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 of the United States Department of Health and Human Services; SETH HARRIS, in his official capacity as acting Secretary of the United States Department of Labor; JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:13-CV-00032-SA-DAS

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REPLY FOR MOTION FOR PRELIMINARY INJUNCTION AND PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff American Family Association, Inc. ("AFA") seeks an injunction enjoining application of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111-148) and the Health Care and Education Reconciliation Act (Pub. L. 111-52) (jointly the "PPACA") to avoid a federal mandate ("Mandate") that compels AFA to facilitate insurance coverage for abortion-inducing drugs to its employees—an action that runs afoul of AFA's mission and religious beliefs. The concern for AFA is pressing because the Mandate is presently in effect, and AFA does not qualify for the temporary enforcement safe harbor, having maintained health insurance coverage for FDA-approved contraceptive methods, including Plan B and Ella, previously. Without the delay offered by the temporary enforcement safe harbor, AFA has been subjected to the penalties from the onerous regulation ever since February 1, 2013, when the annual insurance coverage for its employees commenced and the regulation effectively kicked in for AFA.

In response, federal defendants (collectively the "Government") submit an affidavit from a Ms. Teresa Miller. Ms. Miller, who purports to work in some unknown capacity for the Centers for Medicare & Medicaid Services with the Department of Health and Human Services, claims she has reviewed AFA's Complaint and Motion for Preliminary Injunction, and based on allegations that AFA is religious non-profit organization with religious objections to coverage, says "the Government will not take any action to enforce the current regulations against AFA, its health group plans, or its insurer, during the timeframe established by the temporary enforcement safe harbor." (Exhibit 3 to Response). In other words, the Government is saying the matter is now moot because the Government has carved out an individual exception for AFA, allowing AFA to enjoy the protection of the temporary enforcement safe harbor despite not qualifying for it.

On the strength of this litigation-driven remark, the Government contends the dispute is over, the injunction should be denied, and the case dismissed. But the Government skirts its responsibility to demonstrate mootness of AFA's claims. Trying to circumvent the heavy burden altogether, the Government ignores the mootness standard, urging standing and ripeness arguments instead.

The Government boasts of a series of district court decisions where these standing and ripeness arguments prevailed; yet, none are analogous to the one at bar. None involved what the Government wants to do here: moot the case through a post-complaint promise of no action. AFA had standing when it filed suit and maintains standing in the case today. The Mandate—being in effect at all relevant times—is most definitely ripe for challenge. The Government's untimely affidavit does not moot AFA's claim and neither does it eliminate AFA's need for immediate relief.

STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, this Court is to accept as true all of the factual allegations set out in AFA's complaint and view the facts in the light most favorable to AFA. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). For motions to dismiss based on ripeness or standing, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). When the facts in a complaint are questioned, the Court may consider any relevant evidence outside the pleadings submitted by the parties, including affidavits. *Irwin v. Veterans Admin.,* 874 F.2d 1092, 1096 (5th Cir. 1989). A plaintiff only has to prove by a preponderance of the evidence that a Court has jurisdiction. *Id.*

Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any plausible set of facts in support of his claim that would entitle plaintiff to relief. *Lane,* 529 F.3d at 557. For a claim of mootness—the real defense pursued here—the burden shifts to the defendant who "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs*., 528 U.S. 167, 190 (2000).

ARGUMENT

As reason for asking this Court to deny AFA's request for preliminary injunction and to dismiss the case entirely, the Government questions whether AFA has presented an actual controversy for Article III standing. This "actual controversy" condition is fleshed out in standing, ripeness, and mootness doctrines, among others. *Roark & Hardee LP. v. City of Austin*, 522 F.3d 533, 541-41 (5th Cir. 2008). Standing focuses on whether the party bringing suit has sufficient stake in outcome when the suit was filed. *National Rifle Assoc. of America, Inc., v. Bureau of Alcohol, Tobacco, Fire-arms, and Explosives,* 700 F.3d 185, 191 (5th Cir. 2012). Ripeness, which is also drawn from prudential reasons, is "peculiarly a question of timing." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012) (citation omitted). This doctrine is invoked to prevent premature adjudications. *Roark & Hardee LP*, 522 F.3d at 544. While standing pertains to who may bring suit, ripeness addresses when that suit may be brought. *Id.* at 544 n. 12. The mootness standard likewise relates to timing, insisting that standing needed for the commencement of the suit persist throughout the course of the litigation. *NRA*, 700 F.3d at 191.

AFA has standing to challenge the Mandate; the claim is ripe; and Miller's affidavit does not act to moot the claims.

I. AFA Has Standing to Bring Claims

Government contends that AFA's case must be dismissed under Rule 12(b)(1) because AFA lacks standing.[1] Standing exists if (1) a plaintiff has suffered an injury-in-fact (2) that is fairly traceable to the defendant's actions and (3) is likely redressable by a favorable decision. *Lujan,* 504 U.S. at 560–61. Standing is determined at the time the lawsuit was filed based on the facts as they existed at that time. *Lujan,* 504 U.S. at 570 n.5 ("[S]tanding is to be determined as of the commencement of suit."); *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 830 (1989). [2] Government does not—and cannot—dispute the fact that a favorable decision by this Court will redress AFA's injuries. In lieu, Government erroneously posits that AFA has not sufficiently alleged or shown it has suffered an injury-in-fact that is fairly traceable to Government's actions.[3] AFA's Complaint, AFA's Motion for Preliminary Injunction, and the Affidavit of Timothy B. Wildmon, attached as Exhibit 1 to the Motion for Preliminary Injunction, show otherwise. These pleadings demonstrate that AFA has suffered requisite injury for standing purposes.[4]

A party can satisfy the injury-in-fact requirements of Article III by demonstrating that "it has suffered a concrete and particularized injury that is either actual or imminent …." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). "A plaintiff bringing a pre-enforcement facial

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[1] Defendants' Memorandum Brief in Opposition to Plaintiff's Motion for Preliminary Injunction and in Support of Defendants' Motion to Dismiss, at 6 ("Defs.' Mem. in Sup. Mot. to Dismiss").
[2] Standing is established as of the time the claim is brought while mootness is the court's power to entertain that claim from that point forward. *Saleh v. Fed. Bureau of Prisons,* No. 5-cv-2467, 2009 WL 3158120, at *5 (D. Colo. Sept. 29, 2009) (citing *RMA Ventures California v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1073 n.6 (10th Cir. 2009). This makes Defendants' post-filing statement and conduct irrelevant for the standing analysis.
[3] Defs.' Mem. in Sup. Mot. to Dismiss at 6–9.
[4] Plaintiffs incorporate herein by reference the Complaint (Doc. #1), Plaintiff's Motion for Preliminary Injunction (Doc. #4), and Plaintiff AFA's Memorandum in Support of Motion for Preliminary Injunction (Doc. #5) and the evidence attached thereto.

challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has 'an actual and well-founded fear that the law will be enforced against' it." *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

At the time of filing, AFA had an actual and well-founded belief that the Mandate would be enforced against it, causing it to suffer actual and imminent injuries adequate to give it standing to challenge the Mandate. In February of 2013, at the time of filing its suit, AFA was placed in the untenable position of either providing health insurance that would cause it to go against its religious scruples, forego its religious scruples, or subject itself to substantial and terminal fines.

A. AFA's health plan is not a grandfathered plan and thus subject to the dictates of the Mandate.

The Mandate applies to all heath care plans that are not grandfathered under 42 U.S.C. § 18011(a)(2), and the facts stated in AFA's Complaint ("Complaint"), in AFA's Motion for Preliminary Injunction ("Pls' Mot. PI"), and in the Affidavit of Timothy B. Wildmon ("Aff. Wildmon"), reveal that AFA's health plan is not grandfathered, triggering the Mandate.[5] AFA raised its health plan's deductible and lowered its employer contribution to its employees' premium by amounts sufficient to remove its grandfathered status.[6] Because the foregoing changes caused AFA's health plan to lose any grandfathered status it could have had, AFA's health plan was subject to the terms of the Mandate at the time of filing the Complaint.[7]

[5] Complaint ¶¶ 100–101; Pls' Mot. PI, at 10; Aff. Wildmon ¶¶ 48–50; *see also* 78 Fed. Reg. 8456, 8457

[6] Aff. Wildmon ¶¶ 48–49.

[7] An employer must also certify or make certain disclosures in any plan materials provided to participants and/or beneficiaries that its health plan has grandfathered status in order to maintain such status. 45 C.F.R. § 147.140 (a)(2). AFA has not done so and did not do so at the time of filing, and, as a result, AFA's health plan is not a grandfathered plan. Aff. Wildmon ¶ 50.

B. The Mandate caused AFA to suffer imminent injuries resulting from its well-founded fear of enforcement.

The Mandate also caused AFA to suffer imminent harms at the time of filing. While many entities are not required to comply with the Mandate this year due to the temporary enforcement safe harbor, AFA does not qualify for the exception. To qualify, the following criteria must be met:

(1) The organization is organized and operates as a non-profit entity.

(2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable State law, because of the religious beliefs of the organization. A group health plan is considered to have satisfied this criterion if the organization "took some action to try to exclude or limit such coverage that was not successful as of February 10, 2012."

(3) The group health plan sponsored by the organization (or another entity on behalf of the plan, such as health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that the plan will not provide some or all contraceptive coverage for the first plan year beginning on or after August 1, 2012.

(4) The organization self-certifies that it satisfies the criteria above, and documents its self-certification in accordance with prescribed procedures.[8]

Of the four obligatory elements, AFA only meets the first one. Significantly, AFA cannot possibly meet the second prong that requires the absence of contraceptive insurance coverage as of February 10, 2012 or some action to exclude or limit the coverage. Much to AFA's dismay, it retained the objectionable coverage during the delineated time frame (due to oversight) and did not take any action to avoid it.[9]

Without the benefit of the temporary enforcement safe harbor, the Government forced AFA to choose to: (1) abide by the Mandate and cover services and drugs in violation of its deeply held religious belief; (2) alter its entire organizational structure in hopes of satisfying

[8] HHS Guidance on Temporary Enforcement Safe Harbor (August 15, 2012).
[9] Complaint, ¶¶ 70- 72, 107-08; Aff. Wildmon, ¶¶ 31-33.

Defendants' unconstitutional Religious Employer Exemption; or (3) face onerous fines from Defendants for adhering to tis religious beliefs and violating the Mandate.[10]

In addition to this unconstitutional dilemma, the Mandate also compelled AFA to curtail its religious activities by reallocating funds from activities integral to AFA's religious mission to pay for the significant fines and potential lawsuits that might arise for not complying with the Mandate.[11] Such curtailment would be necessary because AFA has no excess funds in its budget. Moreover, at the time of filing, AFA faced the imminent threat of losing current and potential employees, as well as lawsuits from plan participants, which are all injuries directly traceable to the Mandate and its impending enforcement.[12]

AFA faced all of the foregoing harms at the time of filing, and such harms are ample to establish necessary injury-in-fact for Article III standing. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'"); *Am. Booksellers Ass'n*, 484 U.S. at 392–93; *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 529, 536 (1925) (stating that a challenge to a law was justiciable because of its impact on an institution's recruiting); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 758 (10th Cir. 2010) ("It is hardly controversial that exposure to liability constitutes injury-

[10] For refusing to follow the Mandate, while providing its health plan, AFA is subject to an assessment of $100 per day per individual. *See* 26 U.S.C. § 4980D (b); 29 U.S.C. § 1132 (b)(3); 42 U.S.C. § 300gg-22 (b)(2)(C)(i); Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012). Alternatively, if AFA eliminates its health plan rather than follow the Mandate, it could be subject to an annual penalty of $2,000 per employee. *See* 26 U.S.C. § 4980H (a), (c)(1).

[11] Complaint ¶ 94.

[12] Complaint ¶ 84; Aff. Wildmon ¶¶ 39, 41.

in-fact."); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) ("In this case, the choice that the statute presents to plaintiffs—censor their communications or risk prosecution—plainly presents a 'realistic danger' of 'direct injury.'").

II. AFA's Challenge is Ripe

Government urges that AFA's Motion should be denied and Complaint should be dismissed because AFA's claims are no longer ripe in light of Defendants' Notice of Proposed Rulemaking ("NPRM").[13] This argument raises prudential ripeness concerns of fitness and hardship. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (describing fitness and hardship as prudential concerns).[14]

Government's argument is misplaced because the Mandate was both fit for review and imposed significant hardships on AFA at the time this case was filed.[15] AFA does not challenge

[13] Defs.' Mem. in Sup. Mot. to Dismiss at 10–14. Defendants' assurances do not defeat AFA's standing because an injury can exist even if the government has suggested that it will not enforce a particular law, because "there is nothing that prevents the State from changing its mind." *Vt. Right to Life Comm., Inc.*, 221 F.3d at 383.

[14] Ripeness has a jurisdictional component that is determined at the time of filing, along with its prudential component, and its jurisdictional component is satisfied by demonstrating the requirements for Article III standing at the time of filing. *See Duke Power Co. v. Carolina Envt'l Study Grp.*, 438 U.S. 59, 81 (1978) ("To the extent that 'issues of ripeness involve, at least in part, the existence of a live "Case or Controversy,"' our conclusion that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested would appear to satisfy this requirement." (citation omitted)); *Mont Belvieu Square, Ltd. v. City of Mont Belvieu, Tex.*, 27 F. Supp. 2d 935, 940 (S.D. Tex. 1998) ("While the repeal of § 481.143 four years later may have some other relevance to MBS's claims, it does not bear on the ripeness issue because at the time MBS filed suit, its claims were ripe."); *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 814 (8th Cir. 2006) ("Jurisdictional issues such as standing and ripeness are determined at the time the lawsuit was filed in December 2003."); *but see Am. Petroleum Inst.*, 683 F.3d at 384. As already demonstrated, AFA satisfied the requirements for Article III standing at the time of filing, and this fact satisfies the jurisdictional requirements for ripeness.

[15] This case was and is fit for review because AFA's challenge to the Mandate is a legal one directed at a definitive final rule, and this fact is not affected by the NPRM, which is not a concrete plan to change the Mandate. *See Archdiocese of N.Y.*, 2012 WL 6042864, at *21 (concluding the Mandate was fit for review because it was a final rule and the ANPRM "is not a 'concrete plan'" and "is, in fact, only 'directed at possibilities'"). Moreover, as demonstrated in

the NPRM or any possible new rules, but the Mandate that remains in place. The Government may or may not follow through with any change to the Mandate, for any number of reasons, but AFA's challenge does not relate to the future.[16]

Even if this Court is inclined to believe that the Government's promise of change raises ripeness concerns, dismissal would not be the proper course. In at least four instances in which Government claimed its ever-changing rulemaking affects ripeness, federal courts declined to dismiss those cases. Instead, these courts ordered the cases be held in abeyance until Government follows through and actually changes the rule.[17] Thus, at a minimum, this Court should stay the current matter pending Defendants' issuance of a new rule (should one be forthcoming).

Given that any proposed change would happen in just a matter of months, this Court could stay the case, and require Government to file status reports with the Court showing that they are in the process of following through. The option of a stay with status reports would be preferable to a dismissal because it would avoid additional cost and burden associated with second litigation.

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its standing argument, withholding of review would have forced AFA to suffer significant hardships stemming from its administrative costs and injuries that would have occurred prior to and issuance of a new rule. *Id.* at *22. The foregoing shows that AFA's lawsuit was ripe at the time of filing, and its challenge to the Mandate continues to be ripe because it remains fit for review with the harms and threats facing AFA continuing to this day.

[16] In any event, it appears that the proposed change would not alleviate AFA's concerns. The NPRM, should it be approved and ratified, would simplify the definition of "religious employer" to "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, as amended." 78 Fed. Reg. 8456, 8474 (Feb. 6, 2013). IRC § 6033(a)(3)(A)(i) exempts "churches, their integrated auxiliaries, and conventions or associations of churches," and IRC § 6033(a)(3)(A)(iii) exempts "the exclusively religious activities of any religious order." As AFA does not fit into either of these sections of the Internal Revenue Code, the NPRM indicates that the Mandate will continue to require AFA to violate its religious beliefs come August 1, 2013.

[17] *East Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-3009 (S.D. Tex. 2012); *Louisiana College v. Sebelius*, No. 1:12-cv-463 (W.D. La. 2012); *Wheaton College v. Sebelius*, No. 12-5273 (D.C. Cir. 2012) (consolidated with *Belmont Abbey College v. Sebelius*, No. 11-1989 (D.C. Cir. 2011)).

This approach was adopted by the D.C. Circuit when it imposed a stay in a similar case involving the same Defendants and similar issues. *Wheaton College v. Sebelius*, No. 12-5273, 2012 WL 6652505, at *2 (D.C. Cit. Dec. 18, 2012). The D.C. Circuit's decision to enter a stay was influenced by its prior decision in *American Petroleum*, in which the court held the case in abeyance and ordered the government agency to provide regular status reports based on a proposed rule because it recognized that an "unforeseen turn" might occur before the final rule was issued. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012).

This case is different from *Wheaton College* because AFA—having not qualified for the temporary enforcement safe harbor—is not just waiting to see what the Mandate will be, but is currently subjected to the penalties from it. For this reason, AFA's claim is ripe and AFA deserves immediate protection in the form of a preliminary injunction. But should this Court view the matter differently, a stay holding this case in abeyance until the rule is changed would be appropriate.

III. AFA's Challenge is Not Moot

Though the Government does not specifically invoke this defense, AFA addresses the doctrine anyway because it serves as the only legitimate basis for challenging AFA's Article III standing.

It is well-settled in the Fifth Circuit and other jurisdictions that "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Opulent Life Church*, 697 F.3d at 285. Under the mootness doctrine, the burden is not on AFA to prove irreparable injury; the burden is squarely on the Government to demonstrate true cessation of improper action. *See Doe v. Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (applying voluntary cessation analysis to determine irreparable harm in preliminary injunction context). The burden the Government carries is "formidable," "heavy," and "stringent." *Friends*

of Earth, 528 U.S. at 189–90). [18] To overcome this burden, the Government must make it "absolutely clear the allegedly wrong behavior could not reasonably be expected to recur." *Id*. at 190.

Ms. Miller's affidavit, indicating that AFA will be treated like it does qualify for the temporary enforcement safe harbor provision—even though it does not—is inadequate to meet the burden. Statements like Ms. Miller's do not allay fears of harm because they leave the wrongdoer "free to return to his old ways." *United States v. W.T. Grant Co*., 345 U.S. 629, 712 (1953). The statement is utterly non-binding. Nothing prevents Ms. Miller from changing her mind or someone else higher up in her department from overturning her decision, once judicial oversight is removed. *See, e.g., Tsombanidis v. West Haven Fire Dept*., 352 F.3d 565, 574 (2d Cir. 2003) (promise to enforce new interpretation of law did not moot challenge because "interpretation of the code might change again."). The Government could have mooted the case by changing the Mandate to exempt religious organizations like AFA or remove the requirement regarding past insurance coverage from the elements needed for the temporary enforcement safe harbor. They have done neither. With the Mandate and requirements for safe harbor firmly in place, the Government is free to start levying fines as it deems fit. *See Roe v. Cheyenne Mountain Conference Resort, Inc.,* 124 F.3d 1221, 1231 (10th Cir. 1997) (finding injunction warranted where defendant only "voluntarily suspended" enforcement of an allegedly wrongful policy without amending or altering the policy).

Obviously, the timing of the isolated waiver for AFA is suspect. The questionable sequence shows the Government is not really interested in avoiding infringement on

[18] This reality explains why the Government pursues standing and ripeness arguments; they have little hope of overcoming the high burden associated with mootness. But because the Government is relying on the post-complaint affidavit of Ms. Miller, the issue is properly analyzed under the mootness standard.

constitutional rights as much avoiding judicial sanction. *See Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342–43 (6th Cir. 2007) ("In this case, that burden [to show mootness] is increased by the fact that the voluntary cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed."). Courts are not prone to dismiss a case because a party promises—in the course of litigation—to stop unconstitutional behavior. *E.g. United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968) (promise to discontinue challenged actions "standing alone, cannot suffice to satisfy the heavy burden of persuasion…").

Also, in respect to the motion to dismiss, the Government's promise not to enforce has no effect on AFA's facial challenge. If the Government could successfully insulate its policies from attack by giving a wink and a nod to an individual litigant, the Government could avoid every facial challenge, and keep unconstitutional laws in place, just by exempting those that challenge the laws. To prevent this scenario, the Government cannot moot injunctive relief by exempting particular litigants without also changing the underlying policy under attack. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 74 F.3d 1308, 1311(D.C. Cir. 1996) *vacated on other grounds* 519 U.S. 1 (1996) ("…the government cannot escape the pitfalls of litigation by simply giving in to a plaintiff's individual claim without renouncing the challenged policy….").

CONCLUSION

For the reasons stated herein, AFA respectfully asks the Court to deny Defendants' Motion to Dismiss and grant AFA's Motion for Preliminary Injunction, or alternatively, enter a stay and hold this case in abeyance pending Government's issuance of any changes or amendments to the Mandate.

Respectfully submitted,

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*Application for Admission *pro hac vice* is forthcoming

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was this date filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent electronically to all counsel of record by operation of the Court's CM/ECF system, signed this 3rd day of May, 2013.

/s/ Nathan W. Kellum
NATHAN W. KELLUM