IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

AVE MARIA UNIVERSITY, Plaintiff, v. KATHLEEN SEBELIUS, *et al.* Defendants.	Case No. 2:12-cv-00088-UA-SPC

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff's Opposition to defendants' Motion to Dismiss makes clear that plaintiff is seeking to challenge regulations – that neither defendants, nor anyone else, is enforcing against Plaintiff – as well as forthcoming amendments to those regulations – that do not even exist yet. This Court should reject plaintiff's request to prematurely adjudicate the merits of its claims because the Court lacks jurisdiction.

Plaintiff's basic premise seems to be that it has standing and its claims are ripe for review unless defendants can demonstrate that there is no set of circumstances under which plaintiff could ever be adversely affected by the challenged regulations and prove that plaintiff will be completely satisfied with forthcoming amendments to those regulations that are designed to accommodate religious organizations' religious liberty interests. Plaintiff has it exactly backwards. It is plaintiff's burden – not defendants' – to demonstrate current or imminent injury stemming from the regulatory actions they seek to challenge. And it is plaintiff's burden to show that, even though the challenged regulations will inevitably change before they could have any effect on plaintiff, this Court should nonetheless intervene to adjudicate the merits of proposed amendments to those regulations that will not affect plaintiff until 2014. The proposed amendments, however, are still being formulated and their content is therefore unknowable.

For the reasons set forth below and in defendants' opening brief, the Court should grant defendants' Motion to Dismiss.

ARGUMENT

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

Defendants demonstrated in their opening brief that plaintiff lacks standing because it has not alleged a concrete and imminent injury resulting from the operation of the preventive services coverage regulations. Plaintiff does not demonstrate otherwise in its Opposition.[1] Plaintiff concedes that it is eligible for the temporary enforcement safe harbor, *see* Pl.'s Opp'n to Mot. to Dismiss ("Opp'n") at 8-9, ECF No. 24, pursuant to which defendants will not bring any enforcement action against plaintiff for failing to provide contraceptive coverage until at least January 1, 2014. By that time, defendants will have finalized amendments to the preventive services coverage regulations to accommodate the religious objections of religious organizations, like plaintiff, to providing contraceptive coverage. Thus, plaintiff has not been, and likely never will be, injured by the challenged regulations in their current form.

Plaintiff nevertheless urges that, even though it is eligible for the enforcement safe harbor, the existence of "'a time delay before the disputed provision[] will come into effect'" is "irrelevant" for purposes of standing. Opp'n at 9 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)). Plaintiff asserts that it need not await the consummation of a threatened injury to obtain preventive relief. *Id*. at 8. But

[1] Defendants' opening brief asserted that plaintiff had not sufficiently alleged that its group health plan is not grandfathered. Defs.' Mot. to Dismiss at 13-15, ECF No. 21. Defendants are no longer pressing this argument at the motion to dismiss stage because the declaration submitted with plaintiff's opposition plausibly suggests that plaintiff's plan has not satisfied certain requirements for maintaining grandfather status. *See* 45 C.F.R. § 147.140(a)(2); 26 C.F.R. § 54.9815-1215T(a)(2); 29 C.F.R. § 2590.715-1251(a)(2).

the instant case involves more than mere delay. Defendants also intend to amend the challenged regulations during the enforcement safe harbor period to accommodate religious organizations' religious objections to covering contraceptive services. These forthcoming amendments are not irrelevant to the standing analysis. In fact, the Supreme Court has made clear that a time delay is only "irrelevant" when "the inevitability of the operation of a statute against certain individuals is patent." *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143. Here, there is nothing patently inevitable about the operation of the preventive services coverage regulations in their current form against plaintiff. Moreover, this is not a case where defendants are relying on the general authority of an agency to change regulations it promulgated whenever it desires. *See* Opp'n at 11. The advance notice of proposed rulemaking (ANPRM) goes much further than that by promising imminent regulatory amendments that are intended to address the concerns raised by organizations like plaintiff.[2]

Plaintiff's reliance on the position defendants took on appeal in another case, *see* Opp'n at 9 (citing *Florida ex rel. Attorney Gen. v. HHS*, 648 F.3d 1235 (11th Cir. 2011)), fares no better.[3] As an initial matter, court in several other cases – none of which

[2] Plaintiff's repeated description of the ANPRM as a "speculative proposed rulemaking" that will not amend the challenged regulations is simply wrong. *See* Opp'n at 1; *see also id*. at 2-3, 10-13, 16-18. Defendants have done more than promise the possibility of a rulemaking sometime in the future; they have initiated the rulemaking by issuing an ANPRM, made clear that the rulemaking will amend the challenged regulations, and made assurances that they will finalize the amendments before the safe harbor expires. *See* 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012).

[3] The government's failure to appeal a decision in one case has no bearing on even the same issue in a related case, much less – as plaintiff urges here – a different issue in an unrelated case. *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (holding

plaintiff cites – dismissed challenges to the minimum coverage provision for lack of standing where the plaintiffs could not show that the provision was certain to injure them when it becomes effective in 2014. *See, e.g.*, *Baldwin v. Sebelius*, 654 F.3d 877, 879 (9th Cir. 2011); *New Jersey Physicians, Inc. v. Obama*, 653 F.3d 234, 239-40 (3d Cir. 2011); *Shreeve v. Obama*, No. 1:10-CV-71, 2010 WL 4628177, at *4 (E.D. Tenn. Nov. 4, 2010). Further, and most importantly, the circumstances here are very different from those present in the cases challenging the minimum coverage provision. There was no hint that Congress would amend the minimum coverage provision; the only question in those cases was whether the particular plaintiff would be subject to that provision. *See, e.g.*, *Baldwin*, 654 F.3d at 879. Indeed, in concluding that the plaintiff in *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 538 (6th Cir. 2011), had standing to challenge the minimum coverage provision, the court specifically noted that "there is no reason to think the law will change."[4] In contrast, here, there is every reason to think the challenged regulations will change in material ways; defendants have publicly announced their intent to amend the regulations to accommodate concerns of the type at issue here and have in fact begun that process. Because the forthcoming amendments may foreclose entirely

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that nonmutual offensive collateral estoppel does not apply against the government); *id.* at 160-62 (noting that the Solicitor General considers many factors when deciding whether to appeal an issue).

[4] Similarly, in *Village of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004), another case on which plaintiff relies, "action by [the court]" was the only thing preventing the city from collecting the challenged fee from the plaintiff.

any injury to plaintiff, or at least alter the nature of any injury (and the substance of plaintiff's legal claims), plaintiff has not established standing.[5]

Contrary to plaintiff's argument, *see* Opp'n at 10, the forthcoming changes to the regulations *do* make any alleged harm to plaintiff so speculative as to defeat standing. First, plaintiff lacked standing at the time it filed its original complaint. The contraception coverage requirement, as applied to plaintiff, is not effective until January 1, 2013. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R.

[5] Plaintiff also contends that it is injured notwithstanding the temporary enforcement safe harbor because the safe harbor is "non-binding." Opp'n at 10 n.7. But plaintiff is dealing with the federal government, which is entitled to a presumption that it acts in good faith. *See, e.g.*, *Schism v. United States*, 316 F.3d 1259, 1302 (11th Cir. 2002) (explaining that government officials are presumed to act in good faith); *cf. Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) ("[W]e assume that formally announced changes to official government policy are not mere litigation posturing."); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) ("[C]essation of [] allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties."). Defendants have never withdrawn – or done anything to suggest that they may withdraw – the safe harbor before it expires. Any suggestion that defendants may take back the safe harbor is not only dubious, it is also insufficient to establish an injury in fact. *See Schutz v. Thorne*, 415 F.3d 1128, 1134-35 (10th Cir. 2005) ("Standing is not conferred by 'conjecture' or 'speculation' about future [events]."). Indeed, courts have found similar promises not to enforce by the government sufficient to defeat jurisdiction. *See, e.g.*, *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); *Presbytery of N.J. 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 prosecute churches for violating law). The case cited by plaintiff, *see* Opp'n at 10 n.7, does not show otherwise. *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388-89 (4th Cir. 2001) (basing decision on fact that agency's non-enforcement policy was expressly limited to a particular geographic region, and the plaintiff alleged a specific intent to engage in advocacy outside of that region). Furthermore, even if defendants were to withdraw the temporary enforcement safe harbor before it expires – and there is absolutely no evidence to suggest that they will – plaintiff could bring suit at that time, seeking preliminary injunctive relief if warranted.

§ 147.130(b)(1). Thus, when plaintiff filed its original complaint on February 21, 2012, plaintiff was not under any obligation to provide coverage for contraceptive services. And plaintiff is under no such obligation today.

Second, plaintiff attempts to recast defendants' standing argument as a question of mootness, thereby transferring the burden of proof from plaintiff to defendants. Opp'n at 11-12.[6] The Court should reject this ploy, as it ignores the distinct interests that are served by the standing and mootness doctrines. "Standing doctrine functions to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000). "In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years." *Id*. The mootness doctrine serves to avoid "abandon[ing] [a] case at an advanced stage" where doing so "may prove more wasteful than frugal." *Id*. at 191-92. Because this case has not been litigated "for years" and is not at "an advanced stage," *id*. at 191-92, the interests served by the mootness doctrine simply are not implicated here. Accordingly, there is no basis for transforming

[6] In attempting to re-write defendants' standing argument as a mootness argument, plaintiff relies on several cases that address standing and/or ripeness, not mootness. *See* Opp'n at 11-12 (citing *Am. Petroleum Inst. v. EPA*, 906 F.2d 729 (D.C. Cir. 1990); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008)). These cases do not establish that plaintiff has standing here or that its claims are ripe. In *American Petroleum Institute*, the court concluded that a pending rulemaking did not render a challenge to a previously adopted rule unripe because the pending rulemaking was "entirely separate from" the challenged rule and the agency would not have any "occasion to refine" or change the challenged rule in the pending rulemaking. 906 F.2d at 739. Similarly, in *American Bird Conservancy*, the "new docket" opened by the agency was not designed to address the problems identified by the plaintiff. 516 F.3d at 1030, 1031 n.1. Here, on the other hand, the rulemaking defendants have initiated is specifically intended to amend the challenged regulations to address the concerns raised by organizations like plaintiff.

plaintiff's burden of establishing standing into a burden on defendants to establish voluntary cessation, and the Court should reject plaintiff's attempt to shift its burden to establish standing to defendants by requiring defendants to show that under no set of circumstances would plaintiff be adversely affected by the challenged regulations.

Finally, plaintiff's assertion that "the accommodations sketched out in the ANPRM would not assuage Ave Maria's religious conflict," Opp'n at 12, serves only to underscore the prematurity of this challenge and further illuminates why the Court lacks jurisdiction over this case. Plaintiff makes clear that it is asking the Court to assess the lawfulness of regulations that do not yet exist. Plaintiff's theory appears to be that, no matter what accommodations defendants ultimately adopt, they will not be satisfactory to plaintiff. But plaintiff has opportunities – throughout the pending rulemaking – to express its concerns and help shape the forthcoming amendments. For example, plaintiff can submit the arguments it makes on pages 12 through 13 of its Opposition to defendants during the comment period on the ANPRM. Defendants have made clear that the ideas suggested in the ANPRM do not represent the full universe of ideas that they will consider adopting and have expressly invited alternative ideas. 77 Fed. Reg. at 16,501, 16,503, 16,508 (Mar. 21, 2012).

In sum, this case involves not only a time delay before defendants will enforce the challenged regulations against plaintiff, but also a commitment by defendants that they will amend the regulations as they relate to organizations like plaintiff, initiation of the amendment process, and opportunities for plaintiff to participate in that process. In these

circumstances, no injury to plaintiff is "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

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

Defendants also demonstrated in their opening brief that plaintiff's challenge to the preventive services coverage regulations is not ripe. Defendants explained that the challenged regulations are not fit for judicial review because of the ongoing rulemaking, which is intended to amend the challenged regulations to accommodate the religious objections of religious organizations, like plaintiff, to providing contraceptive coverage. Moreover, the temporary enforcement safe harbor will be in effect until defendants finalize the amendments such that plaintiff will not suffer any hardship prior to the regulatory changes.

In its Opposition, plaintiff first contends that its claims are fit for judicial review because they "involve facial challenges" to the regulations "that require no factual development." Opp'n at 14. Defendants agree that plaintiff's claims are largely legal,[7] but that does not mean that further factual development is not warranted. One relevant – indeed, essential – fact that has yet to be determined is what the preventive services coverage regulations will actually require of plaintiff, if anything. Until that is known – and it will not be known until the pending rulemaking is completed – the Court cannot know what it is reviewing. *See Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952) (to be ripe for review, a case "must have taken on fixed and final shape so that a

[7] Defendants note, however, that the substantial burden analysis under the Religious Freedom Restoration Act ("RFRA") is a fact-specific inquiry. *See, e.g.*, *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319 (D. Mass. 2006).

court can see what legal issues it is deciding . . ."); *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985) (court must consider whether it "will benefit from deferring review until the agency's policies have crystallized and the question arises in some more concrete and final form" (quotation omitted)).[8]

Plaintiff further asserts that the preventive services coverage regulations are fit for judicial review under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99 (1977), because they are final. Opp'n at 15. As evidence of this finality, plaintiff refers to defendants' issuance of final rules on February 15, 2012. *Id*. at 16. Plaintiff, however, misunderstands the nature of those final rules. They did not serve to finalize the preventive services coverage regulations in their entirety as plaintiff claims. *See id*. ("[T]he Mandate 'mark[ed] the "consummation" of the agency's decisionmaking process.'" (citation omitted)). Rather, they finalized an amendment to the interim final rules – that is, the amendment that authorized an exemption from the contraceptive coverage requirement for certain religious employers. 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012) ("[T]he amendment to the interim final rule . . . is adopted as a final rule without change."). Indeed, the February 15, 2012 final rules explicitly announced that defendants will engage in a "future rulemaking" to "develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such

[8] The Eleventh Circuit decisions cited by plaintiff, *see* Opp'n at 15, do not actually support plaintiff's argument, as unlike the preventive services coverage regulations at issue here, neither case involved a law that was subject to a forthcoming change. *See Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009); *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001).

coverage." 77 Fed. Reg. at 8728. And defendants subsequently initiated that announced rulemaking by issuing the ANPRM on March 21, 2012. *See* 77 Fed. Reg. 16,501. Thus, as applied to non-exempted, non-grandfathered religious organizations with religious objections to providing contraceptive coverage, like plaintiff, the preventive services coverage regulations are not final or definitive. Rather, further administrative proceedings – which may eliminate the need for judicial review entirely or at least narrow and refine the controversy – are contemplated and, indeed, underway.

Although the "possibility of unforeseen amendments [is not] sufficient to render an otherwise fit challenge unripe," *Am. Petroleum Inst.*, 906 F.2d at 739-40), there is nothing *unforeseen* about defendants' intent to amend the regulations challenged here. *See Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483 (5th Cir. 2005) (dismissing challenge to rule as unripe where agency announced its intent to consider issues raised by plaintiff in new rulemaking); *AT&T Corp. v. FCC*, 369 F.3d 554, 563 (D.C. Cir. 2004) (dismissing claim as unripe where issues raised by plaintiff were "still under consideration in ongoing rulemaking proceedings"); *Util. Air Regulatory Grp. v. EPA*, 320 F.3d 272, 279 (D.C. Cir. 2003) (concluding agency's interpretation of regulations was not ripe for review where agency was "currently undertaking a rulemaking to amend [the regulations]"); *Lake Pilots Ass'n v. U.S. Coast Guard*, 257 F. Supp. 2d 148, 161-62 (D.D.C. 2003) (holding challenge to rule was not ripe where agency undertook a new rulemaking to address issue raised by plaintiff in the lawsuit); *Greater St. Louis Health Sys. Agency v. Teasdale*, 506 F. Supp. 23, 36 (E.D.

Mo. 1980) (concluding plaintiffs' claims were not ripe where review committee might rectify errors alleged by plaintiffs before law became applicable).

Nor is plaintiff's insistence that it will not be satisfied with whatever amendments result from the pending rulemaking, *see* Opp'n at 16-17, grounds for this Court to issue an advisory opinion on the lawfulness of the ideas proposed in the ANPRM. Courts may not opine on the lawfulness of regulations that are not yet final no matter how "legal" the issues may be. *See Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005) (observing that the ripeness doctrine prohibits courts from issuing "an opinion advising what the law would be upon a hypothetical state of facts" (quotation omitted)); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1306 (2d Cir. 1996) (holding claims were not ripe where "plaintiffs' arguments depend upon the effects of regulatory choices to be made by [the State] in the future"); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("The interest in postponing review is powerful when the agency position is tentative. Judicial review at that stage improperly intrudes into the agency's decisionmaking process. It also squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind." (citations omitted)). And as previously stated, plaintiff cannot credibly argue that "[n]othing the ANPRM proposes to do . . . could possibly alter" its challenge to the regulations, *see* Opp'n at 17, when plaintiff has ample opportunity to express its concerns and help shape the forthcoming amendments.[9]

[9] Plaintiff misses the point when it says that it is challenging the "finalized" regulations and not "whatever might come out of the proposed rulemaking." Opp'n at 19. As previously explained, plaintiff's challenge is premature not because it seeks to

Finally, with respect to the second prong of the ripeness analysis, plaintiff maintains that it will suffer hardship if judicial review is delayed. Plaintiff contends that it must begin planning now for the possibility that it will drop its health insurance coverage in January 2014 and begin paying a penalty for failure to provide such coverage to its employees.[10] *Id.* at 19. Plaintiff further notes that its inability to offer health coverage in the future may adversely affect its retention and recruitment efforts. *Id*. These allegations, however, do not demonstrate a "direct and immediate" effect on plaintiff's "day-to-day business" with "serious penalties attached to noncompliance," as required to establish hardship. *Abbott Labs.*, 387 U.S. at 152-53. Instead, they are contingencies that may arise in the future. And plaintiff's alleged desire to plan for these contingences does not constitute a hardship; if it did, the hardship prong would become meaningless because organizations (and individuals) are always planning for the future. *See Wilmac Corp. v. Bowen*, 811 F.2d 809, 813 (3d Cir. 1987); *Tenn. Gas Pipeline Co. v. F.E.R.C.*, 736 F.2d 747, 751 (D.C. Cir. 1984) (concluding plaintiff's "planning insecurity" was not sufficient to show hardship); *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 162 (7th Cir. 1976) ("[C]laims of uncertainty in [plaintiff's] business and capital

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challenge the ANPRM, but because the ANPRM makes clear that the existing regulations are not, in fact, final as to organizations like plaintiff. Plaintiff's characterization of its claim as challenging "the Act's preventive services mandate because – and only because – defendants have defined 'preventive services' to include contraception and sterilization" is also not credible. *Id.* at 16. It is clear from the Complaint that plaintiff takes issue not with defendants' interpretation of the statute's preventive services provision, but with the application of that provision to plaintiff.

[10] An employer's failure to provide health coverage for its employees does not, by itself, subject the employer to an assessable payment. *See* 26 U.S.C. § 4980H.

planning are not sufficient to warrant [] review of an ongoing administrative process.").[11] Nor is plaintiff's alleged hardship caused by the challenged regulations. *See Abbott Labs.*, 387 U.S. at 152. Rather, it arises from plaintiff's own desire to prepare for a hypothetical situation in which the forthcoming amendments to the preventive services coverage regulations do not sufficiently address plaintiff's religious concerns.[12]

Plaintiff also claims hardship from the possibility that third-parties may bring suit against plaintiff to enforce the preventive services coverage regulations. Opp'n at 20. But plaintiff does not allege that any such suit has been brought against it, and thus, this alleged hardship is purely theoretical. Hypothetical future hardship does not render a

[11] The case plaintiff cites, *see* Opp'n at 19, is not to the contrary. The alleged hardship in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180, 186-87 (4th Cir. 2007), was that the challenged law required the plaintiff to alter its accounting practices immediately because the plaintiff's existing accounting practices did not permit it to collect the type of information that the plaintiff had to report under the challenged law.

[12] Plaintiff, moreover, cannot transmute the speculative possibility of future injury into a current concrete injury for standing purposes by asserting that it has "devoted considerable resources to determine how to respond to" the preventive services coverage regulations. Opp'n at 7. Such reasoning would gut standing doctrine. A plaintiff could manufacture standing by asserting a current need to prepare for the most remote and ill-defined harms. Even if such manipulation were not so transparent, plaintiff still would bear the burden of pleading standing with specificity. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *R.W. v. Ga. Dep't of Educ.*, 353 Fed. App'x 422, 423 (11th Cir. 2009) (per curiam); *Brown v. FBI*, 793 F. Supp. 2d 368, 374 (D.D.C. 2011). Plaintiff does not meet that burden here because it does not explain what it is devoting resources to, much less why it is doing so in light of the forthcoming amendments to the regulations. Further, any planning plaintiff is engaged in now "stems not from the operation of [the preventive services coverage regulations], but from [plaintiff's] own . . . personal choice" to prepare for contingencies that may never occur. *McConnell v. FEC*, 540 U.S. 93, 228 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 130 S. Ct. 876 (2010). Thus, even if this preparation were an injury, it would not be fairly traceable to the challenged regulations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

case ripe for review. *See Salvation Army v. Dep't of Cmty. Affairs of N.J.*, 919 F.2d 183, 193 (3d Cir. 1990) (concluding "the theoretical possibility of a suit against [plaintiff] by a program beneficiary" was not sufficient to establish jurisdiction). Moreover, if a third-party were to sue plaintiff in the future for failure to provide contraceptive coverage in its health plans, plaintiff would be able to raise all the claims it asserts here as a defense in that action. *See, e.g.*, 42 U.S.C. § 2000bb-1(c) (noting that a violation of RFRA may be raised as a defense). Because defendants are amending the challenged regulations to address concerns raised by organizations like plaintiff and plaintiff has not shown that it will suffer hardship during this amendment process, plaintiff's challenge is not ripe.

CONCLUSION

For these reasons and those set forth in defendants' opening brief, plaintiff lacks standing to challenge the preventive services coverage regulations and its claims are not ripe. This Court, accordingly, should grant defendants' Motion to Dismiss plaintiff's Complaint.

Respectfully submitted this 8th day of June, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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