IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MEDIA RESEARCH CENTER,	)	
Plaintiff,	)	
v.	)	Case No. 1:14-cv-379-GBL-IDD
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

INTRODUCTION

Plaintiff, Media Research Center (MRC), claims that it has a religious objection to federal regulations that require some corporations to provide contraceptive coverage in their employee health plans. But MRC has availed itself of a regulatory accommodation—designed to address the religious concerns of non-profit religious organizations that object to contraceptive coverage—that relieves it of any obligation to take any action to which it has a religious objection. Whatever MRC's objection to the contraceptive coverage requirement may be, MRC has chosen to take advantage of that accommodation. Nonetheless, MRC asks the Court for preliminary injunctive relief to assure MRC that it has indeed fulfilled all conditions to be eligible for an accommodation—even though no one has ever suggested otherwise. MRC's demand for immediate, emergency relief for a non-existent controversy is baseless and should be denied.

To be eligible for an accommodation, an organization need only certify that it meets the eligibility criteria, *i.e.*, that it is a non-profit organization that holds itself out as religious and has a religious objection to providing coverage for some or all contraceptives, and provide a copy of the certification to its health insurance issuer or third party administrator. Once an organization does so, it need not contract, arrange, or pay for contraceptive coverage or services. If the organization has third-party insurance, the third-party insurer takes on the responsibility to provide contraceptive coverage to the organization's employees and covered dependents. If the group health plan of the organization is self-insured—as MRC's health plan is—its third-party administrator (TPA) has responsibility to arrange for contraceptive coverage for the organization's employees and covered dependents. In neither case does the objecting employer

bear the cost (if any) of providing contraceptive coverage; nor does it administer, contract, or arrange for such coverage.

MRC wants to take advantage of the accommodation for self-insured non-profit religious organizations. There is no dispute that MRC has determined that it is eligible for an accommodation and has executed the self-certification. There is also no dispute that MRC has now done everything that the regulations require in order to avail itself of an accommodation. Defendants have not disputed MRC's status as an eligible organization, and have not suggested that they have any intent or reason to do so in the future. In fact, there is no dispute of any kind relevant to the instant motion. Nonetheless, MRC asks the Court to issue a declaratory judgment—through the extraordinary remedy of a preliminary injunction—confirming the organization's eligibility for an accommodation. But, in order to obtain such a judgment, MRC must first show that it satisfies the "case or controversy" requirement of Article III and that, therefore, this Court may properly exercise jurisdiction. Absent an actual dispute between the parties, any opinion issued by this Court would be purely advisory, which the Constitution forbids.

MRC has not cleared and cannot clear this jurisdictional hurdle. First, MRC seeks to comply with, rather than invalidate, the federal regulations, and has apparently done so already. Defendants have not taken, and have expressed no intent to take, any enforcement action based on any claim of non-compliance with the regulations. Therefore, even if MRC has properly asserted a federal cause of action, because it has not identified any concrete injury or hardship stemming from the challenged regulations, MRC has not shown that it has standing to raise its claims. In fact, nowhere in its Complaint does MRC allege that its constitutionally-protected activities are curtailed by the challenged regulations, or that the organization must incur costs to

comply with the regulations. Indeed, MRC has taken all necessary steps to comply with the regulations, without any objection. For similar reasons, MRC has not established that this case is ripe for review.

Second, Count One of MRC's Complaint—the only count on which plaintiff moves for preliminary injunctive relief—does not even assert a federal cause of action. The Declaratory Judgment Act, standing alone, does not create a cause of action. When seeking declaratory relief, a plaintiff must also identify an affirmative claim arising under federal law, which MRC has failed to do here.

Finally, MRC also cannot satisfy the other requirements for preliminary injunctive relief. Most obviously, MRC cannot show irreparable harm for the same reason that it cannot establish standing or ripeness—a complete lack of actual harm. The fact that MRC waited until the day before the challenged regulations applied to its group health plan—nearly 10 months after the regulations were promulgated—to seek preliminary injunctive relief also counsels against a finding of irreparable harm. In sum, MRC is not entitled to an advance, binding judgment—from either defendants or this Court—that it has in fact complied with the challenged regulations. Indeed, MRC seeks precisely the type of advisory opinion that falls outside the limits of Article III.

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-

20, 109 (2011) ("IOM REP."). Section 1001 of the ACA—which includes the preventive services coverage provision relevant here—seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health insurance coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]" (which is a component of the Department of Health and Human Services). 42 U.S.C. § 300gg-13(a)(4).[1]

Because there were no existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations in furtherance of its implementation of the requirement to provide coverage, without cost-sharing, of preventive services for women. IOM REP. at 2.[2] After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women

[1] This provision also applies to immunizations, cholesterol screening, blood pressure screening, mammography, cervical cancer screening, screening and counseling for sexually transmitted infections, domestic violence counseling, depression screening, obesity screening and counseling, diet counseling, hearing loss screening for newborns, autism screening for children, developmental screening for children, alcohol misuse counseling, tobacco use counseling and interventions, well-woman visits, breastfeeding support and supplies, and many other recommended preventive services. *See, e.g.*, U.S. Preventive Services Task Force A and B Recommendations, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

[2] IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv.

with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs). *See id.* at 105. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id.* at 102-03.[3]

On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines (last visited May 21, 2014).[4] Group health plans established or maintained by these religious employers (and associated group health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. *See id.*; 45 C.F.R. § 147.131(a).

---

[3] At least twenty-eight states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (June 2013).

[4] To qualify for the religious employer exemption authorized by the 2011 amended interim final regulations, an employer had to meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization;
> (2) the organization primarily employs persons who share the religious tenets of the organization;
> (3) the organization serves primarily persons who share the religious tenets of the organization; and
> (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. The regulations adopted in 2013 (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,869 (July 2, 2013); *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)); 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)).

The 2013 final rules represent a significant accommodation by the government of the religious objections of certain non-profit religious organizations and promote two important policy goals. The regulations provide women who work for non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the compelling government interests in safeguarding public health and ensuring that women have equal access to health care. The regulations advance these interests in a narrowly tailored fashion that does not require non-profit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

In particular, the 2013 final rules establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans).

Id. at 39,875-80; 45 C.F.R. § 147.131(b). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75.[5]

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id.* at 39,878-79. Its plan participants and beneficiaries, however, will still benefit from separate payments for contraceptive services without cost sharing or other charge. *Id.* at 39,874. In the case of an organization with a self-insured group health plan—such as plaintiff here—the organization's

[5] The 2013 final rules also simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth criterion. *See supra* note 4. Under the 2013 final rules, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a). The changes made to the definition of religious employer in the 2013 final rules are intended to ensure "that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths." 78 Fed. Reg. at 39,874.

TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,879-80. Any costs incurred by the TPA may be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880.

The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, *see id.* at 39,872, except that the amendments to the religious employer exemption apply to group health plans and health insurance issuers for plan years beginning on or after August 1, 2013, *see id.* at 39,871.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20.

ARGUMENT

I. MRC IS NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THIS CASE SUFFERS FROM NUMEROUS JURISDICTIONAL DEFECTS

There is no dispute that MRC has determined that it qualifies for an accommodation, and has completed the self-certification form. *See* Compl. ¶¶ 4, 78, ECF No. 1. The regulations do not require MRC to provide its executed self-certification to the government, nor is the government required to review the determination that MRC has made. Defendants have not called into question the validity of the self-certification or MRC's determination that it is eligible

for an accommodation, and have not suggested that they intend or have reason to do so in the future. Despite the fact that no one is questioning MRC's eligibility for an accommodation, MRC asks this Court to enter a declaratory judgment that it is indeed an "eligible organization." For at least two reasons, this Court lacks jurisdiction to provide the advisory opinion requested by MRC. As explained below, MRC has not satisfied the "case or controversy" requirement of Article III, and has not stated a viable cause of action.

A. The Court Lacks Jurisdiction Because There Is No Case or Controversy, as Required by Article III

Under Article III of the Constitution, the jurisdiction of federal courts is limited to actual "cases or controversies." *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006). "A claim is justiciable if the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). "Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). The doctrines of standing and ripeness are two manifestations of this constitutional limitation on the power of federal courts. *See id.* ("The doctrine of standing is an integral component of the case or controversy requirement."); *id.* at 318-19 ("The doctrine of ripeness prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" (quoting *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 584 (1947)).

Of course, the case or controversy requirement and the attendant doctrines of standing and ripeness apply with equal force in the declaratory judgment context. *See Jones v. Sears*

Roebuck & Co., 301 F. App'x 276, 282 (4th Cir. 2008); *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004); *Shore Bank v. Harvard*, 934 F. Supp. 2d 827, 836-37 (E.D. Va. 2013). "A federal court may exercise its jurisdiction in a declaratory judgment proceeding only when 'the complaint alleges an actual controversy between the parties.'" *Jones*, 301 F. App'x at 282 (quoting *Volvo Constr.*, 386 F.3d at 592). "When determining whether an actual controversy exists in a declaratory judgment action, the Court must ask 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment.'" *Shore Bank*, 934 F. Supp. 2d at 837 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

There is no "actual controversy" in this case—let alone one of "immediacy and reality." "Defendants ha[ve] not taken any action, even of a preliminary nature, against the plaintiff," nor have they "indicated that they intend[] to take any future legal action against the plaintiff." *Volvo Constr.*, 386 F.3d at 593 n.12 (citing *N. Jefferson Square Assocs. v. Va. Hous. Dev. Auth.*, 94 F. Supp. 2d 709, 714 (E.D. Va. 2000)). MRC attempts to make much of their allegation that the government has "refused to acknowledge MRC's status as an 'eligible organization,'" Compl. ¶ 82; *see also* Pl.'s Mem. in Support of Mot. for Prelim. Inj. ("Pl.'s Mem.") at 8, ECF No. 6, but this assertion is both misleading and irrelevant. It is true that the government declined MRC's request for an individualized determination of the organization's eligibility for an accommodation. But this demurral does not cast doubt on MRC's status as an eligible organization, as MRC suggests when it says that government has "refused to acknowledge" its status. To the contrary, the government recognizes that MRC itself has determined that it is eligible for an accommodation, which is all that the regulations require. Qualification for an

accommodation depends on a *self*-certification—it does not require the government to make any determination at all. Nothing in the regulations or elsewhere suggests that defendants will undertake any sort of inquiry regarding MRC's determination. Indeed, defendants *refused* to make a definitive pronouncement on MRC's eligibility for an accommodation in this case because the government cannot possibly be in the business of making the type of individualized determination that MRC seeks for every potentially eligible organization. To agree to do so here would be to open the floodgates for such requests, which could quickly overwhelm defendants' resources. As the regulations recognize, it is MRC and other similarly situated organizations that are in the best position to determine whether they qualify for an accommodation.[6]

Because MRC has determined that it is eligible for an accommodation and has taken the necessary steps to avail itself of an accommodation, and because defendants have done nothing to call that eligibility into question, MRC cannot show that it has standing, nor can it show that this case is ripe for adjudication.

1. MRC does not have standing because it has not alleged an "actual or imminent" injury

"[T]he irreducible constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As

[6] Count Two of MRC's Complaint alleges that such an inquiry would violate the Establishment Clause. *See* Compl. ¶¶ 87-97. So, on the one hand, MRC asks the government or this Court to determine that it is eligible for an accommodation and, on the other hand, MRC claims that it would be unconstitutional for the government or this Court to do so. This contradiction is puzzling, to say the least. In any event, Count Two is not at issue at this time, *see infra* note 11, and the government has no intention of inserting itself into the process of determining MRC's eligibility for an accommodation. Although it is irrelevant at this stage, the government simply notes that it does not agree with MRC's Establishment Clause argument. Any interaction between the government and religious organizations that may be necessary to determine eligibility for an accommodation would not be so "comprehensive," *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), or "pervasive," *Agostini v. Felton*, 521 U.S. 203, 233 (1997), as to result in excessive entanglement.

to the injury prong, a plaintiff must demonstrate that it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (quotations omitted). Allegations of possible future injury do not suffice; rather, "[a] threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quotation omitted); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." (quoting *Whitmore*, 495 U.S. at 158)).

MRC has failed to allege any "actual or imminent" injury that would provide a basis for standing. The organization does not claim that it has had to expend resources to comply with the law; nor does it allege that the challenged regulations restrict or hinder the exercise of MRC's rights in any way. MRC does not object to completing the self-certification form; in fact, it has already done so. Having completed the self-certification and provided the form to its TPA, the challenged regulations require nothing more of MRC (or defendants). As such, plaintiff has not identified—and cannot identify—a single action or forbearance that it has taken or will take in the future in order to comply with the law. In fact, the only "injury" that plaintiff identifies in Count One of its Complaint is legal uncertainty—that, absent a declaratory judgment, "the ruinous fines imposed for noncompliance with the Contraception Mandate will hang over MRC like a Damoclean sword." Compl. ¶ 84. But allegations of mere uncertainty, standing alone, are not sufficiently concrete and particularized for purposes of Article III standing. *See, e.g.*, *Mylan Pharm., Inc. v. U.S. Food & Drug Admin.*, 789 F. Supp. 2d 1, 10 (D.D.C. 2011).[7]

[7] MRC cites *Shore Bank* and other cases in this Circuit for the proposition that, in a declaratory judgment action, "'[e]ven when no lawsuit has been filed, a dispute can be sufficiently concrete

Nor are MRC's speculative concerns about possible future harm sufficient for standing purposes. MRC claims that it needs relief because, without it, the organization is left "at the mercy of some later bureaucratic whim." Pl.'s Mem. at 18. In other words, MRC is concerned that, at some undefined time in the future, the government might decide that MRC does not actually qualify as an eligible organization, at which point the government might seek to impose penalties for the organization's failure to comply with the contraceptive coverage requirement. But this type of purely speculative (and highly unlikely) future harm falls well short of the "certainly impending" injury requirement, and thus cannot be a basis for standing. *See, e.g.*, *Clapper*, 133 S. Ct. at 1147; *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89 n.5 (4th Cir. 2013); *Doe v. Va. State Dep't of Police*, 713 F.3d 745, 754 (4th Cir. 2013); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 122-23 (4th Cir. 2000).

2. This case is not ripe for review

For similar reasons, MRC cannot satisfy its burden of showing that this litigation is ripe for this Court's consideration. *See Miller*, 462 F.3d at 319 ("Analyzing ripeness is similar to determining whether a party has standing."); *Doe*, 713 F.3d at 758 & n.10. "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (quotation omitted). In assessing ripeness, courts evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court

---

to create a justiciable controversy.'" Pl.'s Mem. at 9 (quoting *Shore Bank*, 934 F. Supp. 2d at 837). That is true as a general matter, but it does not help MRC here. In *Shore Bank* and the other cases cited by MRC, the parties were unquestionably in "legally adverse" positions and, thus, there was "clearly a substantial controversy between such parties." *Shore Bank*, 934 F. Supp. 2d at 837. Here, on the other hand, defendants have not taken a position adverse to that of MRC, and there is "'no evidence whatever of any past, pending or threatened action by'" defendants. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 16 n.14 (1983) (quoting *Pub. Serv. Comm'n v. Wycoff*, 344 U.S. 237, 240 (1952)); *see also Shore Bank*, 934 F. Supp. 2d at 838 (same).

consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99, 105 (1977). As the Fourth Circuit has explained, "a case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319. "'The hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiffs] who would be compelled to act under threat of enforcement of the challenged law.'" *Id.* (quoting *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992).

MRC cannot satisfy either prong of the ripeness analysis. MRC's claim is not fit for review because, as explained above, it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted). The "basic rationale" of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148; *see also Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010) (same). Because the government has not questioned MRC's eligibility for an accommodation under the regulations—and has expressed no intent or reason to do so—there is no disagreement at all in this case, not even an abstract one. The injury that MRC seeks to avoid would only come to pass were the government to decide to challenge MRC's determination that it qualifies for an accommodation. What MRC really wants from this Court is an advisory opinion. But the doctrines of standing and ripeness exist precisely "to ensure that federal courts do not issue unconstitutional advisory opinions." *Torres v. O'Quinn*, 612 F.3d 237, 259 (4th Cir. 2010); *see also, e.g., North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) ("Early in its history, this Court held that it had no power to issue advisory opinions.").

MRC also cannot establish that it will suffer any hardship absent immediate judicial review. For the reasons explained above, MRC has not alleged *any* injury, let alone an injury of sufficient gravity and immediacy to make this case ripe. In fact, MRC does not even seek a determination that the regulations are unlawful; the organization just wants a determination that it is in compliance. The Supreme Court has rejected the argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 811; *see also, e.g.*, *Toca Producers v. FERC*, 411 F.3d 262, 266-67 (D.C. Cir. 2005) (concluding that uncertainty of natural gas producers regarding their obligation to remove liquefiable hydrocarbons from natural gas sent downstream was not a sufficient hardship to warrant premature judicial review). If uncertainty alone were sufficient to establish hardship, "courts would soon be overwhelmed with requests for what essentially would be advisory opinions." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 811. Nor does MRC demonstrate the sort of "direct and immediate" effect on its "day-to-day business," with "serious penalties attached to noncompliance," as required by *Abbott Laboratories*, 387 U.S. at 152-53. *See Texas*, 523 U.S. at 301 ("This is not a case like [*Abbott Laboratories*], where the regulations at issue had a 'direct effect on the day-to-day business' of the plaintiffs, because they were compelled to affix required labeling to their products under threat of criminal sanction."). To the contrary, MRC "is not required to engage in, or to refrain from, any conduct" other than the execution of the self-certification and the provision of a copy to its TPA, which it has already completed and to which it does not object. *Id.*

Because "plaintiff has not yet suffered injury and any future impact 'remains wholly speculative,'" MRC's claim is unripe. *Doe*, 713 F.3d at 758. If, in the future, the government were to question MRC's eligibility for an accommodation, plaintiff would "have ample

opportunity [] to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998).

3. Because MRC is not injured in any way by the challenged regulations, pre-enforcement review is not appropriate in this case

To be sure, courts routinely exercise jurisdiction in pre-enforcement challenges, *see MedImmune*, 549 U.S. at 128-29 (discussing *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999)), particularly where the challenged law threatens to chill First Amendment-protected speech, *see S.C. Citizens for Life, Inc. v. Krawcheck*, 301 F. App'x 218, 221-22 (4th Cir. 2008). As explained by the Supreme Court:

> [W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

MedImmune, 549 U.S. at 128-29. But such cases are not exceptions to Article III and the doctrines of standing and ripeness—to the contrary, courts exercise pre-enforcement jurisdiction only when they find that a plaintiff has suffered or is about to suffer a concrete injury, such as a restriction of its First Amendment rights, even absent actual enforcement of the law. *See S.C. Citizens for Life*, 301 F. App'x at 222 (concluding that the challenged statute "facially restricts [plaintiff's] expressive activity," and that the cost of compliance would be "sufficiently burdensome to satisfy the hardship prong of the ripeness test").

Here, MRC has alleged no such injury. Contrary to MRC's assertions, *see* Pl.'s Mem. at 19 (suggesting that MRC faces a "'Catch-22' dilemma of compliance or penalty"), this is not a case where the plaintiff is confronted with a "choice between abandoning his rights or risking

prosecution," *MedImmune*, 549 U.S. at 129. First, unlike in cases where pre-enforcement review is warranted, there is no "credible threat" of enforcement in this case. *S.C. Citizens for Life*, 301 F. App'x at 221. MRC has taken the necessary steps to avail itself of an accommodation to the contraceptive coverage requirement, and defendants have given no indication that they intend or have reason to question MRC's eligibility for that accommodation. Thus, MRC faces no "genuine threat of enforcement." *MedImmune*, 549 U.S. at 129.

Second, and perhaps more importantly, MRC's rights are not curtailed by the challenged regulations in any way. MRC has not explained how its rights will be violated in the absence of a ruling by this Court—nor could MRC plausibly assert such an allegation, given that the regulations require nothing of the organization beyond what it has already done without objection. Nor has MRC identified any First Amendment-protected speech—nor, for that matter, any activity at all—that it wishes to engage in, but that is prohibited or chilled by the regulations. In fact, MRC has not raised a free speech claim at all.[8] Thus, this case is a far cry from *Virginia Society for Human Life*, *North Carolina Right to Life*, and *South Carolina Citizens for Life*. In all of those cases, the plaintiffs were faced with the choice of forgoing constitutionally-protected speech—primarily, the publication of voter guides—or risking severe penalties. *See Va. Soc'y for Human Life*, 263 F.3d at 386-90; *N.C. Right to Life*, 168 F.3d at 710-11; *S.C. Citizens for Life*, 301 F. App'x at 221-22. Not so here, where the challenged regulations do not "require

[8] Thus, it is only out of an abundance of caution that defendants address the line of cases in this Circuit involving pre-enforcement challenges to laws that threaten to chill First Amendment-protected speech (such as *Virginia Society for Human Life*, *North Carolina Right to Life*, and *South Carolina Citizens for Life*). Those cases are inapposite for the reasons explained above, but they also do not apply here in the absence of a free speech claim.

[MRC] to 'adjust [its] conduct immediately,'" *Va. Soc'y for Human Life*, 263 F.3d at 390—and, in fact, do not require the organization to adjust its conduct at all.[9]

Because MRC has not shown and cannot show that it suffers any concrete and imminent harm as a result of the regulations, this Court lacks jurisdiction to adjudicate MRC's claims, and thus MRC cannot show a likelihood of success on the merits.[10]

B. MRC Has Not Identified a Federal Cause of Action

The pending motion suffers from an additional fatal flaw. Count One of MRC's Complaint—the only claim on which plaintiff moves for a preliminary injunction—does not assert a valid cause of action. The Declaratory Judgment Act, 28 U.S.C. § 2201, does not provide a cause of action against the Government; it merely authorizes a form of relief. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("'[T]he operation of the Declaratory Judgment Act is procedural only.'" (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)) (alteration in original)); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508-09 (1959) (noting that the Declaratory Judgment Act was designed to "leav[e] substantive rights unchanged"); *see also Shore Bank*, 934 F. Supp. 2d at 833; *Okpalobi v. Foster*, 244 F.3d 405, 423 n.31 (5th Cir. 2001) ("[A]lthough the Declaratory Judgment Act provides a remedy

[9] In MRC's brief in support of its motion for a preliminary injunction, MRC seems to suggest that the Court should apply the "void-for-vagueness" doctrine in analyzing its claims. *See* Pl.'s Mem. at 2, 11-12. This is an odd argument, as MRC has not even raised a void-for-vagueness claim in its Complaint. Nor could MRC assert such a claim. As explained above, it has alleged no injury to First Amendment-protected speech—indeed, no injury at all. Furthermore, defendants do not understand MRC to be asking the Court to "void" the regulations, which makes perfect sense given that, if the challenged regulations were struck down on void-for-vagueness grounds, the accommodations would no longer apply and MRC would be required to provide contraceptive coverage itself—a result that, undoubtedly, MRC would rather avoid. Finally, although the Court need not reach the issue, the government does not agree that the regulations are vague.

[10] Defendants also believe that MRC's claims fail on their merits. But, in light of the serious jurisdictional defects in this case, the government will not address the merits at this time. If necessary, defendants will do so at a later stage of this litigation.

different from an injunction—it does not provide an additional cause of action with respect to the underlying claim."). Accordingly, claims purportedly based on the Declaratory Judgment Act should be dismissed.

Count One is such a claim. MRC seeks a declaratory judgment that it is an "eligible organization" under the challenged regulations, but asserts no federal cause of action—such as a violation of the Constitution, the Administrative Procedure Act, or any other statute or regulation—independent of the Declaratory Judgment Act. *See* Compl. ¶¶ 79-86. MRC has not attempted to show that the challenged regulations or the ACA themselves create a cause of action—nor would such an argument be plausible. *See, e.g.*, *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 805 (4th Cir. 1996) ("We begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist."). Nor has MRC identified any provision of law that entitled it to an advance determination by either defendants or the Court that MRC is complying with the regulations. In short, MRC completely fails to assert an affirmative claim arising under federal law.[11] As a result, MRC has not actually identified an adequate basis on which this Court may exercise jurisdiction. *See Volvo GM Heavy Truck Corp. v. U.S. Dep't of Labor*, 118 F.3d 205, 210 (4th Cir. 1997) ("[T]he Declaratory Judgments Act does not provide a basis for federal subject matter jurisdiction."). MRC's motion for preliminary injunctive relief should be denied on this ground alone.

[11] In contrast, Count Two of MRC's Complaint, which alleges a cause of action based on the Establishment Clause of the First Amendment, *see supra* note 6, does not suffer from this particular defect, although it fails for other reasons. However, MRC's motion for preliminary injunctive relief appears to be based only on Count One of the Complaint, as MRC's brief makes virtually no mention of the Establishment Clause, except for a tangential reference in the course of speculating why the government might be reluctant to engage in the type of individualized determination that MRC seeks in this case. *See* Pl.'s Mem. in Support of Mot. for Prelim. Inj. ("Pl.'s Mem.") at 18, ECF No. 6.

III. MRC CANNOT ESTABLISH IRREPARABLE HARM, AND THE OTHER PRELIMINARY INJUNCTION FACTORS DO NOT WEIGH IN ITS FAVOR

Nor can MRC satisfy the other prerequisites for a preliminary injunction. As explained above, MRC has not sufficiently alleged that it will suffer *any* harm—much less irreparable harm—as a result of the challenged regulations, or from the government's failure to give MRC an official, advance determination that it is in compliance with the regulations. While MRC is correct that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* Pl.'s Mem. at 19 (same), that maxim is not instructive here, where MRC has not actually shown—or even alleged—the loss of any First Amendment freedoms.

Moreover, MRC inexplicably waited until *the day before the regulations applied to its group health plan* to seek preliminary injunctive relief, even though the regulations were issued nearly ten months earlier. Even setting aside the fatal jurisdictional flaws with MRC's motion, this inexplicable delay and lack of diligence in protecting its alleged rights militates against a finding of irreparable harm. *See Quince Orchard Valley Citizens' Ass'n v. Hodel*, 872 F.2d 75, 79-80 (4th Cir. 1989); *see also, e.g.*, *Ty, Inc. v. Jones Group Inc.*, 237 F.3d 891, 903 (7th Cir. 2001); *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Indep. Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) ("[E]quity aids the vigilant, not those who slumber on their rights."); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunction and noting that delay of forty-four days after final regulations were issued was "inexcusable"). Indeed, this delay alone shows that MRC has not established irreparable harm. *See* Order, *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-

6756, ECF No. 45 (N.D. Ill. Dec. 26, 2012) (denying TRO in challenge to contraceptive coverage regulations because the plaintiffs "have failed to offer any explanation for [their] delay" and because the plaintiffs' dilatory conduct "undermines their argument that they will suffer irreparable harm").[12]

As to the final two preliminary injunction factors—the balance of equities and the public interest—MRC cannot show that those factors weigh in their favor when they have failed to allege any concrete harm that would flow from the denial of a preliminary injunction. And "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998).

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court deny MRC's motion for preliminary injunctive relief.

[12] MRC notes that defendants have consented to preliminary injunctions in a few cases involving for-profit companies. *See* Pl.'s Mem. at 20 (citing cases). As an initial matter, MRC does not explain how that fact is relevant to the question of whether MRC will suffer irreparable harm absent preliminary injunctive relief. MRC seems to suggest that the relevant question is whether the *government* will suffer irreparable harm, *see id.* ("At least one court has noted that this consent weighs against any claim by the Government that it suffers irreparable harm."), but MRC is simply mistaken on that point. Furthermore, the cases cited by MRC are inapposite, as the plaintiffs in those cases are for-profit corporations that are not eligible for an accommodation. Nor did those cases suffer from the serious jurisdictional flaws that plague this case. Finally, defendants' consent in those cases was nothing more than an effort to conserve judicial and governmental resources. Those cases were in the Eighth Circuit, where a motions panel had preliminarily enjoined the regulations pending appeal in similar cases involving for-profit plaintiffs. *See Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11269, 2013 WL 3546702, at *16 (E.D. Mich. July 11, 2013) ("[W]here the government has conceded to injunctive relief, it appears that it has generally done so in jurisdictions where the legal landscape has been set against them, and continuing to litigate the claims in those jurisdictions would be a waste of both judicial and client resources."). The government continues to oppose preliminary injunctions in cases and circuits, like this one, where there is no such motions panel decision in an equivalent case.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

BENJAMIN L. BERWICK (MA Bar No. 679207)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W. Room 7306
Washington, D.C. 20530
Tel: (202) 305-8573
Fax: (202) 616-8470
Email: Benjamin.L.Berwick@usdoj.gov

DANA J. BOENTE
UNITED STATES ATTORNEY

/s/
Antonia Konkoly
Assistant United States Attorney
Justin W. Williams U. S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3799 (direct)
(703) 299-3983 (fax)
antonia.konkoly@usdoj.gov

Attorneys for Defendants

DATED: May 23, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of electronic filing to the following:

C. Matthew Haynes
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5919
Fax: 703-647-5989
Email: matthew.haynes@leclairryan.com

David Alan Warrington
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-684-8007
Fax: 703-684-8075
Email: David.Warrington@leclairryan.com

Joseph M. Rainsbury
LeClair Ryan, PC (Roanoke)
1800 Wells Fargo Tower
Drawer 1200
Roanoke, VA 24006
(540) 510-3055
Fax: (540) 510-3053
Email: joseph.rainsbury@leclairryan.com

Laurin Howard Mills
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5903
Fax: 703-647-5953
Email: laurin.mills@leclairryan.com

Paris Ratliff Sorrell
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5934
Fax: 703-647-5984
Email: Paris.Sorrell@leclairryan.com

William Michael Holm
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5927
Fax: 703-684-8075
Email: michael.holm@leclairryan.com

/s/
Antonia Konkoly
Assistant United States Attorney
Attorney for the Defendants