IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

AMERICAN FAMILY ASSOCIATION, INC., Plaintiff, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 1:13-cv-00032-SA-DAS

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiff challenges and seeks to preliminarily enjoin regulations that defendants are not enforcing against it and will not enforce against it during the time frame established by the enforcement safe harbor, namely until the first plan year that begins on or after August 1, 2013. And defendants have initiated a rulemaking to amend the regulations plaintiff challenges to accommodate the precise religious liberty concerns raised by plaintiff, and have committed to issue new regulations by August 1, 2013. Yet plaintiff continues to urge this Court to engage in a fiction and pretend that the current regulations have some current or future impact on plaintiff. Instead of issuing an injunction or purely advisory opinion, or entering a stay for no purpose other than to facilitate plaintiff's hypothetical future challenge to some future regulations, the Court should dismiss this case.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION BECAUSE THE CASE IS NOT RIPE

Plaintiff has not shown and cannot show that this case is ripe for judicial review. Indeed, plaintiff's primary response to the ripeness arguments contained in defendants' opening brief is the mistaken assertion that ripeness is determined at the time of filing. Mem. in Supp. of Pls.' Reply & Pls.' Resp. to Defs.' Mot. to Dismiss ("Resp.") at 8 n.14, May 3, 2013, ECF No. 21. But both the Supreme Court and the Fifth Circuit have been clear that when evaluating ripeness, "it is the situation now," rather than at the time of filing, "that must govern." *Anderson v. Green*, 513 U.S. 557, 559 (1995) (per curiam) (quoting *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974)); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544-45 (5th Cir. 2008) (same). Examining this case now, it is clear that it is not ripe for review—as 22 other courts have concluded in cases where, as here, defendants have committed not to enforce the regulations against the plaintiffs.[1]

[1] *See Priests for Life v. Sebelius*, No. 12-cv-753 (FB), 2013 WL 1563390 (E.D.N.Y. Apr. 12, 2013); *Criswell College v. Sebelius*, Civil Action No. 3:12-CV-4409-N, slip op. (N.D. Tex. Apr. 9, 2013) (Ex. 1); *Ave Maria Univ. v. Sebelius*, No. 2:12-cv-88-FTM-99SPC, 2013 WL

Defendants have "committed to further amend" the regulations being challenged before the rolling expiration of the safe harbor begins to address the concerns raised by non-profit religious organizations like plaintiff, and have "initiated a rulemaking process to do so." *Colo. Christian Univ.*, 2013 WL 93188, at *5, *8; *see also, e.g.*, *Wheaton Coll.*, 703 F.3d at 552; *Priests for Life*, 2013 WL 1563390, at *2 ("The current regulations, which are not being enforced against Priests for Life and are being altered, are not truly final."); *Criswell Coll.*, Ex. 1, at 10-11; *Conlon*, 2013 WL 500835, at *5; *Archdiocese of St. Louis*, 2013 WL 328926, at *5;

1326638 (M.D. Fla. Mar. 29, 2013); *Eternal Word Television Network, Inc. v. Sebelius*, No. 2:12-cv-501-SLB, 2013 WL 1278956 (N.D. Ala. Mar. 25, 2013); *Franciscan Univ. v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Most Reverend Wenski v. Sebelius*, Case No. 12-23820-CIV-GRAHAM/GOODMAN, slip op. (S.D. Fla. Mar. 5, 2013) (Ex. 2); *Roman Catholic Diocese of Dallas v. Sebelius*, Civil Action No. 3:12-cv-01589-B, 2013 WL 687080 (N.D. Tex. Feb. 26, 2013); *Conlon v. Sebelius*, No. 1:12-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 Washington v. Sebelius*, No. 12-cv-0815 (ABJ), 2013 WL 285599 (D.D.C. Jan. 25, 2013), *appeal docketed* (D.C. Cir. Mar. 25, 2013); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 12-cv-1276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-00523, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012), *appeal docketed*, No. 13-1479 (7th Cir. Mar. 5, 2013); *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-00158, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012), *mot. to alter or amend j. denied*, 2013 WL 690990 (S.D. Miss. Feb. 15, 2013); *Zubik v. Sebelius*, No. 2:12-cv-676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 4:12CV3035, 2012 WL 2913402 (D. Neb. July 17, 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*, 887 F. Supp. 2d 102 (D.D.C. 2012), and *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012)). *But see Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y-TRM (N.D. Tex. Jan. 31, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012). In both *Diocese of Fort Worth* and *Archdiocese of New York*, defendants have filed motions for reconsideration which remain pending before the courts. In *Archdiocese of New York*, the court has stayed proceedings but continues to consider defendants' motion for reconsideration. *See* Order re ECF No. 60, *Roman Catholic Archdiocese of N.Y.*, 1:12-cv-02542-BMC (E.D.N.Y. Apr. 24, 2013).

In addition to these 22 cases decided at least in part on ripeness grounds, a twenty-third court dismissed a challenge like plaintiff's for lack of standing. *Legatus v. Sebelius*, No. 12-cv-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, Nos. 13-1092, 13-1093 (6th Cir. Jan. 24, 2013).

Catholic Diocese of Peoria, 2013 WL 74240, at *5; *Zubik*, 2012 WL 5932977, at *8-9.[2] Because that rulemaking process, which is now well on its way, will "alter the very regulations" at issue in this case, *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989), such that "the Court may never need to confront some or all of the issues" raised by plaintiff, *Criswell Coll.*, Ex. 1, at 10-11, plaintiff's challenge is not fit for review at this time.

In the meantime, plaintiff is protected by defendants' commitment not to enforce the regulations against it and as such can show no hardship from delayed review. This commitment by the federal government, expressed in the declaration of Teresa Miller—not simply some "unknown" employee, Resp. at 1, but an official "responsible for HHS's role in the implementation and enforcement" of the challenged regulations, Miller Decl. at ¶ 2, ECF No. 13-3—is entitled to a presumption of good faith. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). Plaintiff nonetheless attempts to dismiss this commitment by wildly speculating that the government may revoke it at any time, Resp. at 11, but the government is not some seasoned thief who will do and say anything to trap plaintiff in his snare, and plaintiff's accusations are far from the sort of "well-nigh irrefragable proof of bad faith or bias on the part of governmental officials" that is necessary to overcome the presumption of good faith. *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (quotation omitted). Indeed, courts have found commitments like defendants' sufficient to render claims unripe. *See, e.g., Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1470-71 (3d Cir. 1994) (dismissing churches' challenge to discrimination law as unripe where affidavit from State official indicated that State would not

[2] Plaintiff's accusation that defendants may not make good on their commitment to amend the regulations, Resp. at 9, is simply baseless and is insufficient to create jurisdiction. Moreover, it flies in the face of defendants' repeated statements in the Federal Register and in litigation throughout the country, and simply ignores "the reality of the regulatory landscape," *Colo. Christian Univ.*, 2013 WL 93188, at *7—namely the fact that the government has met its rulemaking commitments at every step of the way. After having issued an ANPRM on March 21, 2012, *see* 77 Fed. Reg. 16,501 (Mar. 21, 2012), and an NPRM on February 6, 2013, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013), defendants received comments on the proposed rulemaking. That comment period closed on April 8, 2013, and defendants are on track to issue the new regulations, as promised, by August 1, 2013.

prosecute churches for violating law). Plaintiff offers no reason for this Court to conclude otherwise here. *See, e.g., Colo. Christian Univ.*, 2013 WL 93188, at *5 ("[B]y issuing the ANPRM and beginning the rulemaking process, Defendants have moved beyond the theoretical in considering how to accommodate organizations like CCU. They have also substantiated the good-faith presumption applicable to their consistent statements that the interim final rule will be further amended and will not be enforced in its current form against organizations like CCU."); *Priests for Life*, 2013 WL 1563390, at *2; *Franciscan Univ.*, 2013 WL 1189854, at *5; *Persico*, 2013 WL 228200, at *13; *Belmont Abbey Coll.*, 878 F. Supp. 2d at 36-37.[3]

Moreover, the hardship of which plaintiff halfheartedly complains is simply insufficient to justify review.[4] Plaintiff's claim that withholding review now somehow "*would have* forced AFA" to incur "administrative costs and injuries that *would have* occurred prior to [the] issuance of a new rule," Resp. at 9 n.15 (emphasis added), is entirely backward-looking and so has no bearing on whether withholding review at this point would harm plaintiff. Indeed, plaintiff appears to understand that withholding review would not impose any hardship on it. Given

[3] Plaintiff's argument that the Miller Declaration and defendants' commitments are insufficient to moot its suit, Resp. at 10-12, is both misplaced and beside the point. While the ripeness doctrine seeks to protect agencies from premature adjudication of abstract administrative policies, *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003), mootness doctrine serves the distinct interest of avoiding "abandon[ing] [a] case at an advanced stage" after it has been litigated "for years," where doing so "may prove more wasteful than frugal." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191-92 (2000). In other words, a mootness inquiry is only appropriate once a party has established jurisdiction, but here, plaintiff has never established jurisdiction and cannot do so. Because this case has not been litigated "for years" and is not at "an advanced stage," the interests served by the mootness doctrine simply are not implicated here. In fact, various plaintiffs have raised a similar mootness argument in numerous challenges to these regulations, and *not a single court* has accepted it. *See Wheaton Coll.*, 887 F. Supp. 2d at 108 n.6 (expressly rejecting mootness inquiry); *Eternal Word Television Network, Inc.*, 2013 WL 1278956, at *18 n.23; *Geneva Coll.*, 2013 WL 838238, at *12 n.13; *Roman Catholic Diocese of Dallas*, 2013 WL 687080, at *8 n.7.

[4] Plaintiff's suggestion that the Court stay this case similarly undermines its claim of hardship, and even more strongly undermines its alleged need for preliminary injunctive relief. After all, if plaintiff truly felt (albeit without basis) that it still faced a risk of irreparable harm after defendants' commitment not to enforce the regulations against it, it would not be asking this Court to stop the progress of its suit. Plaintiff appears to recognize as much, since nowhere in its brief does it suggest how it meets the criteria for a preliminary injunction.

defendants' commitment not to enforce the regulations against plaintiff, any costs plaintiff now chooses to incur or injuries plaintiff chooses to inflict on itself are not caused by defendants' actions and are irrelevant to the hardship inquiry.[5] In any event, plaintiff similarly appears to concede that this alleged hardship is no serious hardship at all, since plaintiff is willing to have this Court stay this litigation altogether. Resp. at 9-10.

II. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION BECAUSE PLAINTIFF LACKS STANDING

Plaintiff claims that the regulations caused it to face the choice of abiding by the regulations or by plaintiff's religious beliefs, to reallocate funds to pay for lawsuits or fines that it might incur, and to face the imminent threat of losing employees. Resp. at 6-7. But plaintiff does not face any of these threats because defendants have committed not to enforce the current regulations against plaintiff. Plaintiff appears to understand as much, since its brief simply argues that it once faced these threats, *id.* at 7, but nothing this Court could do could redress these alleged past threats.

In fact, it is not clear what plaintiff thinks this Court could do to, for example, redress its alleged injury of having reallocated funds that, presumably, it could reallocate again. If plaintiff continues to engage in action that could cause it to lose employees or if plaintiff continues to marshal its resources to pay for lawsuits or for fines that defendants have committed not to levy against it, that is plaintiff's choice. *See Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."). Such a choice cannot be said to be traceable to the challenged regulations or

[5] To the extent that plaintiff complains that the proposals contained in the NPRM are insufficient, or that plaintiff must still engage in some activity now to plan for the as-yet-finalized new regulations, *see* Resp. at 9 n.16, nothing this Court can do could address that concern or uncertainty. *See, e.g.*, *Franciscan Univ.*, 2013 WL 1189854, at *6; *Archdiocese of St. Louis*, 2013 WL 328926, at *5 (collecting cases); *Colo. Christian Univ.*, 2013 WL 93188, at *8 n.10; *see also Notre Dame*, 2012 WL 6756332, at *4.

redressable by any decision of this Court regarding those regulations. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. . . . 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."); *McConnell v. FEC*, 540 U.S. 93, 228 (2003) (any planning plaintiffs are engaged in "stems not from the operation of [the preventive services coverage regulations], but from [plaintiff's] own . . . personal choice[s]").

Indeed, of the cases plaintiff cites to support its standing argument, Resp. at 7-8, none involved a challenge to a law that was not being enforced by the government against the plaintiffs and was certain to change. *See, e.g.*, *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (no suggestion that law would not be enforced or would change); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) (same); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003) (same). As defendants have explained, courts have found promises not to enforce by the government similar to that made here sufficient to defeat jurisdiction. *See Winsness v. Yocom*, 433 F.3d 727, 732-33 (10th Cir. 2006) (finding plaintiff's prosecution for violation of State flag-abuse statute was too speculative to support standing where district attorney filed affidavit promising non-prosecution); *Farm-to-Consumer Legal Def. Fund v. Sebelius*, No. C 10–4018–MWB, 2012 WL 1079987, at *2 (N.D. Iowa Mar. 30, 2012) (concluding plaintiffs lacked standing where government stated it did not intend to enforce the challenged regulations against plaintiffs). And here, defendants have also taken significant and concrete steps to amend the current regulations, most recently in the NPRM.

III. BECAUSE THE COURT LACKS JURISDICTION, IT SHOULD DISMISS THE CASE RATHER THAN ISSUE A STAY

Plaintiff's suggestion that this Court could stay this case, Resp. at 9-10, 12, is puzzling in the face of plaintiff's assertion—passing and unpersuasive though it is—that this case is ripe for review and decision now. It is even more puzzling in light of plaintiff's concurrent request for the extraordinary relief of a preliminary injunction. Indeed, plaintiff's openness to the entry of a stay until the new regulations are issued all but concedes the paucity of its ripeness arguments as to plaintiff's challenge to the current regulations, and certainly concedes the paucity of its preliminary injunction motion.

Because the Court lacks jurisdiction, a stay is inappropriate, and all that remains for the Court is to simply dismiss the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Indeed, dismissal of an unripe case is "the customary practice," and plaintiff has offered no reason for this Court to deviate from that customary practice here. *Colo. Christian Univ.*, 2013 WL 93188, at *8 (citing 15 James WM. Moore et al., Moore's Federal Practice § 108.81 (3d ed. 2011) ("[I]f a necessary component of jurisdiction, such as ripeness, is found to be lacking, the court has no choice but to dismiss the action[.]")); *Priests for Life*, 2013 WL 1563390, at *3; *Criswell Coll.*, Ex. 1, at 13-14; *Roman Catholic Diocese of Dallas*, 2013 WL 687080, at *17; *Persico*, 2013 WL 228200, at *14 n.10. Though the D.C. Circuit has held an appeal in a similar case in abeyance, *Wheaton Coll.*, 703 F.3d at 553, it too "offered no compelling reason for doing so." *Colo. Christian Univ.*, 2013 WL 93188, at *8. And, importantly, the D.C. Circuit in *Wheaton* did not hold that the district courts erred in dismissing the suits or that the district courts were instead required to hold the cases in abeyance; it merely held the *appeals* in abeyance. The government fully expects that the appeals will simply be dismissed once the new regulations are issued. Indeed, a district court within the D.C. Circuit has dismissed a similar case in its entirety, rather than issue a stay or hold it in abeyance, finding that the D.C. Circuit's disposition did not require it to do the same and noting that "[c]ourts in this circuit regularly dismiss cases for the absence of a ripe case or controversy." *Archbishop of*

Wash., 2013 WL 285599, at *4 (collecting cases). As that court explained, dismissal does not prevent a plaintiff from filing a "new and different" challenge in the future if it is unsatisfied with the new regulations or "in the unlikely event that the government does not keep its word" to issue those new regulations. *Id.*

And any such challenge would truly be "new and different" because it would be a challenge to regulations that do not yet exist. *See Criswell Coll.*, Ex. 1, at 11 ("[T]he Court's analysis would in any event be different under a different regulatory scheme."). Indeed, plaintiff appears ultimately to be interested in challenging that future regulatory scheme, not the present one; it even admits that it seeks a stay of this litigation expressly to facilitate commencing a second case. Resp. at 9. But the ripeness doctrine does not contemplate any such thing. It is black-letter law that the cost of filing another lawsuit is not sufficient even to establish hardship for purposes of ripeness. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998); *Fla. Power & Light Co. v. E.P.A.*, 145 F.3d 1414, 1421 (D.C. Cir. 1998). A request to stay an unripe challenge so as to allow a plaintiff to more easily mount a *different* challenge to *different* regulations that do not yet exist—once such a challenge may have ripened in the future—is wholly inappropriate. The Court should not exercise its discretion to assist a plaintiff that tilts at windmills in its speculative quest to develop jurisdiction at some time in the future. Simply put, because plaintiff's suit is unripe now—and plaintiff barely argues to the contrary—the proper course is to dismiss this case in its entirety. Indeed, "all [of the] district courts to have held that similar challenges to the contraceptive-coverage requirement are not justiciable have dismissed the actions." *Priests for Life*, 2013 WL 1563390, at *3.

CONCLUSION

For these reasons and those contained in defendants' opening brief, the Court should grant defendants' motion to dismiss for lack of jurisdiction.

Respectfully submitted this 8th day of May, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michael C. Pollack
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