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.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff Media Research Center ("MRC")'s Motion for Preliminary Injunction (Doc. 5). MRC seeks to enjoin the Departments of Labor, Treasury, and Health and Human Services and their respective Secretaries from imposing fines against MRC for any violation of 42 U.S.C. § 300gg-13 ("Coverage Mandate" or "Mandate"), a regulation issued subsequent to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Mandate requires group health insurance plans to cover contraception, sterilization, and related counseling. *See* 42 U.S.C. § 300gg-13(a)(4). MRC argues that it should not be required to cover these services and seeks a declaratory judgment to that effect, first, on the ground that it falls within the Mandate's "eligible organization" exemption (Count I) and second, on the alternative ground that the Mandate violates the Establishment Clause of the First Amendment (Count II).

There are three issues before the Court. The first issue is whether MRC has standing to seek declaratory judgment that it falls within the "eligible organization" exemption (Count I) where MRC alleges, by way of injury, that its uncertainty over the exemption exposes it to potentially ruinous fines. The Court holds that MRC lacks standing to pursue Count I, such that

no "case" or "controversy" exists, because uncertainty over a regulatory interpretation and the mere possibility of fines do not suffice as Article III injury. The second issue is whether the case presents an "actual controversy" within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), where MRC alleges that the Government might one day seek to fine MRC for failing to cover contraceptive services, despite MRC's self-certification that it is statutorily exempt from the Mandate. The Court holds that the case does not present an "actual controversy" within the meaning of the Declaratory Judgment Act for the same reasons that it fails to present a "case" or "controversy" within the meaning of Article III. The third issue is whether MRC's motion should be granted on the strength of its Establishment Clause argument where MRC fails to explain how the Mandate establishes a religion and instead argues that the Mandate should be deemed void for vagueness. The Court DENIES the motion because the burden is on MRC to make a clear showing that it will succeed on its Establishment Clause claim, and here the regulation does not establish a religion merely because the regulation is vague.

For these reasons, the Court **DENIES** MRC's Motion for Preliminary Injunction and **DISMISSES** Count I **WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

I. BACKGROUND

MRC brings this declaratory-judgment action against the Secretaries of the Departments of Labor, Treasury, and Health and Human Services (collectively "Departments") and their respective Departments over a regulation promulgated by the Departments exempting "eligible organizations" from the provision of contraception, sterilization, and related counseling ("Coverage Mandate" or "Mandate"). MRC is a nonprofit organization whose stated mission is to expose liberal bias in the news media and popular culture. (Doc. 1, ¶ 24.) MRC's Culture and Media Institute aims to "promote[] a fair portrayal of social conservatism and religious faith" by

reporting on and critiquing anti-religious statements and sentiments in the mainstream media. (*Id.* ¶ 33.) Representative examples of the reports produced include "Rewriting the Bible: The Gospel According to Liberals" and "Secular Snobs: Documenting the National Media's Long-Standing Hostility to Religion." (*Id.* ¶¶ 34, 45.) In Count I of its complaint, MRC seeks a declaratory judgment that it falls within the "eligible organization" exemption to the Mandate. (*Id.* ¶¶ 79–86.) Alternatively, in Count II, it seeks a declaratory judgment that the Mandate violates the Establishment Clause of the First Amendment. (*Id.* ¶¶ 87–97.)

MRC and the majority of its employees maintain religious objections to the provision of contraception, abortifacient, and sterilization procedures. MRC's Board of Directors has adopted a resolution attesting to its religious objections. (*Id.* ¶¶ 73–75.) The majority of MRC's employees has adopted a similar resolution. (*Id.* ¶¶ 76–77.) The Government has not challenged the sincerity of these objections or the religious beliefs underlying them. To promulgate its beliefs, MRC maintains a self-insured group health plan for its employees. (*Id.* ¶ 67.) This plan purposefully excludes coverage for contraceptive and other preventative services, including sterilization. (*Id.* ¶¶ 70–71.)

MRC alleges that the Coverage Mandate of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), threatens MRC's ability to adhere to its religious beliefs and exclude coverage for the objected-to services. The ACA requires group health insurance plans to cover a number of preventative medical services at no charge to the patient. 42 U.S.C. § 300gg-13. Among the covered services are women's "preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [('HRSA').]" *Id.* § 300gg-13(a)(4).

Because no HRSA guidelines existed at the time of the ACA's enactment, the Department of Health and Human Services ("HHS") commissioned the nongovernmental Institute of Medicine ("IOM") to recommend guidelines. The guidelines recommended by IOM and adopted by HHS require group health plans to cover "all Food and Drug Administration approved contraception methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." 77 Fed. Reg. 8725 (Feb. 15, 2012) (internal quotation marks omitted). FDA-approved contraceptive methods include Plan B, Ella, and intrauterine devices. (Doc. 1, ¶ 57.)

On August 3, 2011, the Departments issued an interim final regulation exempting "religious employers" from the requirement to cover contraceptives. 76 Fed. Reg. 46621 (Aug. 3, 2011). To qualify for the "religious employer" exemption, the employer had to meet certain requirements, including having the inculcation of religious values as its purpose. *Id.* at 46623. The "religious employer" exemption was made final on February 10, 2012, with the criteria for the "religious employer" exemption unchanged. *Id.*

Later, on July 2, 2013, following a notice-and-comment period, the Departments amended the final regulation to clarify the "religious employer" exemption and create a new exemption for "eligible organizations." The purpose of the "eligible organization" exemption is, in part, to "protect[] certain nonprofit religious organizations with religious objections," who did not fall within the "religious employer" exemption. 78 Fed. Reg. 39870 (July 2, 2013). To qualify as an "eligible organization," the organization must (i) oppose the coverage of some or all of the contraceptive services covered by the Mandate on religious grounds, (ii) operate as a nonprofit, (iii) "hold[] itself out as a religious organization," and (iv) self-certify that it meets the first three requirements. 45 C.F.R. § 147.131(b)(4) (2013). HHS and the Department of Labor

issued a self-certification form, ESBA Form 700, for employers seeking to use the "eligible organization" exemption. MRC has self-certified as an "eligible organization" by completing and executing ESBA Form 700. (Doc. 1, ¶ 78.)

An eligible organization provides the self-certification to its insurer if it is fully insured or its third-party administrator ("TPA") if it is self-insured like MRC. Once the self-certification is provided, the eligible organization cannot be required to pay for contraception. Rather, the insurer or TPA must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage" and "[p]rovide separate payments for any contraceptive services" but may not "impose any cost-sharing requirements . . . or impose any premium, fee, or other charge . . . on the eligible organization[.]" 45 C.F.R. § 147.131(c). Additionally, the insurer or TPA may not require any documentation from the eligible organization regarding its status besides the self-certification. *Id.* § 147.131(c)(1). The eligible organization is not required to file its self-certification with the Departments, but it must keep the self-certification on file and make the self-certification "available for examination upon request." 78 Fed. Reg. 39870.

Failure to comply with the ACA's requirements for group health plans, including coverage of the contraception services, results in a tax of "$100 for each day . . . with respect to each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). However, the ACA contains several restrictions on the amount of tax that can be imposed, including prohibitions on taxes for "failure[s] not discovered exercising reasonable diligence" and "failures corrected within certain periods" and caps on taxes imposed for "unintentional failures." *See id.* § 4980D(c).

II. 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." *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (quotation omitted). To obtain a preliminary injunction, the plaintiff must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008); *The Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355, 355 (2010) (reissuing *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345–47 (4th Cir. 2009). Additionally, the party seeking injunctive relief is required to make a *clear* showing that he or she is likely to succeed on the merits at trial. *Real Truth About Obama*, 575 F.3d at 346. The party seeking injunctive relief also bears the burden of proving that *each* factor supports granting relief. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

III. ANALYSIS

Plaintiff Media Research Center ("MRC") asks the Court to preliminarily enjoin the Departments of Labor, Treasury, and Health and Human Services ("the Departments" or "the Government") and their respective Secretaries from fining MRC for any violation of the Coverage Mandate. At the same time, MRC alleges that the Mandate exempts MRC from any requirement to abide by its terms. The Government has not challenged MRC's self-exemption, and MRC presents nothing to suggest that a challenge is likely in the future.

MRC's injury is neither a set of "certainly impending" fines nor a forced choice between religious imperatives and regulatory obligations. Properly understood, MRC's injury is its subjective uncertainty over whether it falls within an exemption to the Mandate. The Court holds

that MRC's subjective uncertainty over a regulatory interpretation is not Article III injury-in-fact and thus, MRC lacks standing to pursue Count I of its complaint. Additionally, the Court holds that MRC fails to make a clear showing that it is likely to succeed on Count II, MRC's remaining Establishment Clause claim. Thus, the Court **DENIES** MRC's motion and **DISMISSES** Count I **WITHOUT PREJUDICE** for lack of jurisdiction.

The Court divides its analysis into three parts. First, the Court explains why MRC fails to establish standing as to Count I of the complaint, requiring Count I's dismissal for lack of jurisdiction. Second, the Court explains why the case fails to present an "actual controversy" within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Third, the Court explains why MRC has not established a likelihood of success on the merits of Count II, requiring denial of its motion for a preliminary injunction.

A. Absence of Certainly Impending Injury Requires Dismissal of Count I.

First, the Court finds that MRC's failure to allege a "certainly impending" injury requires dismissal of Count I on jurisdictional grounds. MRC argues that it can establish Article III injury-in-fact because of "[t]he potential that the Government might one day seek to impose ruinous fines of $12,500 per day on MRC." (Doc. 28, at 5.) However, the Supreme Court has made clear that "threatened injury must be *certainly impending* to constitute injury in fact" and that "[a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted) (citation omitted). Because MRC alleges no specific facts to move the specter of ruinous fines from "merely possible" to "certainly impending," the Court holds that MRC has not established injury-in-fact. Thus, MRC lacks standing to pursue Count I, requiring Count I's dismissal for lack of jurisdiction.

The requirement of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must allege that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (internal quotation marks omitted). The standing inquiry in this case turns on the injury-in-fact requirement. Specifically, it turns on whether the injury alleged—the imposition of ruinous fines—is "actual or imminent," which would meet Article III's requirements, or "conjectural" and "hypothetical," which would fail to meet Article III's requirements.

The Court finds that the alleged injury is necessarily conjectural because the imposition of ruinous fines depends on a "highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148. Specifically, MRC's fear of ruinous fines depends on (i) the Government interpreting the "eligible organization" exemption in a manner that keeps organizations like MRC outside its ambit, (ii) the Government requesting MRC's self-certification, (iii) the Government deeming MRC's self-certification incorrect upon examination, and (iv) the Government taxing MRC a catastrophic amount despite the ACA's limitations on taxes for "unintentional failures," "failure[s] not discovered exercising reasonable diligence," and "failures corrected within certain periods," *see* 26 U.S.C. § 4980D(c). While all of the foregoing might come to pass, it is MRC's burden to establish that the fines are "certainly impending" and not merely capable of occurring.

The speculative injury MRC alleges is similar to the speculative injuries that the Supreme Court rejected in *Clapper v. Amnesty International, USA*, 133 S. Ct. (2013), and the Fourth

Circuit rejected in dicta in *Liberty University Inc. v. Lew*, 733 F.3d 72, 85 (4th Cir. 2013). In *Clapper*, the plaintiffs—a group of human rights and other advocacy organizations—sought declaratory judgment that a statute permitting government interception of private communications for foreign-intelligence gathering was unconstitutional. *Clapper*, 133 S. Ct. at 1142. By way of injury, the plaintiffs alleged an "objectively reasonable likelihood" existed that the government would intercept attorneys representing individuals who may have links to foreign entities suspected of terrorism. *Id.* at 1143. The Supreme Court determined that the injury alleged was speculative, emphasizing that "threatened injury must be *certainly impending* to constitute injury in fact and that allegations of *possible* future injury are not sufficient." *Id.* at 1147 (internal quotation marks omitted) (citation omitted). The Court reasoned that because the plaintiffs "set forth no specific facts demonstrating that the communications of their foreign contracts will be targeted," they were "merely speculat[ing] and mak[ing] assumptions about whether their communications . . . will be acquired" and "how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target." *Id.* at 1148–49. Ultimately, the plaintiffs' allegation of "injury based on potential future surveillance" did not create Article III injury-in-fact. *Id.* at 1150.

In *Liberty*, the Fourth Circuit reiterated *Clapper*'s distinction between certainly impending injury sufficient for standing and insufficient injury. In *Liberty*, the plaintiff Liberty University sought declaratory judgment, in part, that the "employer mandate" of the ACA was invalid. *Liberty Univ., Inc. v. Lew*, 733 F.3d at 85. The employer mandate requires an "applicable large employer" to provide affordable healthcare to full-time employees and their dependents. *Id.* at 84. In dicta, the Fourth Circuit wrote that "while it is *possible* that Liberty's current plan fails to provide affordable coverage, subjecting Liberty to an assessable payment . . . , Liberty alleges

only that its coverage '*could*' be deemed unaffordable." *Id.* at 89 n.5 (emphasis added). The Fourth Circuit then quoted *Clapper*'s language about the insufficiency of possible future injury. *Id.*

Clapper and *Liberty* establish that the mere possibility of future regulatory fines will not surmount the hurdle of Article III. Rather, the burden is on MRC to allege that regulatory fines were "certainly impending," which it could have achieved by alleging specific facts showing that fines will be imposed on MRC. MRC has not alleged those facts. Indeed, MRC's failure to allege those facts is what distinguishes MRC's predicament from the cases it cites in support of its position, *Terrace v. Thompson*, 263 U.S. 197 (1923), and *Steffel v. Thompson*, 415 U.S. 452 (1974).[1] In both *Terrace* and *Steffel*, the plaintiff was seeking to violate a law despite receiving a specific threat of the law's enforcement from the relevant law-enforcement official. *See Terrace*, 263 U.S. at 212; *Steffel*, 415 U.S. at 455–56. While a specific threat of law enforcement is not always needed, *see, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15–16 (2010) (permitting preenforcement review before the plaintiffs were criminally prosecuted because the plaintiffs alleged an intent to violate the statute, the government had charged several others with

[1] At oral argument, MRC also relied on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Although the dispute in *Abbott* concerned the ripeness of the plaintiffs' claims, the Supreme Court noted that the plaintiffs undoubtedly had standing because "the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." *Abbott*, 387 U.S. at 154.

The certainty of the sanctions on the drug manufacturers in *Abbott* is in contradistinction to the uncertainty of sanctions ever being imposed on MRC. In *Abbott*, there was no question that the drug manufacturers were subject to the FDA labeling requirements; here, MRC itself argues that it is not exempt to the Coverage Mandate. In *Abbott*, the drug manufacturers had already expended substantial sums to comply with the FDA's labeling requirements; here, MRC with its self-certification in tow has not paid for any contraceptive services or taken any other action at odds with its religious beliefs. For these reasons, while fines were a practical certainty in *Abbott*, they are only a mere possibility for MRC and as the Supreme Court itself said in *Abbott*, "possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action." *Id.* at 153.

violations of the statute, and the government made no representation that the plaintiffs would not be prosecuted), some fact *specific to the plaintiff* must be alleged to establish that injury is certainly impending and not merely speculative.

At times, MRC attempts to reframe its injury as the "forced choice between violating its religious beliefs or violating the law." (Doc. 28, at 7.) That, however, is not an accurate description of MRC's situation. MRC has filed its self-certification and by the Mandate's operation, once MRC provides this self-certification to its third party administrator, MRC cannot be forced to pay the contraception of its employees. Of course, it is possible that the Government may later deem the self-certification to be incorrect and that MRC may later need to choose between its religious beliefs and its legal obligations, but that choice is not now upon MRC and it is uncertain whether it ever will be.[2]

For these reasons, the Court **DISMISSES** Count I **WITHOUT PREJUDICE** for lack of jurisdiction.

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[2] Following oral argument, MRC filed a notice of supplemental authority (Doc. 35), citing to a recently issued decision of the Supreme Court, *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 WL 2675871 (U.S. June 16, 2014). MRC cites to *Driehaus* for the proposition that "denying prompt judicial review would impose a substantial hardship on petitioners, forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other." *Id.* at *11.

The Court reiterates that MRC has not been forced to choose between regulatory obligations and religious beliefs. Moreover, in *Driehaus*, the Supreme Court affirmed that injury-in-fact exists when the plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at *6 (quotation omitted). The facts of this case could not be more inapposite with MRC alleging an intent to *comply* with the Mandate, first by executing the self-certification and then by providing a copy to its third-party administrator.

B. Absence of Article III "Case or Controversy" Suggests an Absence of "Actual Controversy" Under the Declaratory Judgment Act.

By failing to establish its standing to bring Count I, MRC also fails to allege a "case" or "controversy" within the meaning of Article III. *See Natural Resources Def. Council, Inc. v. Watkins*, 954 F.2d 974, 984 (4th Cir. 1992) ("A case or controversy requires that the plaintiff must have standing.") (internal quotation marks omitted) (citation omitted)). Because Article III's case-or-controversy requirement is synonymous with the "actual controversy" requirement of the Declaratory Judgment Act, *see Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937), and given the attenuated likelihood of the harm alleged, the Court holds that there is no "actual controversy" within the meaning of the Declaratory Judgment Act. Thus, the Court lacks declaratory-judgment jurisdiction, as well as Article III jurisdiction, to hear Count I of MRC's Complaint.

C. No Clear Showing of Likelihood of Success on the Merits on Count II Requires Denial of MRC's Motion.

Turning to Count II, the Government has not challenged MRC's standing to seek declaratory judgment that the Mandate violates the Establishment Clause. Thus, the Court reaches the merits of MRC's motion on this ground and **DENIES** the motion because MRC has not established a likelihood of success on the merits of its Establishment Clause claim.

Though MRC styles Count II of its complaint as an Establishment Clause challenge, its motion for a preliminary injunction scarcely references the Establishment Clause, let alone how exactly the Coverage Mandate violates the Establishment Clause. Curiously, its motion discusses how the Coverage Mandate should be deemed void for vagueness or a violation of MRC's free-exercise rights. (*See* Doc. 6, at 11–14.) The locus of the Court's inquiry, however, is whether MRC can succeed on the claims it will raise *at trial*—i.e., on the Establishment Clause claim it

alleges in its Complaint. Because a party seeking injunctive relief must make a *clear* showing that he or she will likely succeed on the merits at trial, *Real Truth About Obama*, 575 F.3d at 345, and because MRC has made virtually no showing of how it could succeed on an Establishment Clause claim, the Court **DENIES** MRC's Motion for Preliminary Injunction.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** MRC's Motion for Preliminary Injunction as to Counts I and II. Additionally, the Court **DISMISSES** Count I **WITHOUT PREJUDICE** for lack of jurisdiction.

IT IS SO ORDERED.

ENTERED this 3rd day of July, 2014.

Alexandria, Virginia
7/3/2014

/s/
Gerald Bruce Lee
United States District Judge