IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA,

Plaintiffs,

v.

Civil Action No. 12-cv-00815

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about freedom protected by the First Amendment, assured by the Religious Freedom Restoration Act ("RFRA"), and trampled by Defendants' haphazard rulemakings. Defendants—the U.S. Departments of Health and Human Services, Labor, and Treasury, and their respective Secretaries—have finalized regulations (the "Mandate") that require health plans to offer coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling. Plaintiffs—entities affiliated with the Roman Catholic Church—cannot facilitate those services or speech without violating their religious beliefs. Yet despite many calls for a reasonable religious employer exemption, the final rule exempts only entities that Defendants deem sufficiently "religious." Defendants have thus put Plaintiffs to an impossible choice: (1) facilitate services and speech that violate their religious beliefs; (2) attempt to qualify for a patently unconstitutional exemption; or (3) expose themselves to devastating fines, thus putting all of their ministries and services at risk of reduction or elimination.

Defendants cannot possibly justify placing Plaintiffs in this position. Indeed, the first court to address the merits of this issue preliminarily enjoined application of the Mandate to a family-owned company, reasoning, among other things, that Defendants lacked a compelling interest to force even a *for-profit* entity to provide services contrary to the religious beliefs of its Catholic owners. *See Newland v. Sebelius*, No. 1:12-CV-1123, 2012 WL 3069154, at *5–8 (D. Colo. July 27, 2012). It follows *a fortiori* that Defendants have no legitimate interest in forcing religious *nonprofit* entities, like Plaintiffs, to violate their sincerely held beliefs.

Defendants thus understandably want to prevent this Court from reaching the merits. Insensitive to Plaintiffs' present dilemma, they argue that Plaintiffs lack a sufficient injury for standing and that their challenge is unripe because Defendants plan to amend their final rule before August 2013 and have issued a temporary safe harbor from government enforcement.

Defendants' justiciability arguments, however, give short shrift to the significant constitutional rights at issue and ignore the *present* impacts the Mandate has on Plaintiffs' operations.

Standing. At the most basic level, Defendants cannot demonstrate that Plaintiffs failed to make the minimal showing necessary to establish standing "where First Amendment rights are involved." *Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011). In any case, Defendants' safe harbor is of no moment, as the Supreme "Court has allowed challenges to go forward even [where] complaints were filed almost six years and roughly three years before . . . laws went into effect." *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011); *see, e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925). Here, the religious and economic harms that will befall Plaintiffs are, at most, a little over a year away.

Perhaps more importantly, Defendants overlook the fact that "the present impact of a future though uncertain harm may establish injury in fact for standing purposes." *Lac Du Flambeau Band v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005); *see also Clinton v. City of New York*, 524 U.S. 417, 430–31 (1998). The Mandate has numerous "present impacts," forcing Plaintiffs to budget for millions of dollars in fines; precluding them from making informed decisions about their operations, programming, and benefits packages; and undermining their ability to recruit and retain employees. These actual harms easily establish Article III injury.

Ripeness. Defendants ripeness argument fares no better. Again, Defendants neglect the courts' special solicitude for First Amendment rights. Regardless, Plaintiffs' claims plainly satisfy both factors of the prudential-ripeness test. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Plaintiffs are not asking this Court to adjudicate an "abstract disagreement[]," *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985), regarding an "informal" or "tentative" rule, *Abbott Labs.*, 387 U.S. at 151, but rather present discrete legal challenges to

final agency action memorialized in the Code of Federal Regulations. And given the Mandate's present impact on decisions that must be "made now or in the short future," hardship from delayed review would be substantial. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

While Defendants maintain that the Mandate is not really "final" because they plan to "again address th[e] issue[,]" their expressed intentions "cannot transform [a] long-final order[] into [a] conditional one[]," *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 398 (D.C. Cir. 2008) (per curiam), nor can the "probability" of "future revision," *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002). More importantly, the claim that a safe harbor coupled with a proposed rulemaking renders a suit nonjusticiable has been explicitly rejected by the D.C. Circuit. *See CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408 (D.C. Cir. 2011).

At bottom, Defendants "confuse mootness with standing" and ripeness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Although an actual change in law can render a case moot, Defendants' plans to make some as-yet-undefined amendment to the Mandate does not deprive Plaintiffs of the ability to challenge the law as it exists *now*, particularly where, as here, it is imposing both imminent and current harms. *See CSI Aviation*, 637 F.3d at 414. If Defendants wanted to insulate the Mandate from review, they should not have rushed to issue it in a final, binding form. Now that they have done so—and impacted Plaintiffs' current operations—Plaintiffs have standing and this suit is ripe. Accordingly, this Court should deny Defendants' motion to dismiss.

BACKGROUND

A. The Final U.S. Government Mandate and Religious-Employer Exemption

The Affordable Care Act requires "group health plan[s]" to cover women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). In July 2010, the U.S. Department of Health

and Human Services ("HHS") issued interim final rules, codified in relevant part at 45 C.F.R. § 147.130(a)(1)(iv), to implement this provision, noting that it was developing guidelines to define the scope of the requirement. 75 Fed. Reg. 41,726, 41,731 (July 19, 2010).[1] HHS issued these interim final rules without notice-and-comment rulemaking, explaining that "to allow plans and health insurance coverage to be designed and implemented on a timely basis, regulations must be published and available . . . well in advance." *Id.* at 41,730.

Over a year later, in August 2011, HHS announced its "preventive care" guidelines, again bypassing notice-and-comment rulemaking. Those guidelines require health plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[2] FDA-approved contraceptives include drugs, such as the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), that can induce an abortion. Defendants thus required health plans to cover abortion-inducing drugs, contraceptives, sterilization, and related speech for all plan years beginning after August 1, 2012. If Plaintiffs fail to provide coverage for these services in their health plans, they are subject to an assessment of $100 a day per individual. *See* 26 U.S.C. § 4980D(b). And if Plaintiffs drop their health plans to avoid the Mandate, they are subject to an annual penalty of $2,000 per employee. *See* 26 U.S.C. § 4980H(a), (c)(1).

Shortly thereafter, Defendants issued a narrow exemption for "religious employers," defining such entities as "organization[s] that meet[] all of the following criteria":

(1) The inculcation of religious values is the purpose of the organization.

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[1] The Treasury and Labor Departments issued companion regulations which are also challenged here. 75 Fed. Reg. at 41,756–59. The arguments made with respect to the HHS regulations apply equally to those regulations.

[2] *See* Health Res. & Servs. Admin., Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Aug. 26, 2012).

> (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.
>
> (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, 46,626 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130(a)(1)(iv)(B)). As the narrowest religious employer definition ever adopted in federal law, the exemption became the subject of intense controversy. Despite public outcry, in January 2012, Defendants refused to alter their definition. Instead, they announced a temporary safe harbor for certain religious employers, providing them with "an additional year, until August 1, 2013, to comply with the new law."[3] As noted by Cardinal Timothy Dolan, this effectively gave objecting religious institutions "a year to figure out how to violate [their] consciences." (Compl. ¶ 122.)

Then, in February 2012, Defendants finalized the religious employer exemption "without change." 77 Fed. Reg. 8725, 8728, 8730 (Feb. 15, 2012). Meanwhile, under mounting public pressure, the White House announced a possible "accommodation" by which insurers of non-exempt religious organizations would "be required to directly offer . . . contraceptive care [to participants] free of charge."[4] Commentary accompanying the final rule thus noted that Defendants "plan[ned] to develop and propose changes to [their] final regulations" before August 2013. 77 Fed. Reg. at 8727. Defendants thereafter issued an Advance Notice of Proposed Rulemaking ("ANPRM") seeking comments on how to structure the "accommodation."

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[3] Press Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/ 2012pres/01/20120120 a.html.

[4] White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

77 Fed. Reg. 16,501 (Mar. 21, 2012). The ANPRM itself, however, is no more than an exercise in public brainstorming, containing a recitation of proposals, hypotheticals, and "possible approaches." *Id.* at 16,507. But it does make two things clear: First, none of the proposed scenarios would actually solve the problem, as all would require Plaintiffs to facilitate access to services that contradict their deeply held religious beliefs. (Compl. ¶¶ 125, 129, 143–45.)[5] Second, it confirms that the narrow "religious employer" exemption will not be changed. *See* 77 Fed. Reg. at 16,503–04 (ANPRM to apply to "non-exempt" organizations). As of the date of this filing, Defendants have yet to announce proposed changes to the Mandate.

B. Plaintiffs' Suit to Remedy the Burdens on Their Religious Exercise

Plaintiffs are Catholic entities that provide a wide range of spiritual, educational, and social services to residents in the greater Washington, D.C., community, Catholic and non-Catholic alike. (Compl. ¶ 2). Plaintiff Roman Catholic Archbishop of Washington, a corporation sole (the "Archdiocese"), not only provides pastoral care and spiritual guidance to Catholics, but also serves individuals throughout the D.C. area through its schools and multiple charitable programs. (*Id.* ¶¶ 26–48.) Plaintiffs Consortium of Catholic Academies of the Archdiocese of Washington, Inc. ("CCA") and Archbishop Carroll High School, Inc. ("Archbishop Carroll") educate a religiously and ethnically diverse student body consisting largely of inner-city children. (*Id.* ¶¶ 49–64.) Plaintiff Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"), the largest nongovernmental social service provider in the region, offers a host of social services to thousands in need. (*Id.* ¶¶ 65–74.) And Plaintiff Catholic University of America ("CUA") offers its students a rigorous education, while serving

[5] *See* Comments of U.S. Conference of Catholic Bishops, at 3, 10–18 (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

the community through, inter alia, its research centers, intellectual offerings, and charitable outreach. (*Id.* ¶¶ 75–91.)

The Archdiocese operates a self-insured group health plan for its employees, run by a third-party administrator, that does not cover abortion-inducing drugs, contraceptives or sterilization. (*Id.* ¶¶ 44–46.) The employees of CCA, Archbishop Carroll, and Catholic Charities are offered health insurance through the Archdiocese's plan. (*Id.* ¶¶ 56, 64, 74.) CUA provides its employees with health insurance through United Healthcare and makes available to its students a health plan provided by AETNA. Neither plan covers abortion-inducing drugs, contraceptives or sterilization. (*Id.* ¶¶ 86, 90.) CCA, Archbishop Carroll, Catholic Charities, and CUA do not qualify for the religious employer exemption, and it is unclear whether the Archdiocese would qualify. (*Id.* ¶¶ 37–43, 52–54, 60–63, 70–73, 79–81, 85, 89.) No Plaintiff operates a grandfathered plan. (*Id.* ¶¶ 47, 56, 64, 74, 88, 91.)[6]

The Mandate and its narrow definition of "religious employer" severely burden Plaintiffs' religious beliefs. Those beliefs treat abortion, sterilization, and contraception as intrinsically immoral and prohibit Plaintiffs from paying for, providing, and/or facilitating those practices. (Compl. ¶¶ 4, 132.) Yet the Mandate requires their health plans to cover such services and related speech. (*Id.* ¶¶ 5, 93–99, 104–130, 132–33.) Plaintiffs' religious beliefs also require them to serve all individuals regardless of religious faith. (*Id.* ¶¶ 3, 7, 37.) To qualify for the discriminatory "religious employer" exemption, however, Plaintiffs would have to submit to an unconstitutionally invasive governmental inquiry and meet standards that require them to primarily serve and employ coreligionists. If Plaintiffs refuse to adhere to the Mandate or to

[6] Group health plans that existed on March 23, 2010 are eligible for grandfathered status, provided certain requirements are followed. They do not presently have to meet the requirements of the Mandate.

attempt to qualify for the exemption, they are subject to massive fines that would substantially impact their ability to serve their communities. (*Id.* ¶¶ 95–100, 140.)

Having been placed in this impossible situation, on May 21, 2012, Plaintiffs filed suit, alleging that the Mandate violates RFRA, the First Amendment, and the Administrative Procedure Act ("APA"). At the same time, they began to prepare for life under the Mandate. As alleged in the complaint and described in detail below, the Mandate currently impacts Plaintiffs' operations and planning. For example, it forces Plaintiffs to prepare for the devastating penalties that will result from noncompliance, requiring them to plan for the elimination of educational, charitable, or social service programs. It makes it much more difficult, costly, and complicated for Plaintiffs to make informed decisions, now or in the near future, regarding their operations, benefits, and compensation. And it puts them at a competitive disadvantage relative to other employers in their ability to recruit and retain employees. Significantly, any change to existing law will come far too late to alleviate these present and imminent harms. Plaintiffs therefore need immediate resolution of this legal challenge. (Compl. ¶¶ 22, 141, 170–71, 174–76.)[7]

ARGUMENT

To rebut a motion to dismiss under Rule 12(b)(1), "'detailed factual allegations'" are "not require[d]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court, moreover, must accept as true both the complaint's allegations and supporting affidavits. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167,

[7] *See generally* Affidavit of Thomas Duffy ("Duffy Aff."), attached as Ex. A; Affidavit of Cynthia DeSimone ("DeSimone Aff."), attached as Ex. B; Affidavit of Matthew Houle ("Houle Aff."), attached as Ex. C; Affidavit of Marguerite Conley ("Conley Aff."), attached as Ex. D; Affidavit of Mary Beth Blaufuss ("Blaufuss Aff."), attached as Ex. E; Affidavit of Msgr. John Enzler ("Enzler Aff."), attached as Ex. F; Affidavit of Frank G. Persico ("Persico Aff."), attached as Ex. G.

171 (1967); *LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011).[8] Assessed against these standards, Plaintiffs have shown that they have standing and that their claims are ripe.

I. PLAINTIFFS HAVE STANDING TO BRING ALL OF THEIR CLAIMS

Article III standing exists if (1) a plaintiff has suffered an injury (2) fairly traceable to the defendant's challenged actions and (3) likely redressable by a favorable decision. *Lujan*, 504 U.S. at 560–61. Defendants do not dispute the second or third of these factors; they assert only that Plaintiffs failed to allege an adequate injury. (Mot. to Dismiss at 11–15.) They are mistaken.

A. Standing's Injury Requirement Is a Lenient One in Pre-Enforcement Suits Seeking to Vindicate First Amendment Rights

Under Article III, a "litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (internal quotation marks omitted). "The [Supreme] Court [has] made it particularly clear that there is a readiness to find standing conferred by non-economic values in order to consider issues concerning the Establishment Clause and the Free Exercise Clause." *Allen v. Hickel*, 424 F.2d 944, 946 (D.C. Cir. 1970); *see also Bloedorn*, 631 F.3d at 1228 ("The injury requirement is most loosely applied . . . where First Amendment rights are involved . . . ." (internal quotation marks and citation omitted)); 13A Wright et al., *Federal Practice & Procedure* § 3531.4, at 196 (3d ed. 2008) (same). Thus, standards related to the *type* of injury required and the *timing* of that injury are relaxed in the First Amendment context.

[8] *See also Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987) ("The plaintiff . . . can freely augment his pleadings with affidavits, while the defendant is barred *at this stage of the proceedings* from attacking the claims made therein."); *Nat. Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1250–51 (11th Cir. 2006) (same); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089, 1092 (10th Cir. 2006) (en banc) (relying on post-complaint affidavits, which "'must [be] construe[d] . . . in the light most favorable to the petitioner,'" to hold that plaintiffs "sufficiently alleged an injury in fact to withstand dismissal of their complaint" (citation omitted)).

Types of Injury. Article III injury in the First Amendment context can take many forms. Most obviously, "exposure to liability constitutes injury-in-fact." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 758 (10th Cir. 2010). When a party must choose between refraining from exercising First Amendment rights or incurring penalties, Article III injury exists. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003). Such "[m]onetary harm is a classic form of injury-in-fact." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (Alito, J.).

But the injury need not be economic. *See Friends of the Earth*, 528 U.S. at 182. Rather, Article III injury can be "'clearly conferred by non-economic religious values.'" *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (citation omitted); *Allen*, 424 F.2d at 946. Consequently, government interference with religious practices and speech, as well as religious discrimination, all qualify as sufficient injury. *See Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("A person . . . may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause."); *Chabad of S. Ohio v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004) (religious speech); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1525 (11th Cir. 1993) (religious discrimination); 13A Wright et al., *supra*, § 3531.4 ("[C]laims based on interference with the plaintiff's . . . religious practices easily support standing.").

In addition, "the present impact of a future though uncertain harm may establish injury in fact for standing purposes." *Lac Du*, 422 F.3d at 498. For example, the Supreme Court held that New York could challenge President Clinton's decision to veto a provision eliminating its obligations to return funds to Defendant HHS because, even though HHS was itself considering a waiver of that obligation, the uncertain future liability impacted New York's present

"borrowing power, financial strength, and fiscal planning." *Clinton*, 524 U.S. at 431. Thus, even the creation of a "substantial contingent liability immediately and directly" conferred standing. *Id.* Other courts have reached similar results. *See, e.g.*, *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 431 (D.C. Cir. 1993) (finding injury because potential future action "affect[ed] [plaintiff's] present behavior").[9] These collateral harms may even "simply be the fear or anxiety of [the] future harm" and the uncertainty that arises from it. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002) ("[A]n agency ruling that replaces a certain outcome with one that contains uncertainty causes an injury that is felt immediately and confers standing."); 13A Wright et al., *supra*, § 3531.4 ("Living with fear and uncertainty is itself a burden.").

Timing of Injury. In terms of an injury's timing, "[t]here are two potential theories . . . — 'actual' present injury and 'imminent' future injury." *Thomas More*, 651 F.3d at 535. When an actual injury exists now, Article III is, of course, satisfied. *Id.* at 536. For an injury to be imminent, a plaintiff need only show a "substantial probability" that it will occur, *LaRoque*, 650 F.3d at 788, demonstrating that the harm is "not conjectural or hypothetical," *Lujan*, 504 U.S. at 560. An injury can meet that test even if it would not arise until years later, because "[s]tanding depends on the probability of harm, not its temporal proximity." *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006); 13A Wright et al., *supra*, § 3531.4, at 264 ("[T]he question whether anticipated future injury suffices to establish standing is approached as a question of judgment and degrees."). Indeed, "[t]he catalog of decisions that conduct review before a rule has gone into force, and hence long before prosecution is 'imminent,' is extensive."

[9] *See Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1299 (10th Cir. 2008) (noting that courts "recognize[] that contingent liability may present an injury in fact" including where it impacts an entity's "ability to plan"); *Thomas More*, 651 F.3d at 536 (finding injury because future law "changed [plaintiffs'] present spending and saving habits").

520 S. Mich., 433 F.3d at 963; *see, e.g.*, *Pierce*, 268 U.S. at 536; *Vill. of Bensenville v. FAA*, 376 F.3d. 1114, 1119 (D.C. Cir. 2004) (thirteen years). And an imminent injury can exist even if the government has suggested that it will not enforce a particular law, because that policy (especially if not passed as a final rule) is always subject to change. *See Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("Nothing, however, prevents the Commission from enforcing its rule at any time with . . . another change of mind.").[10]

B. Plaintiffs' Imminent and Actual Injuries Give Them Standing

Here, Plaintiffs have standing to challenge the Mandate and its narrow religious-employer definition for two separate reasons. They are suffering both *imminent injury* from its looming enforcement and *actual injury* from the uncertainty that it has created.

1. The Mandate Imminently Impairs Plaintiffs' First Amendment Rights

The Mandate and its narrow definition of "religious employer" require Plaintiffs to choose among (1) including services in their health plans that violate their religious beliefs; (2) attempting to meet the unconstitutional religious employer exemption; or (3) exposing themselves to onerous fines. This impossible dilemma inflicts numerous imminent injuries on Plaintiffs, all of which establish Article III standing.

First, the Mandate imposes numerous discrete but related noneconomic, religious injuries on Plaintiffs. Most significantly, it requires them to facilitate coverage for abortion-inducing drugs, contraception, sterilization, and related speech, in contravention of their sincerely held

[10] *See also Eckles v. City of Corydon*, 341 F.3d 762, 768 (8th Cir. 2003) (finding imminent injury even where a city "stated that it [would] abstain from enforcing [an abatement] notice," because there was "nothing to prevent the City from enforcing it immediately if it so chose"); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388 (4th Cir. 2001) (suggesting that an agency's "policy of nonenforcement" was "not contained in a final rule that underwent the rigors of notice and comment rulemaking," and so did not defeat standing); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (rejecting state's claim of nonenforcement as ground for lack of standing because "there is nothing that prevents the State from changing its mind").

religious beliefs. (Compl. ¶¶ 132–33, 181, 197.) Moreover, to qualify for the Mandate's narrow exemption for "religious employers," Plaintiffs would have to neglect their religious duty to serve all in need. (*Id.* ¶¶ 3, 7, 37.) Under the terms of the exemption, before extending services, Plaintiffs would have to stop saying, "Are you hungry?" and say, instead, "Are you Catholic?" This narrow definition likewise requires intrusive inquiries into the religious practices of Plaintiffs and their employees and clients, and discriminates against Plaintiffs by establishing criteria favoring religions that do not share their commitment to serve all. (*Id.* ¶¶ 213–32.) Finally, by requiring Plaintiffs to facilitate practices that directly conflict with their religious beliefs, the Mandate unconstitutionally interferes with matters of internal church governance. (*Id.* ¶¶ 233–47.) All of these harms are concrete Article III injuries. *See Ass'n of Data*, 397 U.S. at 154; *Awad*, 670 F.3d at 1122; *Chabad*, 363 F.3d at 432; *Church of Scientology*, 2 F.3d at 1525.

Second, the Mandate also imposes imminent economic harms. Most significantly, failure to provide the mandated coverage may subject an employer to substantial monetary penalties. *See* 26 U.S.C. § 4980D(b); *id.* § 4980H(a), (c)(1). And because CUA is subject to ERISA, as of January 1, 2013, its plan participants can bring actions for unpaid benefits, notwithstanding Defendants' temporary safe harbor, which applies only to *government* enforcement efforts. 29 U.S.C. § 1132(a)(1)(B).[11] *See Chamber of Commerce*, 69 F.3d at 603 (concluding that plaintiffs had standing where "even without [Government] enforcement," they were "subject to [private] litigation challenging the legality of their actions" and "easily reject[ing]" the Government's

[11] The provisions of the Affordable Care Act authorizing the Mandate are incorporated into ERISA. 29 U.S.C. § 1185d(a)(1). Accordingly, CUA is subject to suit by a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Id.* § 1132(a)(1)(B). This private right of action is unaffected by the safe harbor. *See* Guidance on Temporary Enforcement Safe Harbor at 3 (Feb. 10, 2012), *available at* http://cciio.cms.gov/ resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf

arguments to the contrary as "rather weak"); *see infra* Part II.C.2. This "exposure to liability" is a concrete injury. *Chamber of Commerce*, 594 F.3d at 758.

These religious and economic injuries are sufficiently imminent to establish Article III standing. Far from being "hypothetical" or "conjectural," *Lujan*, 504 U.S. at 560, the Mandate and its narrow exemption are legally binding rules that are codified in the Code of Federal Regulations that became effective on August 1, 2012. 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. at 8726. And while this regulation may not presently apply to all Plaintiffs, the whole point of pre-enforcement suits is to give plaintiffs relief *before* they must choose between exposing themselves to liability or refraining from exercising constitutional rights. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007); *Am. Booksellers Ass'n*, 484 U.S. at 392. And in any case, there is no doubt about the imminent threat to CUA, which will be subject to suits by plan participants on January 1, 2013.

2. The Mandate Currently Harms Plaintiffs

On top of these *imminent* injuries, Plaintiffs' complaint and supporting affidavits demonstrate that the Mandate *currently* harms them. These "present impact[s]" establish "injury in fact for standing purposes." *Lac Du*, 422 F.3d at 498; *see also Clinton*, 524 U.S. at 431. Among other things, the "[c]osts that [Plaintiffs] would incur in preparing to comply (or the legal risks they would incur in not doing so) suppl[y] standing." *520 S. Mich. Ave.*, 433 F.3d at 963.

First, the Mandate currently impacts Plaintiffs' "financial strength[] and fiscal planning," *Clinton*, 524 U.S. at 431, as well as their "present spending and saving habits," *Thomas More*, 651 F.3d at 536; (*See* Duffy Aff.¶¶ 13–27; Conley Aff. ¶¶ 14–18; Blaufuss Aff. ¶¶ 16–17; Enzler Aff. ¶¶ 13-16; Persico Aff. ¶¶ 8–14.) Under the Mandate, Plaintiffs have two ways to avoid violating their religious beliefs: (1) stop insuring their employees and students, or (2) continue to provide insurance but without coverage for contraception, abortion-inducing drugs, sterilization,

and related counseling. Either option triggers fines that could range from tens of thousands to tens of millions of dollars. (*See* Duffy Aff.¶¶ 10–11; Conley Aff. ¶¶ 9–10; Blaufuss Aff. ¶¶ 9–10; Enzler Aff. ¶¶ 8–9; Persico Aff. ¶¶ 8–9.) Indeed, the Archdiocese could face penalties that are more than double its current operating budget. (Duffy Aff. ¶ 10.) Because Plaintiffs' fiscal years begin in May or July, ordinarily, they would begin budgeting for the 2013-2014 fiscal year—the first fiscal year during which they will be subject to the Mandate's fines—in the very near future, and well in advance of August 1, 2013. (*See* Duffy Aff.¶ 14 (November); Conley Aff. ¶ 14 (December); Blaufuss Aff. ¶ 17 (December); Enzler Aff. ¶ 16 (January); Persico Aff. ¶ 11 (October).) For example, the Archdiocese's 2013-2014 budgets need to be *finalized* by July 1, 2013. But given the magnitude of the fines at issue, Plaintiffs must "begin budgeting for that massive financial burden" even earlier; in some cases, "immediately." (Duffy Aff. ¶¶ 17–27; Compl. ¶ 174; *see also* Persico Aff. ¶¶11–13.)

In particular, "[a]bsorbing millions of dollars in annual fines . . . will require massive cuts in programming and the elimination of a significant number of jobs." (Duffy Aff. ¶¶ 22). Plaintiffs must consider, inter alia, what programs they will eliminate or curtail (*id.* ¶ 8; Conley Aff. ¶¶ 10, 16–18; Blaufuss Aff. ¶ 16; Enzler Aff. ¶¶ 13; Persico Aff. ¶ 14), the impact of the fines on tuition (Duffy Aff. ¶ 24; Conley Aff. ¶ 14), and whether and how they will increase salaries should they be forced to drop their benefits packages (Persico Aff. ¶¶ 10, 12–13). For the Archdiocese, these decisions trigger a prolonged administrative process. (Duffy Aff. ¶¶ 28–33.) Planning for all of these decisions takes time. Not only would it be "reckless" to delay these preparations (Duffy Aff. ¶ 19), but were the Archdiocese to wait until August 1, 2013 to begin the process, it would also violate binding requirements of the Code of Canon Law, a legal system that governs all Catholic entities, including the Archdiocese (*id.* ¶¶ 15–16).

Second, Plaintiffs must plan how they will respond to the Mandate for health plan years that fall outside the temporary safe harbor. This injury is "immediate because Plaintiffs need[] to plan the substance" of their benefits packages now or in the near future. *Va. Soc'y*, 263 F.3d at 389. Health plans do not take shape overnight, but require significant advance planning, analysis, and negotiations. *Newland*, 2012 WL 3069154, at *4 (noting the "extensive planning involved in preparing and providing [an] employee insurance plan"); (Compl. ¶¶ 22, 171). The inability to make informed decisions regarding the status and content of their health plans could undermine Plaintiffs' ability to recruit and retain employees, and could result in loss of employees. (Conley Aff. ¶¶ 13, 21; Blaufuss Aff. ¶¶ 14–15.)

Indeed, Defendants *conceded* the necessity of such lead time when they discarded notice-and-comment rulemaking, explaining that the "requirements in the interim final regulations require significant lead time in order to implement." 75 Fed. Reg. at 41,730. Health plans "subject to [those regulations] have to be able to take the[] changes into account in establishing their premiums, and in making other changes to the designs of plan or policy benefits, and these premiums and plan or policy changes would have to receive necessary approvals in advance of the plan or policy year in question." *Id.* Defendants thus gave health plans a year to comply with the preventive-care guidelines under which the Mandate was enacted. *See, e.g.*, *id.* at 41,760. That fact alone suggests that Plaintiffs need a year *from a decision on the merits in this case* to implement an appropriate course of action. Any attempt by Defendants to dispute the injury to Plaintiffs from the need for advanced planning illustrates that they lacked a good-faith belief that they needed to adopt interim final rules without notice-and-comment rulemaking.

Third, the Mandate currently puts Plaintiffs at a competitive disadvantage in recruiting, hiring, and retaining employees, volunteers, and students. (Compl. ¶¶ 22, 141, 175; Duffy Aff.

¶¶ 34–35; Houle Aff. ¶¶ 7–14; Conley Aff. ¶¶ 12–13; Blaufuss Aff. ¶¶ 12–15; Enzler Aff. ¶¶ 11–12; Persico Aff. ¶ 13); *see also Pierce*, 268 U.S. at 536 (finding challenge to law banning private schools justiciable well before its effective date due to its impact on schools' recruiting); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 486 (D.C. Cir. 2007) ("The court has repeatedly recognized that parties suffer constitutional injury in fact when agencies . . . allow increased competition against them."); *Great Lakes*, 984 F.2d at 430 (finding actual injury where a potential future action impacted an entity's "competitive posture within the industry"). "[T]wo key factors" in recruiting new and retaining existing employees "are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees . . . . [A]ny uncertainty regarding these factors undermines [Plaintiffs'] ability to retain existing employees and recruit new ones." (Duffy Aff. ¶ 34; Houle Aff. ¶ 7; Conley Aff. ¶ 12; Blaufuss Aff. ¶ 12.) The uncertainty triggered by the Mandate thus currently places Plaintiffs "at a competitive disadvantage . . . relative to employers who do not have religious objections to the Mandate." (Duffy Aff. ¶ 35; Houle Aff. ¶ 14; Conley Aff. ¶ 12; Blaufuss Aff. ¶ 13; Enzler Aff. ¶ 11; *see also* Persico Aff. ¶ 13.)

Indeed, job applicants have *already* begun to inquire "how the employee health benefits offered by the Archdiocese will be affected by the Mandate," and since the Mandate was introduced, the Archdiocese has experienced an "unprecedented number of 'no shows'" at interviews. (Houle Aff. ¶¶ 11–14). Likewise, "[s]everal [current] employees have already approached [Catholic Charities'] HR staff and said that if [the organization] eliminates its employee health plan, they will quit and find employment elsewhere." (Enzler Aff. ¶ 12.) And CCA and Archbishop Carroll, which retain employees on a year to year basis, must be prepared to inform their teachers and staff by early 2013 of any substantial changes to their healthcare

benefits for the upcoming school year as a result of the Mandate. (Conley Aff. ¶ 13; Blaufuss Aff. ¶ 14.) "The departure of employees that is likely to occur if [they] remain[] incapable of affirming . . . that [they] will continue to provide health benefits would devastate [the schools]." (Blaufuss Aff. ¶ 15; *see also* Conley Aff. ¶ 21.) In short, the "existence of the Mandate . . . has already impacted the Archdiocese's hiring, and it will continue" to do so with "catastrophic" results. (Houle Aff. ¶ 14).

Finally, the Mandate has a present effect on staffing resources. For example, "the Archdiocese has expended voluminous resources in studying, commenting on, and responding to" the Mandate. (DeSimone Aff. ¶ 8.) Archdiocesan employees "have devoted approximately 600 hours in determining the Archdiocese's obligations under the Mandate and shaping its response." (*Id.* ¶ 9; *see also id.* ¶¶ 10–14.) Indeed, because the Archdiocese's legal staff has been "forced to divert such a large portion of [their] attention to the Mandate," "[n]umerous legal matters have had to be handled by outside firms, at a considerable expense." (*Id.* ¶15.)

Each of these injuries, standing alone, is sufficient to create an "injury-in-fact" under Article III. Together, they easily establish Plaintiffs' standing to challenge the Mandate.

C. Defendants Contrary Arguments Do Not Withstand Scrutiny

Defendants provide a variety of rationales for why Plaintiffs do not have standing to bring their claims. All of their arguments lack merit.

1. Defendants' Temporary Safe Harbor Does Not Undermine Standing

Defendants first argue that Plaintiffs' injury is speculative because they will not enforce the Mandate against Plaintiffs until January 1, 2014. (Mot. to Dismiss at 11–15.) But that safe harbor does not undermine Plaintiffs' standing for several reasons.

First, unlike the Mandate and narrow "religious employer" exemption, the safe-harbor has not been codified in the Code of Federal Regulations, and so does not have the force and

effect of law. Thus, as numerous other courts have held when confronted with a government's assertion that it would not enforce existing law, "there is nothing that prevents [Defendants] from changing [their] mind." *Vermont Right*, 221 F.3d at 383; *see also Eckles*, 341 F.3d 762; *Chamber of Commerce*, 69 F.3d at 603; *Va. Soc'y*, 263 F.3d at 388.

Second, the safe harbor does nothing to eliminate "the present impact" of the Mandate, described in detail above, on Plaintiffs' planning, budgeting, and recruitment/retention efforts. *See supra* at I.B.2. As noted, since Plaintiffs' fiscal years begin in May or July, they must *finalize* their 2013-2014 budgets—the first fiscal year during which they will be subject to the Mandate's fines—well before August 1, 2013, and *begin* the budgeting process in the very near future. *See supra* at 15. These present impacts are themselves sufficiently concrete for standing purposes, whether or not the injuries from the Mandate's operation would also satisfy Article III. *See Clinton*, 524 U.S. at 430–31; *Thomas More*, 651 F.3d at 536. Nor does the safe harbor protect CUA from the imminent threat of private enforcement suits. *See Chamber of Commerce*, 69 F.3d at 603. Moreover, it appears to only cover "contraceptive services." Guidance on Temporary Enforcement Safe Harbor, *supra*. The Mandate, however, also requires coverage for sterilization, which equally violates Plaintiffs' religious beliefs. (Compl. ¶ 4.)

Finally, the one-year delay is far too brief to make Plaintiffs' future injuries speculative. As explained above, the Supreme Court has permitted challenges "filed almost six years and roughly three years before the laws went into effect." *Thomas More*, 651 F.3d at 537. Defendants will have enforcement power against Plaintiffs no later than January 1, 2014, a comparatively brief delay. *See Belmont Abbey Coll. v. Sebelius*, No. 11-1989, 2012 WL 2914417, at *9 (D.D.C. July 18, 2012) (holding that "the temporary-enforcement safe harbor does not render the alleged injury [from the Mandate] too remote to constitute an injury").

Indeed, the Government conceded that a forty-month gap does not defeat standing in a nearly identical setting. *See Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *overruled on other grounds by Nat. Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). It follows, *a fortiori*, that the present gap—which is far less than forty-months—has no impact on Plaintiffs' standing.

2. Potential Changes to Existing Law Do Not Undermine Standing

Even though the Mandate has been memorialized in the Code of Federal Regulations, Defendants point to the ANPRM, suggesting that their intention to change the law eliminates Plaintiffs' standing. (Mot. to Dismiss at 13–15.) But this argument, too, is erroneous.

First, just like their temporary safe harbor, Defendants' proposed rulemaking does nothing to eliminate the actual, present impacts of the Mandate described above. *See supra* at I.B.2. Even assuming one of the scenarios discussed in the ANPRM becomes the law, by the time it went into effect, it would be too late to alleviate Plaintiffs' present injury, as Plaintiffs need to begin to make decisions regarding their 2013-2014 fiscal years as soon as October 2012. (Duffy Aff. ¶¶ 37–38; Conley Aff. ¶ 21; Blaufuss Aff. ¶ 20; Enzler Aff. ¶ 19; Persico Aff. ¶¶ 20–21); *supra* Part I.B.2. Indeed, the ANPRM only adds to the "present injurious effect" of the Mandate on Plaintiffs' operations by increasing the legal uncertainty. *Great Lakes*, 984 F.2d at 430; *see also CSI Aviation*, 637 F.3d at 414 (noting that a temporary enforcement safe harbor, coupled with promise of future changes to the law, "amplifie[s]" a plaintiffs' present injury).

Defendants respond by suggesting—without citation—that reliance on present impacts of future harm would "gut standing doctrine" because a "plaintiff could manufacture standing by asserting a current need to prepare for the most remote and ill-defined harms." (Mot. to Dismiss at 15.) This assertion is simply contrary to black-letter law. As noted above, numerous courts

have relied on a potential future injury's present effect on, among other things, an entity's "fiscal planning" as a basis for standing. *See, e.g.*, *Clinton*, 524 U.S. at 431; *supra* Part I.A.

Moreover, far from preparing for "remote and ill-defined harms," Plaintiffs are attempting to organize their affairs based on current law. They cannot be asked to forestall this preparation on the basis of Defendants' wholly hypothetical future world in which their religious objections have disappeared. These preparations stem not from "plaintiffs' own . . . personal choices to prepare for contingencies that may never occur" (Mot. to Dismiss at 15 (internal quotation marks, citations, and alterations omitted)), but are instead directly caused by an existing regulation that compels them to violate their sincerely held religious beliefs, pay substantial fines, or completely restructure their operations to fit within a crabbed definition of "religious employer."[12]

By suggesting that Plaintiffs' preparations are unnecessary, Defendants are asking Plaintiffs to wager their religious convictions and financial viability on the hope that the ANPRM will resolve their objections. Such a wager would be particularly reckless here given that Defendants' prior claims of accommodation offered no real relief, resulting in a patently

[12] Defendants understandably relegate to a footnote their argument that Plaintiffs' injuries are "self-inflicted" because the Complaint states that Plaintiffs lost their grandfathered status due to their failure to include the required notice in its plan documents. (Mot. to Dismiss at 12 n.6.) Plaintiffs' injuries—including the looming violation of their constitutional rights and the present impact of that violation—arise from Defendants' efforts to force Plaintiffs to violate their religious beliefs or pay a penalty. Plaintiffs' failure to provide the required notice—which took place long before the scope of the Mandate became apparent—no more eliminates standing to challenge the Mandate than would a plaintiff's voluntary decision to speak eliminate its standing to challenge laws prohibiting speech. Indeed, on Defendants' theory, virtually any action taken by a plaintiff for which that plaintiff is subject to sanction by the Government could be labeled "self-inflicted," and therefore insufficient to establish standing. But "the mere fact that [a plaintiff's] own decisions played a role in [creating its injury] does not obviate the causal connection between the defendants' conduct and the plaintiff's injury." *Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, 466 F.3d 961, 965 (11th Cir. 2006); *see also Becker v. FEC*, 230 F.3d 381, 388 (1st Cir. 2000) (holding that "one who challenges a governmental action may not be denied standing merely because his challenge in a sense stems from his own choosing"); 13A Wright et al., Federal Practice & Procedure § 3531.5, at 362 (3d ed. 2008) (noting that even the "voluntary choice to suffer the injury that conferred standing [is] sufficient"). Instead, "[s]tanding is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain." *St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000) (internal quotation marks and citation omitted). That is plainly not the case here.

unconstitutional religious employer exemption and an ANPRM that contains no proposals that would eliminate the burden on Plaintiffs' religious beliefs. (Compl. ¶¶ 116–17, 121–22, 125, 129, 143–45, 158–169.)[13] Just as the Supreme Court did not force New York to bet on obtaining a waiver from liability from HHS, *Clinton*, 524 U.S. at 430–31, this Court should not require to Plaintiffs to stake their fiscal and moral future on the ANPRM.

These present impacts also easily distinguish this case from *Belmont Abbey*. There, the court did not even consider (let alone reject) the argument that "the present impact of a future though uncertain harm" from the Mandate was causing the plaintiff *actual* injuries *now*. *Lac Du*, 422 F.3d at 498; *see also Clinton*, 524 U.S. at 430–31. Rather, it held only that the *future* religious and economic injuries from the Mandate were not sufficiently imminent. *Belmont Abbey*, 2012 WL 2914417, at *10.[14] Here, Plaintiffs have clearly established present injuries arising from the Mandate.

Second, setting aside these actual, ongoing injuries, the existence of the ANPRM does not dispose of Plaintiffs' imminent injuries. *See supra* Part I.B.1. Defendants maintain that "there is no reason to suspect that plaintiffs will be required to sponsor a health plan [that violates their religious beliefs]" and that "[a]ny suggestion to the contrary is entirely speculative at this point." (Mot. to Dismiss at 14.) Defendants' arguments, ultimately, are exactly backwards: it is the

[13] *See* Comments of U.S. Conference of Catholic Bishops, at 3, 10–18 (May 15, 2012) ("[H]owever the term 'religious organization' is ultimately defined, the Administration's suggested 'accommodation' for such organizations, as described in the ANPRM, will not relieve them from the burden on religious liberty that the mandate creates."), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

[14] For the same reasons, this case is also distinguishable from *Nebraska v. U.S. Department of Health & Human Services*, No. 4:12-cv-03035, 2012 WL 2913402 (D. Neb. July 17, 2012). Moreover, the only basis for that court's standing ruling against the organizational plaintiffs was the fact that the plaintiffs failed to adequately allege that they "intend[ed] to make–or [were] even contemplating–specific changes to [their grandfathered] plan[s] that would end [their] grandfathered status." *Id.* at *12. Here, Defendants do not dispute Plaintiffs' allegations that they do not operate grandfathered plans, so the standing holding in *Nebraska* is entirely beside the point.

enactment and workability of the proposed accommodation, not Plaintiffs' injury, that is speculative. Simply put, the ANPRM is not the law: the Mandate is. Barring extraordinary intervention, Defendants will be able to enforce that law against Plaintiffs in a little over a year.

As discussed in greater detail below, *see infra* Part II.C.1, the argument that a proposed rulemaking renders this imminent injury speculative "confuse[s] mootness with standing." *Friends of the Earth*, 528 U.S. at 189. Indeed, Defendants do not cite a single case, aside from *Belmont Abbey*, suggesting that the potential for a change in law eliminates standing. That is because a potential change in the law is "not the kind[] of future development[] that enter[s] into the imminence inquiry." *Thomas More*, 651 F.3d at 537. Instead, that potential change raises a mootness question. *See* 13C Wright et al., *supra*, § 3533.6 (citing cases); *Becker*, 230 F.3d at 386 n.3 ("[Q]uestions of standing and questions of mootness are distinct, and it is important to treat them separately."). And for the reasons described below, speculation that Defendants may change the law cannot moot this case at this stage of the litigation. *See infra* Part II.C.1.[15]

Moreover, unlike 45 C.F.R. § 147.130(a)(1)(iv), the ANPRM "is not . . . a final rule" and so lacks the force of law. *Va. Soc'y*, 263 F.3d at 388. It is no different from a promise not to enforce a particular statute against a particular plaintiff. But as noted above, such unenforceable unilateral promises do not eliminate standing because nothing prevents Defendants from changing their mind. *See supra* at 12.

II. ALL OF PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW

For essentially the same reasons, Plaintiffs' claims are also ripe: they present a concrete legal challenge to a final rule, and delayed resolution of this case would impose substantial

[15] In this regard, although *Belmont Abbey* is distinguishable, it was wrongly decided. Defendants' argument that their rulemaking may change the law does not make Plaintiffs' injuries any less imminent; rather, as noted, it "confuse[s] mootness with standing." *Friends of the Earth*, 528 U.S. at 189.

burdens on Plaintiffs' operations. Defendants' contrary argument rests on improper speculation about potential changes to the law and ignores harms the Mandate currently inflicts on Plaintiffs.

A. A Case Is Ripe for Review If It Presents Legal Questions About Final Agency Action That Impacts a Plaintiff's Current Decisions

"Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as "prudential reasons for refusing to exercise jurisdiction." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (citation omitted). *Constitutional* ripeness, a prerequisite to jurisdiction, grows out of the case-or-controversy rule and largely duplicates standing's injury requirement. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978); *Awad*, 670 F.3d at 1124. *Prudential* ripeness is discretionary, not jurisdictional. *See Stolt-Nielsen*, 130 S. Ct. at 1767 n.2; *In re Cassim*, 594 F.3d 432, 438 (6th Cir. 2010). For prudential ripeness, since *Abbott Laboratories*, courts have examined "the fitness of the issues for judicial decision" and "the hardship to the parties of" delaying a decision. 387 U.S. at 149. Given the test's discretionary nature, it "entails a functional, not a formal, inquiry," *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999), one that "depends on a pragmatic balancing of th[e] two variables and the underlying interests . . . they represent," *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986). Moreover, under this balancing, courts are "guided by [a] presumption of reviewability." *Id.*; *Cont'l Air Lines, Inc. v. CAB*, 522 F.2d 107, 128 (D.C. Cir. 1974) (en banc) ("Any doubts we might have are resolved by the presumption of reviewability which . . . 'permeates the *Abbott Laboratories* ruling.'").

1. Fitness for Judicial Decision

The first prudential factor (whether the issue is fit for decision) implements a "'basic rationale'" for the doctrine: "'to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas*, 473 U.S. at 580 (citation omitted). It

does so by examining "whether the issue presented is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 967 (D.C. Cir. 2011).

The question "whether the agency's action is sufficiently final" prevents courts from prematurely "intrud[ing] into the agency's decisionmaking." *Ciba-Geigy*, 801 F.2d at 435. Final rules in the Code of Federal Regulations, however, are the prototypical example of final action fit for review, because "promulgat[ion] in a formal manner after announcement in the Federal Register and consideration of comments by interested parties" shows that the action is not simply "informal" or "tentative." *Abbott Labs.*, 387 U.S. at 151; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) ("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations . . . ."). Likewise, interim final rules are final for purposes of judicial review, as the word "'[i]nterim' refers only to the Rule's intended duration—not its tentative nature." *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996). Courts thus routinely consider challenges to such rules. *E.g.*, *Ark. Dairy Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 827 (D.C. Cir. 2009); *Competitive Telecomm. Ass'n v. FCC*, 87 F.3d 522, 531 (D.C. Cir. 1996).

The other "fitness" questions (whether the issue is purely legal or would benefit from a more concrete setting) address whether resolution via subsequent enforcement proceedings would be so superior to resolution via a pre-enforcement suit that courts should stay their hand. *See Chamber of Commerce*, 69 F.3d at 604. When a case presents a "purely legal" issue, for example, courts have less reason to wait, because "factual development in an as applied context" would not further clarify that issue. *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1120 (D.C. Cir. 2005). Indeed, courts "assume [the] threshold suitability [of the issue] for judicial

determination" in such circumstances. *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985); *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990) (per curiam).

Likewise, the question whether "consideration of the issue[s] would be facilitated by further factual developments" helps determine whether the issues raised in the pre-enforcement suit are concrete and specific rather than abstract and hypothetical. *See Ciba-Geigy*, 801 F.2d at 435. In other words, it ensures that the "scope of the controversy has been reduced to . . . manageable proportions." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Even when some fact development is contemplated, a case is ripe if discovery would "clarify the factual record" for a court to resolve the issues presented. *Sharkey v. Quarantillo*, 541 F.3d 75, 90 (2d Cir. 2008); *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1175 n.4 (9th Cir. 2009); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cnty.*, 325 F.3d 879, 884 (7th Cir. 2003).

2. Hardship from Delay

Prudential ripeness's second factor—the hardship from delayed review—comes into play only if a "court has doubts about the fitness of the issue for judicial resolution." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) (internal quotation marks and alterations omitted). Absent "fitness" issues, hardship is "largely irrelevant," *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1263 (D.C. Cir. 2004). But where "fitness" is questioned, the hardship from delay may nevertheless illustrate that the case should be decided now. *Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010).

The hardship analysis considers "the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution." *Neb. Pub. Power Dist. v. MidAm. Energy Co*. 234 F.3d 1032, 1038 (8th Cir. 2000). As for traditional damages, courts find sufficient hardship when litigants face the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate,"

Abbott Labs., 387 U.S. at 152— "the choice between the disadvantages of complying with a[] [regulation] or risking the harms that come with noncompliance," *Metro. Milwaukee*, 325 F.3d at 883; *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 406 (D.C. Cir. 1997).

As for uncertainty, when "'decisions to be made now or in the short future may be affected'" by a challenged regulation, delayed review qualifies as a "palpable and considerable hardship." *Pac. Gas & Elec. Co*, 461 U.S. at 201–02 (citation omitted).[16] As the D.C. Circuit has explained, courts "should have a very good reason for" "resolv[ing] a particular question at another time and place, . . . if in doing so they are refusing a petitioner's request to be relieved of an onerous legal uncertainty." *Cont'l*, 522 F.2d at 128. That is so, even if there is a "lengthy, built-in time delay before [a regulation] takes effect." *Riva v. Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995). This "planning" hardship exists when a party needs "adequate time to make effective . . . decisions," *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006), or engages in "long-term transactions [as] a matter of course," *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 263 (D.C. Cir. 2007) (per curiam).

Finally, as with standing, a lower threshold of harm applies when First Amendment rights are at issue, as courts recognize the "special need to protect against any inhibiting chill" of those rights. 13B Wright et al., *supra*, § 3532.3, at 515; *see, e.g.*, *Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980).

[16] *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175 (1992); *Peake Excavating, Inc. v. Town Bd.*, 93 F.3d 68, 72 (2d Cir. 1996); *Triple G Landfills, Inc. v. Bd. of Comm'rs*, 977 F.2d 287, 290 (7th Cir. 1992).

B. Plaintiffs' Claims Meet the Prudential-Ripeness Standards

Apart from their mistaken standing arguments, Defendants make no claim that Plaintiffs fail to satisfy the constitutional-ripeness test. They assert only that Plaintiffs' claims do not meet the two prudential-ripeness factors. (Mot. to Dismiss at 15–22.) They are wrong.

1. Plaintiffs Assert Clear Legal Challenges to Final Agency Action

Plaintiffs' counts are all fit for review. To begin with, they challenge "final" action within the meaning of the prudential-ripeness test. *See Abbott Labs.*, 387 U.S. at 149. As indicated, a rule promulgated in the Code of Federal Regulations is a prototypical example of "final" agency action ripe for review. *See id.* at 151. That is exactly what Plaintiffs challenge here. In addition, Plaintiffs allege specific statutory, constitutional, and administrative challenges to 45 C.F.R. § 147.130(a)(1)(iv), not abstract disagreements with agency policy. Indeed, Defendants concede that the "Complaint raises largely legal claims." (Mot. to Dismiss at 19.) Each challenge is as easily resolved in this pre-enforcement suit as it would be in a subsequent enforcement action. *Chamber of Commerce*, 69 F.3d at 604.

RFRA Claim. Count I presents a legal challenge under RFRA, which bars a federal agency from substantially burdening "a person's exercise of religion" unless "it demonstrates that application of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Resolution of this issue is primarily a *legal* question suitable for pre-enforcement review. *See, e.g.*, *United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008) (citing cases).

Constitutional Claims. The five constitutional claims also present primarily legal questions. *See, e.g.*, *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206 (3d Cir. 2004) (Alito, J.) Count II alleges that the Mandate is not a neutral law of general applicability and cannot withstand strict scrutiny. *See id.* at 209–10. Counts III and IV allege that the "religious

employer" exemption violates the Religion Clauses by requiring an intrusive inquiry into whether Plaintiffs are "'*sufficiently* religious,'" *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002), and by "discriminat[ing] among religious institutions," *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008). Likewise, Count V alleges that the Mandate and the exemption unconstitutionally interfere with internal matters of church governance. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). And Count VI raises the question whether the Mandate forces Plaintiffs to subsidize speech with which they disagree in violation of the Free Speech Clause. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410–11 (2001). These are all primarily legal issues.

APA Claims. Finally, "[i]t is well-established that claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues," as do "claims that an agency violated the APA by failing to provide notice and opportunity for comment." *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007). These legal questions are presented in Counts VII, VIII, and IX.

To be sure, Plaintiffs will seek discovery to help establish some of their claims. They will, for example, gather evidence on Defendants' motives for adopting 45 C.F.R. § 147.130(a)(1)(iv). But no "factual development is necessary to *clarify* the issue[s] before the court." *Elec. Power Supply*, 391 F.3d at 1263 (emphasis added). Rather, discovery will be used to *answer* the clear legal questions presented. Consequently, the Court "will be in no better position later than [it is] now to decide th[e] question[s]." *Christopher Lake Dev. Co. v. St. Louis Cnty.*, 35 F.3d 1269, 1274 (8th Cir. 1994); *cf. Metro. Milwaukee*, 325 F.3d at 884 (directing district court, after finding challenge to ordinance ripe, to "encourage the parties to develop facts underlying the County's motivation for enacting the ordinance").

2. Delayed Resolution Will Harm Plaintiffs

The second prudential-ripeness factor further establishes that Plaintiffs' claims are ripe because any "postponement of decision would likely work substantial hardship" on them. *Pac. Gas*, 461 U.S. at 201. As indicated above, *see supra* Part I.B.2, Plaintiffs have an urgent need to know their obligations, as 45 C.F.R. § 147.130(a)(1)(iv) regulates activity that "requires considerable advance planning" and impacts "decisions" that Plaintiffs must "ma[k]e now or in the short future." *Pac. Gas*, 461 U.S. at 201. Like the plaintiffs in *Abbott Laboratories* and *Pacific Gas*, Plaintiffs face imminent decisions regarding whether to substantially modify their operations under the threat of crippling fines. *Cf. Pac. Gas*, 461 U.S. at 201; *Abbott Labs.*, 387 U.S. at 153. "This choice, between taking immediate action to their detriment and risking substantial future penalties for non-compliance, presents a paradigm case of 'hardship' . . . ." *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1101 (D.C. Cir. 1995) (per curiam).

To begin, delayed review would impede Plaintiffs' ability to "prudently . . . arrange [their] fiscal affairs" and to "nail down their plans for financial security" in the coming years. *Riva*, 61 F.3d at 1012. Under the Mandate, in order to avoid violating their religious beliefs, Plaintiffs must either drop their health plans or refuse to provide coverage for the objectionable services. Either way, they must prepare and budget for the substantial fines that will ensue. (Compl. ¶ 174); *see supra* Part I.B.2.[17] "If [they] anticipate[] that" the Mandate will be modified or struck down "and guess[] wrong," they will be "inadequately prepared" to deal with the onerous fines that will follow. *Riva*, 61 F.3d at 1012. "Conversely, if [they] anticipate[] that the [Mandate]" will be upheld and "guess[] wrong, [they] may needlessly deprive [both their

[17] It would likewise require significant advanced planning for Plaintiffs to attempt to fall within the narrow religious-employer definition. (Compl. ¶ 173.)

employees and those they serve] in the intervening . . . years, preparing for a rainy day that never dawns." *Id.*

Similarly, there is "extensive planning involved in preparing and providing [an] employee insurance plan." *Newland*, 2012 WL 3069154, at *4. As noted above, any changes to Plaintiffs' health plans must be made "now or in the short future." *Pac. Gas*, 461 U.S. at 201; *see supra* Part I.B.2; *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007) (concluding a claim was ripe where plaintiff had to "alter its internal accounting procedures and healthcare spending *now*").

Ultimately, just as requiring political parties to wait "until the eve of [an] election" to bring challenges to election laws would "severely diminish the effectiveness" of their "campaign decisions," *Miller*, 462 F.3d at 321, delaying review would prevent Plaintiffs from making "informed decisions" regarding their health plans and budgeting, *Peake*, 93 F.3d at 72. Indeed, delaying review until August 1, 2013 would leave Plaintiffs with insufficient time to structure their operations in a way that avoids violating their sincerely held religious beliefs at *any* reasonable cost in the event that Defendants' attempts at accommodation fail. (*See, e.g.*, Duffy Aff. ¶¶ 37–38; Conley Aff. ¶ 21; Blaufuss Aff. ¶ 20; Enzler Aff. ¶ 19; Persico Aff. ¶¶ 20–21.) For the Archdiocese, such a delay could cause it to violate canon law (Duffy Aff. ¶¶ 15–16). "[P]laintiffs' injuries" thus "become worse each day decision is delayed." *Miller*, 462 F.3d at 321; *cf. Cont'l*, 522 F.2d at 127–28 ("Aircraft cannot be converted overnight. The expense of delaying and then having to do so hurriedly might be considerable. In any case definite plans cannot be made."). The Court should not require Plaintiffs to wager their fiscal and moral futures on the hope that, this time, Defendants will solve the problem. Instead, "the better course [is] to let [Plaintiffs] know where [they] [stand]," *Triple G*, 977 F.2d at 290, as a later "decision

would impose upon [Plaintiffs] the uncertainty of not knowing whether [they] will [must] incur the substantial expenses," *Skull Valley Band v. Nielson*, 376 F.3d 1223, 1239 (10th Cir. 2004).

Aside from preventing Plaintiffs from making informed decisions about their operations, delayed review also exacerbates the "onerous legal uncertainty," *Cont'l*, 522 F.2d at 128, that has impaired and will continue to impair Plaintiffs' ability to recruit, hire, and retain employees, volunteers, and students. (Compl. ¶¶ 22, 141, 175.); *supra* Part I.B.2; *cf. TRT Telecomms. Corp. v. FCC*, 876 F.2d 134, 141 (D.C. Cir. 1989) ("[I]t is reasonable to expect petitioners to suffer a loss of business as a result of the announced policy, as their present and prospective customers might reasonably defer contracting." (internal citation omitted)). Indeed, it is not only Plaintiffs who will suffer hardship if this Court postpones review of the Mandate. The decisions described above will also have adverse consequences for Plaintiffs employees and the communities Plaintiffs serve, as Plaintiffs may be forced to eliminate or reduce a variety of social, health, educational, and religious services. (Compl. ¶ 22); *supra* Part I.B.2; *cf. Pac. Gas*, 461 U.S. at 202 (noting that postponing review "may ultimately work harm on the citizens of California" in addition to the plaintiffs). As for CUA, because its plan is subject to ERISA, it will also be exposed to liability from its plan participants for unpaid benefits beginning on January 1, 2013, as nothing in the safe harbor eliminates such liability.

Finally, it bears emphasizing that Plaintiffs' First Amendment rights are at stake. While the harms described above more than satisfy any hardship inquiry, they also plainly meet the reduced standard for First Amendment claims. 13B Wright et al., *supra*, § 3532.3, at 515.

C. Defendants' Contrary Arguments Lack Merit

Defendants' ripeness arguments duplicate their standing arguments: they assert that Plaintiffs' claims are unripe because they intend to amend 45 C.F.R. § 147.130 and announced a one-year safe harbor. (Mot. to Dismiss at 15–22.) Both arguments lack merit.

1. Defendants' Speculation That They May Change Current Regulations Does Not Make Those Regulations Unfit For Review

Defendants claim that this case is unfit because they "have initiated a rulemaking to amend the preventive services coverage regulations to accommodate the concerns expressed by plaintiffs." (Mot. to Dismiss at 18.) This argument lacks merit for three reasons.

First, Defendants misunderstand the difference between an agency's *finalization* of regulations (which is a factor for *ripeness*) and an agency's *change* of regulations (which is a factor for *mootness*). Agency action, once final, does not become unripe merely because it is subject to change. "[T]he mere contingency that [an agency] might revise the regulations at some future time does not render premature [a] challenge to the existing requirements." *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965). As the D.C. Circuit has squarely held, "that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). Thus, an agency's claim that it plans to "again address th[e] issues" that it has already addressed "cannot transform long-final orders into conditional ones," *La. Pub. Serv. Comm'n*, 522 F.3d at 398, nor can the "probability" of "future revision," *Gen. Elec. Co.*, 290 F.3d at 380.[18] If that were so, final rules would never be ripe for review because "an agency

[18] This is black-letter law. *See, e.g.*, *Gen. Elec. Co.*, 290 F.3d at 380 (rejecting EPA's argument that its "Guidance Document [was] not final because it [was] subject to change," noting that, "[i]f the possibility (indeed, the probability) of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final"); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410–11 n.11 (5th Cir. 1999) (rejecting FCC's argument that case was unripe because "of [a] Joint Board's Second Recommended Decision" that "advised the agency to make substantial revisions" to the challenged order); *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998) (rejecting argument that case was not ripe based on "ongoing Commission proceedings" that could change the "Final Plan and implementing orders"); *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1484 (10th Cir. 1995) (rejecting argument that case was unripe "because the state had initiated proceedings to change [the challenged statute]"); *Am. Paper Inst., Inc. v. EPA.*, 996 F.2d 346, 355 n.8 (D.C. Cir. 1993) (rejecting argument that case was unripe based on fact that EPA was "currently considering" changes to its regulations because those regulations were still the law).

always retains the power to revise a final rule through additional rulemaking." *Am. Petroleum Inst.*, 906 F.2d at 739–40.

Rather, a change in the law raises a mootness question. *See* 13C Wright et al., *supra*, § 3533.6. But Defendants had obvious reasons for squeezing their mootness argument into everything but the law of mootness. Their speculative suggestion that they may enact a new regulation cannot possibly render Plaintiffs' challenge moot *now*. "The protracted nature of agency proceedings and the uncertainty as to whether and when the proposed regulation may be adopted preclude a finding of mootness." *Vanscoter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990).[19] "That the defendants have reconsidered the regulations about which the plaintiffs complain does not mean that the defendants have eliminated the alleged deficiencies in the" original rule. *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1044 (7th Cir. 1987). Indeed, a case does not become moot even *after* a change in law if it does not remedy the plaintiff's injury. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (finding that case was not moot despite change in law where "[t]he new ordinance may disadvantage [plaintiffs] to a lesser degree than the old one, but . . . it disadvantages them in the same fundamental way").

The D.C. Circuit's decision in *CSI Aviation* illustrates this distinction. There, the plaintiff brokered air-charter services for federal agencies. The Department of Transportation ("DOT") issued a cease-and-desist letter, stating that the plaintiff's operations violated the Federal Aviation Act. 637 F.3d at 410. When the plaintiff objected, DOT granted it a temporary

[19] *See also Tallahassee Mem'l Reg'l Ctr. v. Bowen*, 815 F.2d 1435, 1452 n.33 (11th Cir. 1987) (rejecting mootness claim since "[t]he potential for abuse is real if agencies are allowed to moot claims by hurried rule making"); *El Paso Elec. Co. v. FERC*, 667 F.2d 462, 467 (5th Cir. 1982) (rejecting mootness claim due to risk of "set[ting] a precedent permitting an agency to escape review of its orders solely by the instigation of new rulemaking proceedings").

exemption and promised to hold a rulemaking on the subject. *Id.* at 411, 414. Despite the safe harbor and the proposed rulemaking, the D.C. Circuit held that it could review the final agency action embodied in DOT's letter. *Id.* at 411–14. The only relevant question was whether the temporary exemption and planned rulemaking *mooted* the challenge, not whether they rendered it *unripe*. *Id.* Since the rulemaking had yet to occur and the exemption was temporary, "DOT's assurances provide[d] nothing more than the mere possibility" of relief, a possibility that could not moot the challenge. *Id.*

The same is true here. Defendants *finalized* 45 C.F.R. § 147.130(a)(1)(iv) and "plan to develop and propose *changes* to the[] *final* regulation[]." 77 Fed. Reg. at 8727 (emphases added). Even the "probability" of "future revision" cannot change the fact that the regulations are thus final and fit for review. *Gen. Elec. Co.*, 290 F.3d at 380. That they "may be altered in the future has nothing to do with whether [they are] subject to judicial review at the moment." *Appalachian Power*, 208 F.3d at 1022. Defendants cannot evade traditional justiciability principles simply by dressing up their mootness argument in ripeness or standing garb. *Cf. Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 264 (3d Cir. 2002) (Alito, J.) (rejecting ripeness argument as effort to avoid mootness law).

The cases cited by Defendants are not to the contrary. Rather, Defendants rely mostly on cases that did not involve prototypical final agency action—final rules published in the Code of the Federal Regulations. (*See* Mot. to Dismiss at 18–19.) In *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004) (per curiam), for example, the plaintiff brought a challenge not to final rules, but to the agency's *failure to issue* those rules in the middle of the very agency proceedings considering whether to make them. *Id.* at 562–63. Likewise, in *Utility Air Regulatory Group v. EPA*, 320 F.3d 272 (D.C. Cir. 2003), the plaintiff challenged the agency's *interpretation* of the

rules set forth in a manual that qualified "neither [as] a regulation nor [as] an amendment thereto" but as a tentative policy statement. *Id.* at 278. In *Toca Producers v. FERC*, 411 F.3d 262 (D.C. Cir. 2005), the plaintiffs challenged agency conclusions in an order dismissing their complaint, which were not final because the order triggered a new proceeding to address the plaintiffs' concerns. *Id.* at 265. And in *Occidental Chemical Corp. v. FERC*, 869 F.2d 127, 128–29 (2d Cir. 1989), the agency's initial determination was in an order that it had since stayed, so there was "no final agency action" on the books at the time of review.[20]

Indeed, the exceptions—*Texas Independent Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479 (5th Cir. 2005), and *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012)—confirm that this case is ripe. *Texas Independent Producers*, for example, addressed a statute that directed the EPA both to issue permit rules for storm-water dischargers and to exempt most oil-and-gas operators. 413 F.3d at 480–81. Oil-and-gas trade associations challenged an EPA "Deferral Rule" that deferred any permit requirements for those operators until March 2005 while the EPA finalized an exemption rule. *Id.* at 481–82. There, however, the EPA had "never issued a final rule with respect to the oil and gas exemption," and so the ongoing agency proceedings were designed to *finalize* the exemption, not to *change* it. *Id.* at 482, 483–84. Moreover, the plaintiffs faced no hardship from delay because they conceded that, "[g]iven th[e] uncertain nature of the oil and gas industry," they were "unable to plan far in advance." *Id.* at 483. Here, Defendants *have* finalized the exemption for "religious

[20] Likewise, Defendants' citations to *Motor Vehicle Manufacturers Association v. N.Y. State Department of Environmental Conservation*, 79 F.3d 1298, 1306 (2d Cir. 1996), and *Texas v. United States*, 523 U.S. 296, 300 (1998), miss the point. (Mot. to Dismiss at 19–20.) Plaintiffs' claims do not "depend on the effects of regulatory choices yet to be made," nor do they "rest[] upon contingent future events that may not occur as anticipated." Plaintiffs do not challenge hypothetical future agency action; rather, they challenge *existing* law. *Lake Pilots Ass'n v. U.S. Coast Guard*, 257 F. Supp. 2d 148 (D.D.C. 2003) is also irrelevant to the current challenge. In that case, the final rule challenged by the plaintiff had been replaced by a temporary final rule. *Id.* at 153–54, 160–62. Here, the Mandate has not been superseded or replaced.

employer[s]," and the remainder of the Mandate has been codified in the Code of Federal Regulations. 77 Fed. Reg. at 8725. And Defendants have conceded the need for advance planning. 75 Fed. Reg. at 41,730 ("regulations [should] be published. . . well in advance").

Finally, *American Petroleum*—the principal case on which Defendants rely—in fact *confirms* the general rule that potential changes to the law do *not* render a case unripe, save for very narrow factual circumstances not implicated here. That case concerned a 2008 final rule, wherein the EPA adopted exclusions from the definition of hazardous waste (and the regulations that apply to it) that did not include "spent refinery catalysts." 683 F.3d at 385. When issuing the final rule, the EPA noted that it would address whether those catalysts should be exempted in a proposed rulemaking. *Id.* The petitioner (an entity seeking an exemption for the catalysts) and the Sierra Club challenged the rule. The EPA settled with the Sierra Club, agreeing to propose a new rule to remedy the Sierra Club's concerns by June 30, 2011. *Id.* at 386. The EPA then actually proposed a rule that completely rewrote the final rule. *Id.*

In addressing the Government's ripeness challenge, the court expressly noted the general principle that an agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way." 683 F.3d at 388. It thus voiced no concern that the EPA's *initial* proposed rulemaking made the case unripe. Instead, it found that the case's unique facts called for a narrow exception, since there, (1) the agency had issued an *actual* proposed rule; (2) the agency's rulemaking was not subject to its discretion but resulted from a binding settlement agreement that required it "to take final action" by a specific date; and (3) the agency's proposed rule was a "complete reversal of course." *Id.* at 388–89. Indeed, confirming the narrowness of the exception it was applying, the

court *did not even dismiss the case*. Instead, it held the case "in abeyance pending resolution of the proposed rulemaking, subject to regular reports from [the agency] on its status." *Id.* at 389.

As the foregoing discussion demonstrates, the narrow exception applied in *American Petroleum* has no bearing in this case. At the most basic level, Defendants did not institute the new rulemaking as part of any binding settlement and have "set [their] own deadline for final action." *Id.* They thus retain complete discretion over whether and when to change the Mandate.

Moreover, Defendants have yet to propose a new final rule; they have simply announced an intent to do so. The court's ripeness analysis in *American Petroleum*, however, took no notice of the EPA's preliminary announcement of an intent to amend the rule, but rather hinged on the "July 2011 proposed rule." *Id.* at 388. The *American Petroleum* court was able to review the proposed rule and conclude that aspects of petitioner's claim would "disappear" were that rule enacted. *Id.* Thus, the proposed rule overcame the "presumption of reviewability" that otherwise applies, *Ciba-Geigy Corp.*, 801 F.2d at 434, because it gave adequate assurances that the EPA would adopt a meaningful change to the regulation.

Finally, Defendants have never suggested that their future rulemaking will result in a "complete reversal of course," *Am. Petroleum*, 683 F.3d at 388, and Plaintiffs, far from admitting that their claims would "disappear," have consistently maintained that "the promised 'accommodation' would not alter the fact that Plaintiffs would be required to facilitate practices that run directly contrary to their beliefs." (*See* Compl. ¶ 143.) This Court cannot blithely accept Defendants representations that the ANPRM will resolve all of Plaintiffs' difficulties, when Plaintiffs have insisted that the ideas contained in the ANPRM do "nothing of substance to protect the right of conscience." (*See* Compl. ¶ 125). As the D.C. Circuit explained in *CSI Aviation*, Defendants cannot now avoid an otherwise appropriate lawsuit merely by promising to

consider Plaintiffs' views in the future. 637 F.3d at 410–12. Were it otherwise, this "trust us—we'll fix it later" approach could be used to moot virtually any regulatory challenge.[21]

Second, even assuming that Defendants amend the Mandate, Defendants are simply wrong when they claim that "plaintiffs 'will have ample opportunity to bring their legal challenge'" if "their concerns are not laid to rest" by the amendment. (Mot. to Dismiss at 19 (alterations omitted) (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998).) Defendants have given no indication that their on-going, prolonged regulatory process will be completed with ample time for Plaintiffs to react and litigate. To the contrary, Defendants have merely committed to trying to finalize a rule by August 1, 2013, which is the very day the Mandate will begin applying to Plaintiffs. Thus, at most, they have committed to providing a nanosecond between announcing the final rule and its effective date. That is obviously insufficient. Moreover, by August 1, 2013, Plaintiffs will have long since planned and budgeted for their 2013-2014 fiscal years and suffered the competitive disadvantage the Mandate imposes. *See supra* Parts I.B.2, I.C.2. Consequently, despite Defendants' claim to the contrary, there will be no time for Plaintiffs to make the necessary changes to their operations if, as appears likely, Defendants do not eliminate the burden on Plaintiffs' religious freedom.[22]

Third, "'ripeness is peculiarly a question of timing' and is governed by the situation at *the time of review*." *Neb. Pub. Power Dist.*, 234 F.3d at 1039–40 (citation omitted) (emphasis added); *see Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989)

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[21] For these reasons, the *Nebraska* and *Belmont Abbey* courts were wrong to rely on *American Petroleum* to dismiss similar cases. *Belmont Abbey*, 2012 WL 2914417, at *10–14; *Nebraska* , 2012 WL 2913402, at 23.

[22] Defendants also urge this Court to avoid "judicial review now" of "any future amendments to the regulations" or "suggested proposals." (Mot. to Dismiss at 20.) But Plaintiffs have never asked this Court to review any of the proposals set forth in the ANPRM. All they have done is asked this court to review the legality of the existing regulations.

("[I]t is irrelevant whether the case was ripe for review when the complaint was filed."); *Henley v. Herring*, 779 F.2d 1553, 1555 (11th Cir. 1986) (noting the "significan[ce]" of "intervening events"). As indicated, Plaintiffs plan to conduct discovery. *See supra* Part II.B.1. The ultimate merits of Plaintiffs' claims will likely not reach this court until months down the road, the *relevant time* for ripeness. Moreover, Defendants claim that they will finalize new regulations by August 1, 2013. 77 Fed. Reg. 16,503. It would, therefore, be imprudent to dismiss this case now and delay discovery, only to have Plaintiffs "return here shortly" with the same claims and seeking the same discovery, *Neb. Pub. Power Dist.*, 234 F.3d at 1039–40, but on an emergency basis that burdens the court "by requiring [it] to expedite the litigation," *LaRoque*, 650 F.3d at 788. Indeed, by the time the court of appeals would make a ripeness decision months later, the safe harbor likely will have expired. *Cf. Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1975) (rejecting a ripeness decision based on developments since dismissal because "it is the situation now rather than the situation at the time of the [earlier decision] that must govern").

2. Defendants' Safe Harbor and ANPRM Do Not Eliminate the Hardship Currently Imposed on Plaintiffs from Delayed Review

Defendants also claim that delayed review would not harm Plaintiffs because "the safe harbor and the forthcoming amendments to the regulations" ensure that they will "face no imminent enforcement action by defendants." (Mot. to Dismiss at 21.) Hardship, however, is present, "even though enforcement is not certain," if "the mere threat of future enforcement has a present concrete effect on [a party's] day-to-day affairs." *Metro. Milwaukee*, 325 F.3d at 882. As described in detail above, the threat of future enforcement of the Mandate has already impacted Plaintiffs' affairs. *See supra* Parts I.B.2 & II.B.2. For the same reason that they fail to eliminate Plaintiffs *present* injuries for purposes of standing, *supra* Part I.C.2, the safe harbor and the ANPRM are simply irrelevant to Plaintiffs' *present* hardships under the prudential

ripeness inquiry. Thus, the safe harbor has not relieved Plaintiffs of the "painful choice between costly compliance" now or "the risk of prosecution at an uncertain point in the future." *CSI Aviation*, 637 F.3d at 412.

To the contrary, as *CSI Aviation* shows, if anything, the safe harbor coupled with the promise of future rulemaking only "amplif[ies]" Plaintiffs' hardship. 637 F.3d at 414. There, despite a year-long "temporary exemption" and a promised rulemaking, *id.* at 411, 414, the D.C. Circuit found significant hardship from delayed review because the agency's earlier decision "cast a cloud of uncertainty" over the plaintiff's business, which "require[d] a substantial amount of advance planning." *Id.* at 412, 414. Its protracted approach "not only raise[d] the specter of future harm . . . , but actually harm[ed] the company now." *Id.* The same is true here. The uncertainty continues to, among other things, undermine Plaintiffs' relationship with their employees and job applicants and impedes their ability to engage in advanced planning for major operational restructuring and the payment of onerous fines. *See supra* Part I.B.2. Moreover, as noted above, the safe harbor does not appear to cover sterilization. These harms are real. "[I]t is the future [rulemaking], not [Plaintiffs'] injury, that is speculative." *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 61–62 (1st Cir. 2010).

Defendants thus once again miss the mark by suggesting that Plaintiffs' hardships "are contingencies that may arise in the future." (Mot. to Dismiss at 21). These hardships *have already taken place* and are continuing *now*. Plaintiffs have *already* been impeded in their ability to engage in long-term fiscal and operational planning, Plaintiffs' recruitment and retention efforts have *already* been impacted, and Plaintiffs have *already* expended significant staffing resources. *See supra* Parts I.B.2 & II.B.2. Indeed these hardships will continue—and additional hardships will arise—unless and until the Mandate and "religious employer"

definition are repealed or stricken from the Code of Federal Regulations. Plaintiffs are not preparing "for a hypothetical (and unlikely) situation in which the forthcoming amendments to the preventive services regulations do not sufficiently address their religions concerns." (Mot. to Dismiss at 21.) Rather, as stated above, they are arranging their affairs in light of existing law. *See supra* Part I.C.2. True, "organizations . . . are always planning for the future" (Mot. to Dismiss at 21), but when the Government enacts regulations that require the profound restructuring of those plans in a way that harms the organizations now—by, for example, undermining their ability to compete for and retain employees—it is nonsense to claim that a hardship has not been imposed. Moreover, neither the safe harbor nor the ANPRM do anything to eliminate the threat of private enforcement suits under ERISA against CUA.[23]

The cases cited by Defendants are not to the contrary. Unlike here, they did not involve final agency action that required advance planning and immediate responses from the affected entities. The regulations at issue in *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156 (7th Cir. 1976), were "merely a listing of areas for further study by the states," and the petitioners made no claim

[23] The fact that such suits would be brought by private parties rather than the government is irrelevant, since either a government or private suit suffices to render a case ripe for challenge. *See, e.g.*, *Chamber of Commerce*, 69 F.3d at 603 (concluding that the threat of "private party" enforcement made a case ripe); *R.I. Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 303 (D.R.I. 1999); *cf. MedImmune*, 549 U.S. 118. Likewise, the fact that Plaintiffs could use RFRA or the remainder of their claims as defenses in any private enforcement suit is irrelevant, since Plaintiffs have no obligation to wait for such suits to be filed. After all, the "Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure . . . ." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981) (internal quotation marks and citation omitted). Finally, this case does not involve a mere "theoretical possibility of a suit." *See Salvation Army v. Dep't of Cmty. Affairs of N.J.*, 919 F.2d 183, 193 (3d Cir. 1990). Given the high-profile nature of this case and the sharply divided views individuals have on the subject, it is far more than "theoretical[ly] possibl[e]" that a plan participant would bring suit under ERISA. After all, the Government has repeatedly pointed out that large numbers of Catholics *disagree* with the Church's positions on contraception, abortion, and sterilization. In any case, because First Amendment and other sensitive rights are at stake, a general threat of enforcement suffices to render the matter justiciable. *See Chamber of Commerce*, 69 F.3d at 603 (noting that where a "rule infringes on . . . First Amendment rights" a party can challenge that rule so long as there is a "credible threat of prosecution"); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *see also Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093–96 (9th Cir. 2003) (finding "an actual and well-founded fear" of prosecution even though the state was not investigating the plaintiff, and had not threatened prosecution).

that they were "required to do anything []or to refrain from doing anything." *Id.* at 162. Likewise, the "challenged regulations" in *Wilmac Corp. v. Bowen*, 811 F.2d 809 (3d Cir. 1987), "require[d] nothing of [the petitioner] directly," who could "easily and certainly avoid" any "threatened injury." *Id.* at 813. Finally, in *Tennessee Gas Pipeline Co. v. FERC*, 736 F.2d 747, 751 (D.C. Cir. 1984), the only conceivable application of the challenged rule to the petitioner required the invocation of a series of improbable "ifs." *Id.* at 750–51. Here, the Mandate and "religious employer" exemption are codified in a final rule and that final rule on its face applies to Plaintiffs. As a result, Plaintiffs are suffering from substantial adverse burdens *now*. This is more than enough to satisfy the prudential ripeness requirements.[24]

In sum, Defendants seek to have it both ways. They rushed to finalize the Mandate and its narrow religious-employer definition without using notice-and-comment rulemaking or withdrawing the rule pending their new rulemaking, claiming that employers need months to plan their compliance. But they now seek to insulate the rule from judicial review with a protracted public brainstorming session that may (or may not) change the law, claiming that Plaintiffs can respond to any change at the turn of a hat, despite the weighty religious issues at stake. Whatever the merits of Defendants' "regulate first, think later" approach to rulemaking, the regulation that exists *now* is reviewable, especially due to the hardships it has imposed.

III. AT THE LEAST, DEFENDANTS' STANDING AND RIPENESS ARGUMENTS HAVE NO IMPACT ON SEVERAL OF PLAINTIFFS' DISCRETE CLAIMS

Finally, even accepting Defendants' arguments about the ANPRM and safe harbor, Defendants have not even attempted to explain how they impact all of Plaintiffs' claims. They

[24] The hardships discussed in this Part, and in Part II.B.2, provide additional grounds to distinguish the ripeness analysis in *Nebraska* (which was admittedly dicta). 2012 WL 2913402, at 20. At the most basic level, Plaintiffs have established these hardships via their complaint and affidavits. *Id.* at *23. They are not planning "for future contingencies that may never arise" but in response to an existing regulation that requires them to take action now or in the short future. *Id.*

plainly do not. In particular, neither the ANPRM nor the safe harbor impact Plaintiffs' challenges to the narrow "religious employer" exemption or the flawed administrative process used to enact the Mandate. These claims, therefore, involve imminent injury and are clearly ripe.

Defendants have made clear that they "[have] no plans to revisit the [religious-employer definition]" as part of the ANPRM process, *Alcoa*, 643 F.3d at 968; *see also* 77 Fed. Reg. at 16,503–04 (ANPRM to apply to "non-exempt" organizations); 77 Fed. Reg. at 8727 (same), but intend to create a second class of religious organizations that will get something less than a full exemption. Thus, the ANPRM will not impact claims based on the impermissibly narrow definition of "religious employer." *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1031 n.1. (D.C. Cir. 2008) ("[A]gencies cannot avoid judicial review of their final actions merely because they have opened another docket that may address some related matters."). Those claims include:

- Count III, which alleges that the definition requires an unconstitutionally intrusive investigation into Plaintiffs' religious practices (Compl. ¶¶ 213–22);
- Count IV, which alleges that the definition engages in religious discrimination by establishing criteria that favor some religious denominations over others (*id.* ¶¶ 223–32);
- Count V, which alleges that the exemption requires an unconstitutional intrusion into matters of internal church governance (*id.* ¶¶ 233–47).

Likewise, nothing about the ANPRM process will change Defendants' past violations of the APA and the injuries they have caused. Thus, the harms and injuries underlying the following claims are actual and concrete, and will not change or develop further:

- Count VII, which alleges that Defendants failed to conduct notice-and-comment rulemaking (*id.* ¶¶ 262–75);
- Count VIII, which alleges that Defendants enacted the regulations in an arbitrary and capricious manner (*id.* ¶¶ 276–90);
- Count IX, which alleges that Defendants acted contrary to federal law (*id.* ¶¶ 291–305).

Defendants offered no rationale for delaying these claims, and there is no chance that they will be mooted by future developments. That numerous of Plaintiffs' claims are unaffected by Defendants' arguments, moreover, weighs in favor of finding *all* of Plaintiffs claims ripe, because "once one issue is found ripe, the interests of the court, the agency, and the parties may be better served by finding ripe a related issue." *See* 13B Wright et al., *supra*, § 3532.6.[25]

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Respectfully submitted, this the 27 day of August, 2012.

[ORAL HEARING REQUESTED]

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***Motion for Admission Pro Hac Vice Forthcoming*

[25] The fact that the *Nebraska* and *Belmont Abbey* courts did not consider this argument is yet another reason why those cases are distinguishable.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 27, 2012, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which will send notification of such filing to all counsel of record.

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