits of what the Eighth Circuit holds is the "most significant" of the *Dataphase* factors.

developments are "likely" to happen, such that Thrivent is not truly harmed.

But that is not how either the regulatory process or responsible businesses work—a point DOL itself has made quite clearly outside the specific context of this litigation. In DOL's proposal to delay the applicability date for 18 months, DOL was quite clear that a driving force behind the proposed delay was that DOL "is particularly concerned that, without a delay in the applicability dates, ***regulated parties may incur undue expense to comply with conditions or requirements that it ultimately determines to revise or repeal***." ECF No. 97-1 (Notice of Proposed Amendments) at 2 (emphasis added). When not taking a contrary position for purposes of litigation, DOL well understands that "absent the proposed delay . . . Financial Institutions and Advisers would feel compelled to ready themselves for the provisions that become applicable on January 1, 2018, despite the possibility of alternatives on the horizon" and thereby "incur costs to comply with conditions, which may be revised, repealed, or replaced, as well as attendant investor confusion." *Id.* at 20. Of course, until the APA process is complete, DOL can no more guarantee that its proposed delay will take effect than it can guarantee that the anti-arbitration condition ultimately will be stricken from the BIC Exemption.

1. Thrivent Suffers Irreparable Harm Right Now

As a result of the fact that the anti-arbitration condition—which DOL now agrees is unlawful—is part of a duly promulgated and adopted rule that is scheduled to go into effect in less than two and a half months, Thrivent must *now* expend time and resources in order to comply with this already enacted regulation. Furthermore, operating under ongoing uncertainty with respect to whether and when the anti-arbitration condition will apply

presently puts Thrivent at a unique disadvantage vis-à-vis its competitors. Thus, the irreparable harm Thrivent is suffering can only be stopped by a preliminary injunction or summary judgment in Thrivent's favor.

As explained in Thrivent's Memorandum, Thrivent has no mechanism to recover for the significant efforts that it is *presently undertaking and will continue to undertake* in order to *timely* comply with the unlawful anti-arbitration condition. This alone constitutes irreparable harm. (*See* Mem. at 14–15 and cases cited.[3]) To determine how to comply with the unlawful condition, Thrivent must spend time and resources and consider making significant changes to Thrivent's business and its relationship with its members—causing further irreparable harm. ECF No. 85 (Decl. of Johnston, Opp. to Def's Mot. to Stay (Aug. 7, 2017)) ¶¶ 4-5. *See Stuller, Inc. v. Steak N Shake Enterprises, Inc*., 695 F.3d 676, 680 (7th Cir. 2012) (irreparable harm established where, absent preliminary injunction, plaintiff would have to implement a policy that causes a "significant change to its business model"); *Corus Grp. PLC v. Bush*, 26 C.I.T. 937, 943 (2002) ("Generally, where a party is required

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[3] *See also Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (irreparable harm established by the payment of an allegedly unconstitutional tax because there was no mechanism for its return should the statute ultimately be ruled invalid, and thus "the plaintiff will be remediless"); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (granting preliminary injunction where plaintiffs "will suffer irreparable harm if the ordinance is permitted to go into effect, because compliance with it will impose costs on them of altering their facilities and will also cause them to lose revenue."); *Nat'l Med. Care, Inc. v. Shalala*, No. 95-0860 (WBB), 1995 WL 465650, at *3 (D.D.C. June 6, 1995) (enjoining enforcement of federal agency's new policy—notwithstanding finding that plaintiffs "will not suffer great irreparable injury as a result of the changes in government policy"—because plaintiffs have "overwhelming likelihood" of success on the merits, such that "it would be absurd to allow the Defendant to impose these [compliance] costs upon the Plaintiffs at all.")

to fundamentally alter its business operations during litigation in order to comply with a challenged Government action, that party suffers irreparable harm.") Thrivent also filed this lawsuit in an effort to determine whether and how it needed to comply with the anti-arbitration condition, and Thrivent is incurring time and resources in connection with that effort, which further constitutes irreparable harm.

In response, DOL argues that Thrivent's "allegations of harm depend on speculation about the likelihood that the January 1, 2018 applicability date will not be extended." (Opp. at 11.) But DOL is wrong: as Thrivent explained, Thrivent is *currently* sustaining harm as a result of being subject to the anti-arbitration condition. That harm will continue, *regardless* of whether the applicability date is extended, for as long as the anti-arbitration condition remains on the books. (Mem. at 14–17.) Moreover, DOL's opposition significantly misstates the applicable legal standard. DOL suggests that Thrivent must establish that harm is "certain to occur." (Opp. at 11.) But that is not the standard; rather, as the Supreme Court case DOL itself cites makes clear, Thrivent must only establish that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22; *see also Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030, 1037 (8th Cir. 2016) ("[T]he alleged harm need not be occurring or be certain to occur before a court may grant relief." (internal quotation marks omitted)). Regardless, here, Thrivent's irreparable harm is more than "likely," because it is already occurring.

In attempting to persuade the Court that Thrivent's assertions of present harm are not actually real, DOL's opposition is riddled with statements that appear to mock Thrivent's "speculative fears" and that suggest that Thrivent does not truly believe "its own

dire predictions" because Thrivent has "not yet acted" to amend its Bylaws. (Opp. at 12–13.) DOL contends that Thrivent does not need an injunction; instead, Thrivent can rely solely on DOL's "assurances", along with the "likelihood" that the applicability date will be extended. But once again, these arguments from DOL confuse the prospect of future *additional* harm with the reality of the *current and existing* harm that Thrivent is sustaining. It is also difficult to understand how DOL could point to the fact that Thrivent has "not yet acted" to change its Bylaws as somehow undermining Thrivent's assertion of harm. Thrivent has indeed taken action, by filing this lawsuit and the instant preliminary injunction motion to secure certainty and eliminate the need for Thrivent to act to comply with a regulation that Thrivent believes to be—and DOL now agrees is in fact—contrary to federal law.

Similarly, DOL suggests that Thrivent can "keep[ ] its options open" by doing nothing to implement the anti-arbitration condition until the rule actually goes into effect. (Opp. at 10.) Here DOL, again either cavalierly or obliviously, ignores the realities of operating a business. Thrivent cannot make drastic and fundamental changes to its business overnight; it must do so in the months *leading up to* the implementation of the BIC Exemption's anti-arbitration condition. Because the implementation date is looming, Thrivent must *presently* take action. Contrary to DOL's assertion, failing to take such action would not keep Thrivent's options open; it would ensure that Thrivent would be unable to timely implement and comply with the BIC Exemption, and thus, run the risk of exorbitant and unsustainable penalties.

DOL also disregards the uneven playing field on which Thrivent must *presently*

compete as compared to its competitors, as a result of the continued uncertainty regarding Thrivent's rights and obligations with respect to the anti-arbitration condition. Instead, DOL asserts that Thrivent "is currently in the same position" as other financial institutions and claims that Thrivent "offers no evidence" to support its claim that it faces a unique harm. (Opp. at 11.) That is simply not so.

As Thrivent explained in its summary judgment briefing, fraternal benefit societies like Thrivent are uniquely situated and uniquely impacted by the BIC Exemption's anti-arbitration condition. ECF No. 16 at 14. Whereas some states (acting under the authority provided by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*.) have adopted laws precluding commercial and mutual insurers from including arbitration provisions in their insurance contracts, those statutes have been held not to apply to fraternal benefit societies, which are treated differently under state law. *Id.*[4] The basis for this disparate treatment is, in part, because fraternal benefit societies like Thrivent *are* fundamentally different from commercial and mutual insurers—they are not-for-profit organizations, wholly owned by their members, united by a common bond, and responsible for the solvency of the society—and as such they are accorded this different treatment under the law. *Id.* and cases cited. Thrivent, as a fraternal benefit society, is thus one of a small number of financial

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[4] *See also Woodmen of the World Life Ins. Soc'y/Omaha Woodmen Life Ins. Soc'y v. JRY*, 320 F. App'x 216, 220 (5th Cir. 2009) (holding that the Louisiana Insurance Code's anti-arbitration statute did not apply to fraternal benefit societies); *Erickson v. Thrivent Insurance Agency, Inc.*, 231 F. Supp. 3d 324, 332 (D.S.D. 2017) (same in South Dakota); *Thrivent Fin. for Lutherans v. Lakin*, 322 F. Supp. 2d 1017, 1024 (W.D. Mo. 2004) (same in Missouri); *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 469 (S.C. Ct. App. 2001) (same in South Carolina).

institutions that presently resolves disputes through individual arbitration, and it stands apart from the vast majority of commercial and mutual insurers with respect to the harm it endures as a result of DOL's anti-arbitration condition.

2. Thrivent Faces an Imminent Threat of Further Irreparable Harm

With the looming applicability of the BIC Exemption's anti-arbitration condition—set to become applicable in just under two-and-a-half months—Thrivent plainly faces an imminent threat of additional irreparable harm. The effect of the laws currently in place will—with 100% certainty—result in either: (a) Thrivent abandoning its MDRP, causing a fundamental change to its business practice and governance structure; or (b) Thrivent risks (i) paying exorbitant and punitive taxes that will render Thrivent's business unsustainable, (ii) a barrage of private class-action lawsuits, and (iii) no longer being able to attest to its compliance with all federal laws. Thus, absent an injunction, the present laws dictate that Thrivent *will* suffer irreparable harm.[5]

DOL primarily contends that Thrivent cannot establish irreparable harm because DOL has proposed an extension of the January 1, 2018 applicability date, and thus "the arrival of the applicability date [is] neither certain . . . nor imminent." (Opp. at 5–6.) As a threshold matter, DOL is again attempting to hold Thrivent to a "certainty of harm" standard of its own creation. See *supra* at 7. That is not the law. Thrivent must establish that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22.

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[5] This threatened harm is, of course, in addition to the actual harm Thrivent is already suffering. See Section A.1., *supra*.

And indeed, the irreparable harm presently threatening Thrivent *is* likely. DOL's speculative assertions regarding the Department's "intention of issuing a final rule"—which may or may not alter the anti-arbitration condition or its applicability date—do not change this fact. *See In re Schmitz*, 270 F.3d 1254, 1257 (9th Cir. 2001) ("The whole point of publishing notice of proposed regulations is to provide an opportunity for comment, objection, and further consideration before a final decision is made about whether or not to implement them. Any number of legal, political or bureaucratic factors can affect whether mere proposals ever ripen into full-fledged regulations.")

In fact, DOL has expressly conceded that "[w]hether, and to what extent, there will be changes" that affect the BIC Exception's anti-arbitration condition "is unknown." ECF No. 97-1 at 19. There is no evidence in the record supporting DOL's remarkable assertion that the duly adopted regulations are *un*likely to remain in place for the next two-and-a-half months. And, particularly given that Thrivent is in this position due to DOL's prior issuance of an unlawful regulation, Thrivent cannot simply take DOL's speculative claims regarding future action at face value.

DOL is dismissive of Thrivent's concern that it will be subject to IRS enforcement of penalties for non-compliance with the anti-arbitration condition. (Opp. at 7–8.) DOL points to an IRS announcement and DOL guidance to suggest that Thrivent's concern is overwrought, claiming that this "conclusively addresses [Thrivent's] concern about the imposition of excise taxes." Of course, DOL completely ignores Thrivent's point, made repeatedly in its opening brief, that both DOL and the IRS are bound by the Fiduciary Rule and the BIC Exemption. Any pronouncements by either of them that fall short of either

enacting a new rule or rescinding the current one, properly in accordance with the APA, provide little comfort or legal protection to Thrivent.

DOL is also quick to dismiss the potential harm Thrivent will suffer at the hands of private litigants seeking to use the existence of the anti-arbitration condition to pursue judicial class actions rather than arbitration, stating that Thrivent "identifies no evidence that it could actually be subject to liability on this ground." (Opp. at 8.) While Thrivent agrees that it should ultimately prevail if private litigants attempt to avoid the MDRP arbitration requirement in this manner, this does not mean Thrivent would suffer no harm; Thrivent nonetheless would be exposed to such lawsuits, and would have to spend time and resources to prevail in such disputes. DOL's own speculation about the likelihood of such "frivolous litigation," and the harm to Thrivent that results from having to defend such cases even if it ultimately succeeds on the merits, betrays either DOL's cavalier attitude regarding the unintended consequences of the concededly unlawful rule it has promulgated, or naiveté regarding the realities of DOL having constructed a rule to be enforced by private litigants.

Thrivent also asserted in its opening brief that it will be harmed by its inability to certify to its compliance with federal and state laws. (Mem. at 13.) In response, DOL attempts to dismiss this point by suggesting that specific language in a certification Thrivent identified does not *actually* require Thrivent or its officers to certify their compliance with applicable law. (Opp. at 9.) This, of course, ignores the Declaration Thrivent filed in which it confirmed that it does have to make such certifications. (Mem. at 5–6.) And putting aside such certifications, Thrivent is not a scofflaw. If a rule or

regulation applies, Thrivent must and does take steps to follow that rule. But as explained above and in its opening brief, doing so in the context of the existing anti-arbitration condition requires Thrivent to take steps that would fundamentally reshape its business and undermine its fraternal character.

3. The *Tokarz* Case on Which DOL Purports To Rely Actually Highlights Why A Preliminary Injunction Is Appropriate Here

DOL also suggests that Thrivent is presently in a situation "similar to" that of the plaintiffs in *Tokarz v. Mortgage Electronic Registration Sys., Inc.*, No. 17-cv-1022, 2017 WL 3425697 (D. Minn. Aug. 9, 2017), a case in which the Court rejected plaintiffs' request for injunctive relief to void a foreclosure auction. In *Tokarz*, the plaintiffs had a statutory right to redeem the property for six months following the foreclosure. They thus could not establish irreparable harm because they *already had the authority* to effectively void the foreclosure through their statutory right of redemption; even absent an injunction, the right of redemption "preclude[d] their removal from the home" and allowed plaintiffs to "reclaim the property." *Tokarz v. Mortg. Elec. Registration Sys., Inc.*, No. 017-cv-1022 (WMW/KMM), 2017 WL 3432100, at *3 (D. Minn. May 18, 2017), *report and recommendation adopted*, 2017 WL 3425697 (D. Minn. Aug. 9, 2017). Thrivent's situation is entirely different. Thrivent has no similar ability to avoid the irreparable harm that it faces—rather, in this case the *existing regulation* is the cause of the irreparable harm Thrivent currently suffers and will suffer further upon its applicability. Accordingly, *Tokarz* simply highlights the fact that here, Thrivent is powerless to avoid the harm befalling it absent the Court's intervention.

Moreover, it is notable that DOL is attempting to rely on *Tokarz* to assert that here, Thrivent is not sustaining irreparable harm because "there is a sufficient window in which the alleged harms will not occur," and because "'the possibility remains' that the Department will extend the applicability date … before that date arrives." (Opp. at 6–7.) DOL's assertion of a "sufficient window" simply betrays DOL's ignorance regarding what it takes for a financial institution to prepare to comply: Precisely when, in DOL's view, would a preliminary injunction become appropriate, if the applicability date is *not* extended? On December 31, 2017? Thrivent cannot simply flip a switch to suddenly comply with federal regulations. As established above, Thrivent is *presently* sustaining irreparable harm, and that harm will continue for so long as the anti-arbitration condition is on the books, regardless of whether the applicability date might be extended. The requested preliminary injunction will protect against that harm by providing Thrivent with certainty about its compliance obligations throughout the pendency of DOL's new rulemaking process and the course of this litigation.

B. The Balance of Harms and Public Interest Weigh In Favor Of a Preliminary Injunction

Like DOL's challenge that the existence of Thrivent's irreparable harm is "speculative", DOL's arguments as to why either the balance of harms or the public interest counsel against a preliminary injunction are also without merit.

First, DOL argues that Thrivent "has not established that the balance of harms weighs in its favor." (Opp. at 14.) But the sole basis for DOL's assertion appears to be its position that Thrivent has "fail[ed] to establish any cognizable irreparable harm" (*id.*),

because nowhere in its brief does DOL assert *any* harm that would befall DOL if the preliminary injunction were granted.[6] As explained in its opening brief and above, Thrivent *has* established irreparable harm.

In fact, DOL's opposition makes quite clear that DOL would suffer *no harm* if the injunction is granted. DOL agrees with Thrivent that the anti-arbitration condition is unlawful, concedes in its opposition that Thrivent is likely to succeed on the merits (Opp. at 2), and invites the Court to rule on Thrivent's pending summary judgment motion (*id.* at 3). DOL further states that "if the Court reaches the merits it should vacate the challenged provision, not . . . enjoin it." (*Id.* at 15 n.3.) DOL does not explain the basis for its preference for vacatur over an injunction, but in any event DOL's stated preference is only relevant in the context of a permanent injunction that Thrivent seeks on the merits, and not the *preliminary* injunction Thrivent seeks with the present motion. Furthermore, if DOL is willing to have the Court vacate the anti-arbitration provision, it is impossible to see how

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[6] DOL suggests in its brief that Thrivent has either mis-read or misapplied the Eighth Circuit's holding in *Bank One, Utah Nat'l Ass'n v. Guttau*, 190 F.3d 844 (8th Cir. 1999), that *Guttau* has somehow been superseded by the Supreme Court's holding in *Winter*, and that *Guttau* is somehow limited to preemption cases where a permanent injunction is sought. (Opp. at 13–14.) However, none of the cases DOL cites actually state that *Guttau* is thus limited or superseded. Moreover, it is illogical to suggest, as DOL has, that the "logic" of *Guttau* might apply to permanent injunctions (for which there is, if anything, a higher threshold showing required in light of the injunction's permanence), but would not apply to preliminary injunctions. As Thrivent explained, *Guttau* stands for the sensible proposition that the Government cannot be harmed by an injunction preventing it from acting illegally, and that the public interest is necessarily served by preventing the enforcement of unlawful rules and regulations. (Mem. at 7.) Regardless, in its opening brief Thrivent *did* make a showing that both the balance of harms and the public interest weigh in favor of granting the requested preliminary injunction.

DOL would be harmed by the Court's issuance of a preliminary injunction, which only temporarily enjoins DOL until the Court rules on the merits. And since DOL never actually articulates *any* harm it will suffer from the issuance of a preliminary injunction, to the extent Thrivent suffers *any* harm (and it does), the balance of harms weighs in favor of the preliminary injunction.

Second, DOL asserts that Thrivent has not "established that a preliminary injunction would serve the public interest" (Opp. at 15) and then fails to address Thrivent's strongest arguments that a preliminary injunction is in the public interest, while dismissively addressing other arguments Thrivent made in its opening brief.

DOL suggests that *Guttau* might not apply here (see n.4, *supra*). But DOL does not address the *substance* of Thrivent's argument, articulated by the Eighth Circuit in *Guttau*, that the public interest is necessarily served by temporarily enjoining the enforcement of unlawful regulations. This straightforward proposition is impossible to refute, so it is no surprise DOL did not even attempt to do so.

DOL also does not address Thrivent's argument that "as Congress made clear in passing the [Federal Arbitration Act], the public has a strong interest in allowing parties to agree to and pursue arbitration to resolve disputes" (Mem. at 19)—a glaring omission by DOL given that the right to pursue arbitration is the very purpose of the present lawsuit. This proposition is also impossible for DOL to refute because DOL agrees with Thrivent's legal position.

With respect to the status quo, DOL notes that Thrivent has asserted that the public interest "would be served by preserving the status quo" and then states that "the

Department has taken additional steps to preserve the status quo" such that "any injunction would be of marginal utility to the public at best." (Opp. at 15.) But DOL's discussion of "preserving the status quo" misconstrues Thrivent's point. Thrivent's interest (and the public's interest) is in not having to comply with an unlawful provision; but the "status quo" here is that the rule is in place and becomes applicable very soon. Thrivent is therefore seeking injunctive relief to maintain the "status quo" before the anti-arbitration condition becomes applicable, thereby allowing Thrivent to maintain its MDRP and not have to comply with an unlawful regulation while this litigation remains pending. *See Marigold Foods, Inc. v. Redalen*, 834 F. Supp. 1163, 1170 (D. Minn. 1993) (preliminarily enjoining enforcement of state regulation alleged to constitute invalid tax in order to maintain status quo); *see also* 11A Fed. Prac. & Proc. Civ. § 2948 (3d ed.) (explaining that status quo is defined "as the last peaceable uncontested status existing between the parties before the dispute developed") (internal quotation marks omitted).

DOL also attempts to undermine Thrivent's suggestion that the public has an interest in DOL conducting its affairs in accordance with the APA by stating that this is "precisely what [DOL] has done in issuing proposals and reviewing public comments before issuing final rules or revisions to the relevant exemptions" and that DOL "does not need a judicial injunction to enable it to complete its work." (Opp. at 15–16.) But this also misses the point: By its own admission DOL cannot guarantee the outcome of its final rulemaking or its proposed delay. ECF No. 97-1 at 19 ("Whether and to what extent, there will be changes to the Fiduciary Rule and PTEs as a result of [DOL's] reexamination is unknown until its completion.") Thrivent will thus continue to sustain harm while the anti-

arbitration condition remains on the books, for the duration of any new rulemaking that might occur. But with a preliminary injunction in place to protect Thrivent, DOL can take the time it needs to properly promulgate a rule that may avoid further harm to Thrivent.

CONCLUSION

For the foregoing reasons, and those stated in Thrivent's opening brief, the Court should grant Thrivent's motion and enjoin implementation and enforcement of the anti-arbitration condition of the BIC Exemption as to Thrivent until the conclusion of this litigation—whether as a result of a change in the BIC Exemption that truly moots this case or as a result of the Court making a final determination on the merits of Thrivent's challenge.

Respectfully submitted,

Dated: October 18, 2017

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