THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 1:12-CV-3489-WSD
v.	)	
KATHLEEN SEBELIUS, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED AND RECAST COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This case concerns vital rights to religious freedom protected by the First Amendment, assured by Congress under the Religious Freedom Restoration Act, and now endangered by Defendants' haphazard rulemakings. Defendants—the U.S. Departments of Health and Human Services ("HHS"), Labor, and Treasury, and their respective Secretaries—have finalized a regulation (the "Mandate") requiring employer health plans to cover abortion-inducing drugs, contraception, sterilization, and related counseling. *See* 45 C.F.R. § 147.130(a)(1)(iv). Plaintiffs—entities affiliated with the Roman Catholic Church—cannot subsidize these services or speech without violating their core religious beliefs. And, despite calls for a reasonable religious employer exemption clause, the ***final rule*** limits any exemption to only those entities deemed sufficiently "religious" by "primarily" employing and serving people of the same faith. Plaintiffs cannot meet that exemption without violating their faith-based duty to serve all, regardless of faith. Defendants have thus put Plaintiffs to a Hobson's choice: (1) facilitate services that violate their religious beliefs; (2) limit their missions in a way that does so; or (3) face onerous fines as a result of non-compliance. This government-created dilemma violates Plaintiffs' rights to religious liberty.

Instead of facing these issues head on, Defendants seek to prevent this Court from ever addressing the merits. They argue that Plaintiffs lack a sufficient injury

for standing and that their challenge is unripe because Defendants have announced a temporary enforcement safe harbor (the "Safe Harbor") and have vaguely stated that they will amend the final rule in a way that will "***likely***" address Plaintiffs' concerns before the Safe Harbor expires in six months (on August 1, 2013).

These standing and ripeness arguments—which ignore Plaintiffs' religious concerns and the present impact of the Mandate—are without merit.[1] The "Atlanta Plan"[2] is grandfathered; therefore, the Atlanta Plaintiffs currently suffer injury because they are unable to make any substantive changes to their Plan for fear of losing grandfathered status, despite continued increases in health care costs. (Declaration of Charles Thibaudeau ("Thibaudeau Decl.") ¶¶ 8-12, Ex. 1, hereto.) And the Diocese of Savannah's (the "Savannah Diocese") plan is not grandfathered, so it will be required to provide these objectionable services, or face onerous fines for failing to do so, by July 2014. (Declaration of Jo Ann Green ("Green Decl.") ¶¶

[1] As Defendants point out, some district courts outside of this Circuit have issued non-binding rulings refusing to acknowledge the injuries presently imposed by the Mandate on non-profit Catholic entities, finding that such uncontested injuries do not confer standing or that such claims are not ripe because of Defendants' promised accommodation. Nevertheless, this Court should follow the binding law of the Supreme Court and this Circuit and provide these injured parties the relief to which they are entitled under the law.

[2] The "Atlanta Plan" is the health care plan covering employees of the Roman Catholic Archdiocese of Atlanta (the "Atlanta Archdiocese"), Christ the King Catholic School, and Catholic Charities of the Archdiocese of Atlanta (collectively, along with Archbishop Gregory, the "Atlanta Plaintiffs").

4-5, 10, Ex. 2, hereto.)

Standing. Defendants nevertheless argue that Plaintiffs lack an Article III injury due to the Safe Harbor coupled with an announced intention to change the regulations in some fashion at some point in the future. Defendants' argument fails. At the most basic level, Defendants cannot demonstrate that Plaintiffs have 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) (emphasis added) (quoting *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001)). And, in any event, a temporary safe harbor does not eliminate standing. The Supreme "Court has allowed challenges to go forward even though the complaints were filed almost six years and roughly three years before the laws went into effect." *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011). Here, by contrast, the Atlanta Plaintiffs have ***already been injured*** by the Mandate by being forced to forgo changes to maintain grandfathered status, and additional religious and economic harms will befall Plaintiffs from the Mandate as soon as August 2013 (six months away) and no more than 17 months away. Further, Defendants' alleged plans to modify the law in some unexplained fashion sometime before August 2013 do nothing to eliminate the impending injury, as Defendants "confuse mootness with standing." *Friends of the Earth, Inc. v. Laidlaw Envtl.*

Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). Regardless, "the present impact of a future though uncertain harm may establish injury in fact for standing purposes." *Lac Du Flambeau Band of Lake Sup. Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005). Because of the present and imminent injuries to Plaintiffs, they have standing to bring this suit.

Ripeness. Defendants also point to the Safe Harbor and an Advanced Notice of Proposed Rulemaking ("ANPRM") to support their ripeness defense. But again, they ignore the courts' special solicitude for protecting First Amendment rights. And even if this action did not implicate such fundamental rights, Plaintiffs' claims would still be ripe. Plaintiffs satisfy both factors of the prudential-ripeness test: (1) they present discrete legal challenges to a final agency action, and (2) given the present impacts on Plaintiffs' operations, their hardships from delay would be considerable. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Defendants' argument that the Mandate is not really "final" ignores that "the 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). Instead, their argument is, once again, a ***mootness*** claim, and future plans to change an existing law cannot suffice to moot this suit. *See, e.g.*, *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d

408, 414 (D.C. Cir. 2011) (challenge to agency action justiciable where plaintiff was granted a temporary exemption and the agency had proposed a rulemaking). Defendants rushed to issue the Mandate and the narrow religious employer exemption in final, binding form. Now that they have done so—and thereby harmed Plaintiffs' current operations—the suit is ripe for adjudication.

BACKGROUND

In March 2010, Congress passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, "ACA" or "Act"). The Act requires employer "group health plan[s]" to cover, *inter alia*, women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). In July 2010, without notice-and-comment rulemaking, HHS issued interim final rules to implement this requirement. HHS explained that it acted without notice-and-comment rulemaking over two years before the requirement was to go into effect because "***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***." 75 Fed. Reg. 41,726, 41,730 (July 19, 2010) (emphasis added). HHS then delegated to the private Institute of Medicine ("IOM") the development of these guidelines. IOM determined that "preventive care" must include abortion-inducing drugs such as the morning after pill and Ella, contraceptives, sterilization,

and related patient counseling services. (Am. Compl. ¶¶ 67-68.) In August 2011, again without notice-and-comment and via press release, HHS adopted IOM's "preventive care" guidelines in their entirety. (*Id.*)

The U.S. government (the "Government") mandated that employer health plans cover these drugs and services beginning on August 1, 2012. Failure to provide these services could subject an employer to an assessment of $100 a day per individual. *See* 26 U.S.C. § 4980D(b); 29 U.S.C. § 1132(b)(3); 42 U.S.C. § 300gg-22(b)(2)(C)(i); Cong. Research Serv., RL 7-5700. And, if an employer drops its health plan entirely, it could be subject to an annual penalty of $2,000 per employee. *See* 26 U.S.C. § 4980H(a), (c)(1). Certain plans that have not changed certain benefits or employee contributions since March 23, 2010, are considered "grandfathered" and exempt from the Mandate, but only ***for so long as they forgo ever making such changes in the future***. 26 C.F.R. § 54.9815-1251T(g)(1)(v).

The Government shortly thereafter issued a narrow exemption (the "Exemption") from the Mandate for "religious employers," defining (and limiting) a religious employer as "an organization that meets ***all*** of the following criteria":

> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.

> (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. . . .

76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (emphasis added); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B). The Exemption is more narrow than any other religious exemption to any federal statute of which Plaintiffs are aware.[3] This arbitrary and unprecedented narrowness is a major source of controversy in this case.

Following public outcry, the Government issued a press release on January 20, 2012, refusing to broaden the Exemption and announcing that certain religious employers "will have an additional year, until August 1, 2013, to comply with the new law" pursuant to a so-called "Safe Harbor." As noted by Cardinal Timothy Dolan, the release effectively gave objecting religious institutions "a year to figure out how to violate [their] consciences." (Am. Compl. ¶ 83.)

On February 10, 2012, the Government finalized, "without change," the Exemption at 45 C.F.R. § 147.130(a)(1)(iv), 77 Fed. Reg. 8,725, 8,727-8,728, 8,730 (Feb. 15, 2012). At the same time, the Government announced it may later provide some kind of "accommodation" that might require the insurers of non-exempt

[3] ERISA, for example, has long excluded "church plans" from its requirements. *See* 29 U.S.C. §§ 1002(33)(C)(iv), 1003. Likewise, the Affordable Care Act itself excludes from its requirement that all individuals maintain minimum essential coverage those individuals with religious objections to receiving benefits from public or private insurance. 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2).

religious employers—as opposed to the employers themselves—to offer free contraceptive services. (*See* Am. Compl. ¶¶ 83-89.) But the Government has never articulated the terms or specific timing of the intended accommodation, and it has no plans to expand the scope of the Exemption. Indeed, the plans at issue in this case are self-insured, so any "accommodation," even if adopted, would likely provide no relief.[4] (Am. Compl. ¶¶ 39, 41.)

On March 16, 2012, days before the Government's response was due in another case challenging the Mandate, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM") and claimed that all pending and future Mandate challenges were thereby rendered unripe. As Defendants conceded, the ANPRM offers no specific analysis, but rather generally recites only "questions and ideas," hypotheticals, and "potential means" that might accommodate Plaintiffs' free exercise of religion. (Doc 27-1 at 14); 77 Fed. Reg. 16,501, 16,503, 16,507 (Mar. 21, 2012). The ANPRM neither provides any immediate solution nor commits to proposing a potential solution until August 2013, when the Government intends to begin enforcing the Mandate against all non-exempt, non-grandfathered

[4] Indeed, although Defendants insist that the content of their vague accommodation is not "preordained," (Doc 27-1 at 39), the only specific alternative Defendants mentioned in their motion papers is an insurer-payment option, ***which would afford Plaintiffs here no relief whatsoever*** (*Id.* at 11).

religious organizations.[5] The ANPRM does make clear, however, that the Exemption, which was finalized in February 2012 and remains a primary source of dispute in this case, will not be changed by any accommodation that may result from the ANPRM process.[6] *See* 77 Fed. Reg. 16,501-16,508.

The Mandate and its narrow "religious employer" Exemption severely burden Plaintiffs' religious beliefs, which treat abortion, sterilization, and contraception as intrinsically immoral and prohibit Plaintiffs from paying for, providing, and/or facilitating those practices. (Am. Compl. ¶¶ 8-9, 90-98.) Moreover, the Exemption discriminates against religious entities that, like Plaintiffs, believe that they are called upon to serve all individuals regardless of religious faith. (*Id.* ¶¶ 74-82, 107-108.)

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[5] The ANPRM made no provision for additional time before enforcement beyond August 2013. *See* 77 Fed. Reg. 16,501. Yet, the Government rushed to issue the interim final rules with no notice-and-comment, claiming it did so "to allow plans and health insurance coverage to be designed and implemented on a timely basis," acknowledging the "significant lead time[s]" required for implementing health plans. 75 Fed. Reg. at 41,730. In other words, the Government rushed the Mandate through the system claiming months of lead time were necessary for planning, yet now claims such a need to plan is "speculative." The Government cannot have it both ways.

[6] While Defendants once took the position that the Exemption might be subject to change in the future (*see Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-00158, Rebuttal Memorandum in Support of Motion to Dismiss, Sept. 24, 2012, at 17, Ex. 3, hereto), ***Defendants have since admitted that the Exemption is not subject to review or modification.*** *See Catholic Diocese of Nashville v. Sebelius*, No. 3:12-934, Transcript of Proceedings, Nov. 15, 2012, at 40-41, Ex. 4, hereto ("My understanding from the agencies is that the religious employer exemption is not actively undergoing the amendment process.").

The Mandate presently impacts Plaintiffs' operations and religious missions. The uncertainty created by the Mandate and Exemption affects Plaintiffs' ability to plan, negotiate, and implement their group health insurance plans, their employee hiring and retention programs, and their social, educational, and charitable programs. (*Id.* ¶ 129; Thibaudeau Decl. ¶¶ 13-14, 17-19; Green Decl. 8-9, 11-13.) This planning requires time—***a fact acknowledged by the Government***. 75 Fed. Reg. at 41,730. Plaintiffs' processes for determining the health care package for a plan year require 12 to 16 months of lead time before implementation. (Am. Compl. ¶ 120; Thibaudeau Decl. ¶¶ 14; Green Decl. ¶ 9.) And if Plaintiffs decide that the only practical option is to attempt to qualify for the Exemption, then they will need to undertake a major overhaul of their structures, their hiring practices, and the scope of their programming, at the cost of services vital to the communities they serve. (Am. Compl. ¶ 127; Thibaudeau Decl. ¶ 19; Green Decl. ¶ 13.) That process could take years and subject Plaintiffs to costs they simply cannot afford. (Am. Compl. ¶¶ 123-124.) Plaintiffs must budget now for the possibility that Defendants will impose fines and penalties on them for failing to comply with the Mandate. (Am. Compl. ¶¶ 124, 126; Thibaudeau Decl. ¶¶ 15-19; Green Decl. ¶¶ 10-13.)

Finally, while the Atlanta Plaintiffs believes their group health plan currently meets the regulatory definition of a "grandfathered" plan, the need to maintain

grandfathered status (or be forced to provide objectionable services) has already caused the Atlanta Plaintiffs to forgo measures, such as increasing the levels of employee premium contributions, that would have saved them significant sums of money.[7] (Am. Compl. ¶ 46; Thibaudeau Decl. ¶¶ 8-10.) The Atlanta Plaintiffs will continue to suffer harm, as they anticipate that, despite their best efforts, they will almost certainly lose grandfathered status by January 1, 2014, and will then be subject to the Mandate. (Am. Compl. ¶ 47; Thibaudeau Decl. ¶ 11.)

These present harms are caused by Plaintiffs' eminently reasonable and predictable reactions to ***Defendants' decision*** to promulgate the Mandate and an unreasonably narrow Exemption as final regulations. Defendants' response that it is Plaintiffs' "speculation" about the effect of these regulations that is causing harm ignores the fact that Plaintiffs cannot sit back and simply wait on Defendants to deliver their speculative "accommodation." The Mandate and the Exemption, on the other hand, exist now in final (and apparently permanent) form, and they are the

[7] Defendants' assertion that the Atlanta Plaintiffs' decision to make necessary and prudent business decisions in reaction to the Mandate springs from their "own desires" badly misses the mark. (Doc 27-1 at 42.) To the contrary, the Plaintiffs desire nothing more than to be able to practice their religious beliefs without being forced to forgo beneficial and needed changes to their employee health plan. (*See* Thibaudeau Decl. ¶¶ 6-10.) The Atlanta Plaintiffs cannot reasonably be expected to ***forever*** abandon the only real protection from the Mandate over which they have any control (grandfathered status) based on Defendants' unarticulated promise of change, especially following nearly two years of well-publicized protests against the Mandate with no meaningful modifications.

binding law of the land. *See Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864, at *16 (E.D.N.Y. Dec. 4, 2012) (Ex. 5, hereto) ("The [] Mandate is a final rule . . . and the ANPRM has not made the [] Mandate any less binding on plaintiffs."). Defendants' standing and ripeness arguments would have Plaintiffs roll the dice and abandon grandfathered status and necessary planning based on a vague promise of change. But Defendants should not be rewarded—and Plaintiffs' ongoing harms should not go ignored—precisely because Defendants chose this haphazard method of rulemaking. Indeed, as Judge Cogan recognized, "***There is no, 'Trust us, changes are coming' clause in the Constitution.***" *Id.* at *19 (emphasis added).

ARGUMENT

To rebut a motion to dismiss under Rule 12(b)(1), "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 must accept as true both the complaint's allegations and any particularized allegations in affidavits or declarations. *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1251 (11th Cir. 2006) ("When ruling on motions to dismiss for lack of standing, federal courts may consider affidavits and other factual materials in the record."). Plaintiffs' Amended Complaint and the declarations filed with this response set forth real, concrete harms presently suffered by Plaintiffs, which this Court must

accept as true for purposes of this Motion. Therefore, Plaintiffs have adequately alleged that they have standing and that their claims are ripe for immediate review.

I. THE GOVERNMENT DOES NOT CHALLENGE STANDING OR RIPENESS ON THE MAJORITY OF PLAINTIFFS' CLAIMS.

The Government does not challenge most of Plaintiffs' claims on standing or ripeness grounds. Indeed, their arguments are irrelevant to seven of the ten claims asserted in the Complaint. Plaintiffs have asserted three claims (Counts III-V) challenging the Exemption (the "Exemption Counts")—which will not be changed by the promised "accommodation"—and four claims (Counts VII-X) challenging the Government's already-past violations of the APA (the "APA Counts"). The Government has not presented a real argument for dismissing these seven counts.

In the Exemption Counts, Plaintiffs allege that the Exemption violates the Free Exercise and Establishment Clauses, and they assert claims of excessive entanglement, religious discrimination, and interference in matters of internal church governance. (Am. Compl. ¶¶ 158-191 (Counts III-V).) The Government has expressly disavowed any intent ever to alter or expand the Exemption. 77 Fed. Reg. 16,501-16,508; *see also* 77 Fed. Reg. at 8,729 (adopting the Exemption in a final rule "without change"). Indeed, ***the ANPRM process is confined to "non-exempt" entities***, 77 Fed. Reg. 16,501, meaning the Exemption will continue to play a prominent role and to harm the Plaintiffs. *See also* 77 Fed. Reg. at 16,504.

The Exemption's definition of "religious employer" requires an unconstitutional investigation into whether Plaintiffs or any religious organizations are sufficiently "religious," (Compl. ¶¶ 158-167 (Count III)), and requires an unconstitutional intrusion into the church's internal governance, (*id.* ¶¶ 178-191 (Count V)). Plaintiffs are subject to a process to determine, in the discretion of HHS bureaucrats, whether "[t]he inculcation of religious values is the purpose of the organization[s]," and whether the people they serve and employ "primarily" share the same "religious tenets." 76 Fed. Reg. at 46,626. This process injures Plaintiffs by examining their beneficiaries, employees, students, and internal governance in a way that excessively entangles the Government with religion in trying to determine what constitutes "inculcation" of shared religious tenets. Count IV of the Complaint similarly alleges that the definition of "religious employer" unconstitutionally "discriminates among different types of religious entities" by establishing exemption criteria that favor some religious denominations over others. (Compl. ¶¶ 168-177 (Count IV).) Plaintiffs are subject to the application of a test that discriminates against Catholics whose mission is, *inter alia*, to serve people of ***all*** faiths. The ANPRM process does not affect these Counts, and the claims are patently justiciable. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996) (if a statute "makes inappropriate government involvement in

religious affairs inevitable," a plaintiff has standing to bring suit (quoting *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981)).

In the APA Counts, Plaintiffs assert claims under the APA that the Government failed to conduct the required notice-and-comment rulemaking (*id*. ¶¶ 205-218 (Count VII)), acted arbitrarily and capriciously by adopting a narrow definition of religious employer without adequate consideration of definitions in other federal laws (*id*. ¶¶ 227-239 (Count IX)), and violated federal law, including restrictions relating to abortions (*id*. ¶¶ 240-252 (Count X)). They also allege that the agency's unfettered discretion—to define the scope of women's "preventive care" services and to determine, unilaterally, which organizations are and are not sufficiently religious—violates the Constitution's separation of powers. (*Id*. ¶¶ 219-226 (Count VIII).) The harms and injuries underlying these claims are actual and concrete, and will not change or develop further.

At a minimum, Plaintiffs should be allowed to proceed on these seven claims. Moreover, the fact that these claims are justiciable strongly counsels against dismissing Plaintiffs' RFRA, Free Exercise, and Free Speech claims (Counts I, II, VI) as unripe. 13B Wright et al., *Federal Practice & Procedure* § 3532.6 (3d ed. 2008) ("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."). In any event, as

explained below, Plaintiffs have adequately alleged several concrete and immediate injuries that support the justiciability of Counts I, II, and VI as well.

II. PLAINTIFFS HAVE STANDING TO BRING ALL OF THEIR CLAIMS.

Article III standing exists if a plaintiff has suffered an injury fairly traceable to the defendant and likely redressable by a favorable decision. *See Lujan*, 504 U.S. at 560-61. Defendants assert that Plaintiffs fail to allege an adequate injury or that any injury is a result of Plaintiffs' own actions. They are mistaken.

A. Plaintiffs Have Standing Because The Mandate Will Imminently Impair Their 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." *Mass. v. EPA*, 549 U.S. 497, 517 (2007). Because courts "should generally be receptive to anticipatory challenges" when First Amendment rights are at stake, *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 820-21 (5th Cir. 1979), these standards are applied loosely in pre-enforcement suits raising First Amendment claims. *Bloedorn*, 631 F.3d at 1228 ("[T]he injury requirement is most loosely applied . . . where First Amendment rights are involved").

Article III injury in the First Amendment context can take many forms. Most obviously, "[i]t is hardly controversial that 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 Va v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Such "[m]onetary harm is a classic form of injury-in-fact." *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3rd Cir. 2005) (Alito, J.). But, when First Amendment rights are at stake, Article III injury need not be of this economic sort. *See Friends of the Earth*, 528 U.S. at 182 (finding sufficient injury where challenged action threatened "'aesthetic and recreational'" enjoyment); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (same). Moreover, government interference with religious practices qualifies as sufficient injury. *See Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("A person or a family 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."). And religious discrimination likewise provides sufficient injury. *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1525 (11th Cir. 1993).

A future injury can be imminent even if it would not occur, if at all, until many years down the road. *Thomas More*, 651 F.3d at 537, *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (noting that Supreme Court

has allowed challenges ***three to six years*** before law would go into effect) (emphasis added); *Vill. of Bensenville v. Fed. Aviation Admin.*, 376 F.3d. 1114, 1119 (D.C. Cir. 2004) ("[A]bsent action by us, ***come 2017*** Chicago will begin collecting the passenger facility fee; accordingly, 'the impending threat of injury [to the municipalities] is sufficiently real to constitute injury-in-fact.'") (emphasis added). 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." *520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006);

In other words, "***the present impact of a future though uncertain harm may establish injury in fact for standing purposes***." *Lac Du*, 422 F.3d at 498 (emphasis added). Defendants argue that reliance on the present impacts to Plaintiffs "deprive standing doctrine of all force" because a "plaintiff could simply manufacture standing by asserting a current need to prepare for the most remote and ill-defined harms." (Doc 27-1 at 32.) But that suggestion ignores black-letter law, as well as the Government's own admission that significant lead time is necessary for health plan implementation. Indeed, the Supreme Court has held that a plaintiff had standing to challenge a government action that created a contingent future liability for the plaintiff, because the uncertain future harm presently impacted the plaintiff's "borrowing power, financial strength, and fiscal planning." *Clinton v. NYC*, 524

U.S. 417, 431 (1998). This Circuit, and others, have reached similar results. *See, e.g.*, *Ala.-Tombigbee Rivers Coal.*, 338 F.3d at 1254 (finding standing based on plaintiffs' "injury in the form of planning, studies, and delays" in response to agency action); *see also Thomas More*, 651 F.3d at 536 (finding injury because future law "changed [plaintiffs'] present spending and saving habits"). In fact, simple fear or anxiety of future harm and the uncertainty that arises from it may suffice. *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.").

Nor must a party show that the future injury is guaranteed to occur. Rather, so long as "an[ ] agency's act creates 'a substantial probability' of an 'injury in fact,' the causation requirement of Article III is satisfied.'" *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1538 (11th Cir. 1994) (same). And this probability 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 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); *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, perhaps, another change of mind."); *Fla. Cannabis Action Network, Inc. v. City of Jacksonville*, 130 F. Supp. 2d 1358, 1362 (M.D. Fla. 2001) ("The whim, self restraint, or even the well reasoned judgment of a government official cannot serve as the lone safeguard for First Amendment rights."). As Judge Cogan recently found in *Archdiocese of New York*, "[T]he Bill of Rights itself, and the First Amendment in particular, reflect a degree of skepticism towards governmental self-restraint and self-correction." Ex. 5, at *19.

As a direct result of the Mandate, Plaintiffs are now uncertain of how to respect their religious beliefs and also comply with the law. All of these harms—interfering with religious practices, compelling support for speech, discriminating among religions, and shouldering the financial burden of remaining grandfathered—are concrete Article III injuries. *See Ass'n of Data Processing*, 397 U.S. at 154; *Church of Scientology*, 2 F.3d at 1525; *see also Allen v. Sch. Bd. for Santa Rosa Cnty.*, 782 F. Supp. 2d 1304, 1316-17 (N.D. Fla. 2011) (recognizing that uncertainty

as to how to comply with a policy that is restrictive of religious liberty can be sufficient to confer standing).

In addition, the "exposure to liability" Plaintiffs would face if they refuse to comply is a concrete injury. *Chamber*, 594 F.3d at 758. If Plaintiffs keep their health plans but refuse to follow the Mandate, they could be subject to an assessment of $100 a day per individual. *See* 26 U.S.C. § 4980D(b); 29 U.S.C. § 1132(b)(3); 42 U.S.C. § 300gg-22(b)(2)(C)(i); Cong. Research Serv., RL 7-5700. Alternatively, if Plaintiffs drop their health plans, they could be subject to an annual penalty of $2,000 per employee. *See* 26 U.S.C. § 4980H(a), (c)(1). These fines would amount to millions of dollars annually. (Thibaudeau Decl. ¶ 15; Green Decl. ¶ 10.)

Finally, these injuries are the direct result of Defendants' actions, and cannot be thrown at the feet of Plaintiffs. The only "speculation" in this case is whether or how the Government might change the law in the future. Over one year ago, the Government sought comments regarding changing the law, received more than 200,000 comments, and ***did nothing to protect Plaintiffs' rights***. To the contrary, following the last comment period, the Government ***reaffirmed*** that the Mandate would exempt only a small fraction of religious organizations. On this point, there is no uncertainty, and Plaintiffs' reasonable actions in response can be traced to

Defendants' actions. *See Ala.-Tombigbee Rivers Coal.*, 338 F.3d at 1255-56 (recognizing planning injuries as traceable to challenged regulation).

The Government's contention that it might amend the law in the future (but without changing either the Mandate or the Exemption) does not preclude Plaintiffs from challenging the regulations now. *See Thomas More*, 651 F.3d at 537; *see also Larson v. Valente*, 456 U.S. 228, 242 (1982). If the Government plans to exempt Plaintiffs specifically from complying with the Mandate, then it should now enter into a consent decree to exempt Plaintiffs. But it cannot avoid an otherwise appropriate lawsuit merely by promising to consider Plaintiffs' views in the future.

B. Plaintiffs' Present Actual Injuries Give Them Article III Standing.

On top of the imminent injuries to Plaintiff, "the present impact" from the Mandate also establishes an "injury in fact for standing purposes." *Lac Du Flambeau*, 422 F.3d at 498. The Atlanta Plaintiffs are currently restricted from making desired and financially prudent alterations to their health plan that they would have otherwise made (such as increasing employee contributions to premiums or increasing deductible and co-pay requirements) to avoid losing grandfathered status.[8] (Am. Compl. ¶ 46, 121; Thibaudeau Decl. ¶¶ 8-10.) At the

[8] Defendants argue, citing *Archdiocese of New York*, that any actual harms suffered by the Atlanta Plaintiffs related to maintaining grandfathered status do not establish standing because grandfathered plaintiffs are not "subject to the regulations." (*See* Doc 27-1 at 15 n.5, 18.) But Judge Cogan in *Archdiocese of New*

same time, the Atlanta Plaintiffs recognize that they will likely be forced to make changes to the Atlanta Plan by January 2014, and they must plan now for how they will respond to the Mandate for the plan years that fall outside the Safe Harbor. (Am. Compl. ¶¶ 46, 120, 122-127; Thibaudeau Decl. ¶¶ 11-12, 17-19.) And, if Plaintiffs decide that they have to take the drastic steps required to qualify as "religious employers" under the Exemption to the Mandate, then that course of action will require even more time, expense and hardship to implement. (Am. Compl. ¶ 123; Thibaudeau Decl. ¶¶ 17-19; Green Decl. ¶¶ 11-13.)

This is thus a case where the "[c]osts that the [plaintiff] would incur in preparing to comply (or the legal risks [it] would incur in not doing so) suppl[y] standing." *520 S. Mich. Ave.*, 433 F.3d at 963; *see Newland*, 2012 WL 3069154, at *4 (noting the "extensive planning involved in preparing and providing [an] employee insurance plan"); *Archdiocese of New York*, Ex. 5, at *18 ("[T]he practical realities of administering health care coverage for large numbers of employees—***which defendants recognize***—require plaintiffs to incur these costs in advance of the impending effectiveness of the [] Mandate.") (emphasis added). Similarly, if

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York made no such holding. Indeed, he expressly allowed for a situation in which some plaintiffs might argue that they suffered harm because they could not "make certain changes to their current plan without jeopardizing their grandfathered status," but he recognized that the plaintiffs in that case did not "advance[] that theory." Ex. 5, at *12 n.8. Therefore, the court was never asked to issue a holding on such harms.

Plaintiffs decide to follow their religious beliefs by disregarding the Mandate, then they will need to set aside funds for the multi-million dollar fines in their 2013-2014 budgets. (Am. Compl. ¶ 124; Thibaudeau Decl. ¶¶ 17-19; Green Decl. ¶¶ 11-13.) These actual injuries are all traceable to Defendants and independently suffice to establish Article III injury as to Plaintiffs. [9]

III. ALL OF THE CLAIMS ARE RIPE FOR REVIEW.

Plaintiffs' claims are ripe because they present concrete legal challenges to a final rule, and delay would exacerbate the uncertainty. It is simply not reasonable to expect Plaintiffs to refrain from any planning activities while the Government considers whether and how it might someday change the law. Defendants' contrary argument rests on improper speculation regarding possible future changes to the existing law, which presumes that those changes will remedy Plaintiffs' injury and Plaintiffs therefore should refrain from planning to comply with the current law.

Furthermore, the argument ignores the harms Defendants have already caused Plaintiffs by creating and maintaining this state of legal limbo.

[9] To the extent the Court finds that any one Plaintiff has standing but has questions about the standing of other Plaintiffs, the entire lawsuit should go forward. "The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim . . . [courts] need not address whether the remaining plaintiffs have standing." *Fla. v. HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011), *overruled on other grounds by* 132 S. Ct. 2566 (2011).

A. A Case Is Ripe for Review If It Presents Legal Questions About Final Agency Action That Is Impacting 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. It largely duplicates standing's injury requirement, which as noted above is satisfied here. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978); *Awad*, 670 F.3d at 1124. However, *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). Courts examine both "the fitness of the issues for judicial decision" and "the hardship to the parties of" delaying a decision. *Abbot Labs.*, 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 which they represent," *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986). When undertaking this balancing, courts are "guided by [a] presumption of reviewability." *Id.* at 434.

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 v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citation omitted). It does so by examining three questions: "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). Final rules in the Code of Federal Regulations are "sufficiently" 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; *see 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."); *see Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996) (interim final rules are "final" for purposes of judicial review).

Prudential ripeness's second factor (the hardship from delayed review) comes into play only if a "court 'ha[s] 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). If there is no "fitness" reason for delay, the hardship factor is "largely irrelevant," *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255,

1263 (D.C. Cir. 2004). The hardship analysis considers "both 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 hardship when litigants are placed in the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate," *Abbott Labs.*, 387 U.S. at 152—being "faced with the choice between the disadvantages of complying with a[ ] [regulation] or risking the harms that come with noncompliance," *Metro. Milwaukee Ass'n v. Milwaukee Cnty.*, 325 F.3d 879, 883 (7th Cir. 2003). 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. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Finally, as with standing, a plaintiff needs to meet a lower threshold of harm when First Amendment rights are at issue. That is because courts recognize the "special need to protect against any inhibiting chill" of those fundamental rights. 13B Wright, *Federal Practice* § 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).

B. Plaintiffs' Claims Meet The Prudential-Ripeness Standards.

Defendants argue that, since many of the harms alleged by Plaintiffs are based on future events, they are not currently justiciable. They contend that an unarticulated further rulemaking "will be finalized" sometime in advance of their enforcement of the Mandate. (Doc 27-1 at 35.) This argument misconceives the difference between an agency's *finalization* of regulations (which is a factor for *ripeness*) and an agency's later *change* of final regulations (which is a factor for *mootness*). ***Agency action, once final, does not become unripe merely because it may be subject to future 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*, 382 U.S. at 77; *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("[T]hat a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). 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. If that were so, final rules would never be ripe for review because "an agency *always* retains the power to revise a final rule through additional rulemaking." *Am. Petroleum. Instit. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990).

Rather, a change in the law raises a *mootness* question. *See* 13C Wright, *Federal Practice* § 3533.6. Defendants' suggestion that they "expect" and "anticipate" a new regulation sometime later that will "likely" address Plaintiffs' concerns cannot possibly render Plaintiffs' challenge to the final regulations moot ***now***. (*See* Doc 127-1 at 4, 22, 23, 39.) "The potential for abuse is real if agencies are allowed to moot claims by hurried rule making." *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1452 n.33 (11th Cir. 1987); *see 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").

CSI Aviation provides a good example of this distinction. There, the plaintiff brokered air-charter services for federal agencies. The Department of Transportation ("DOT") issued a cease-and-desist letter on the ground that plaintiff's operations violated the Federal Aviation Act ("FAA"). 637 F.3d at 410. Before the plaintiff had challenged DOT's interpretation of the FAA, DOT issued a temporary exemption and planned a rulemaking that, if adopted, would change the law. Yet the D.C. Circuit held that it could still review DOT's action. The letter qualified as final because it was a "definitive legal position" "fully fit" for review. *Id.* at 414. As such, the court asked whether the temporary exemption and planned

rulemaking *mooted* the challenge, not whether it made the challenge *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. There is no dispute that Defendants have ***finalized*** the rule set forth in 45 C.F.R. § 147.130(a)(1)(iv). Defendants concede that they "plan to develop and propose ***changes*** to the[ ] ***final*** regulation[ ]." 77 Fed. Reg. at 8727 (emphases added). The regulations are thus sufficiently "final" for review. 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 should not be able to 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) (rejecting ripeness argument as effort to avoid mootness law).

Defendants, by contrast, rely largely on cases that did not involve prototypical final rules published in the Code of the Federal Regulations. (*See* Doc 27-1 at 26-38.) The exceptions—*Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479 (5th Cir. 2005), *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), and *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996)—confirm that

this case is ripe. In *Texas Indep. Producers*, while the court found the challenge unripe, unlike here the agency had "never issued a final rule with respect to the [challenged] exemption," and so the ongoing agency proceedings were designed to *finalize* the exemption, not to *change* it. 413 F.3d at 482-84.[10] Likewise, in *Am. Petroleum*, the agency proposed a rule that rewrote the final rule, permitting spent refinery catalysts to be exempt in certain circumstances. 683 F.3d at 386. The Court expressed no concern that the EPA's *initial* proposed rulemaking made the case unripe, holding instead that the *actual* proposed rule did so. *Id.* at 386-89.[11] And in *Wilderness Soc'y*, the court found that the case was unripe because the challenged regional rule allowed the agency second-level discretion regarding its ultimate enforcement and implementation of the rule as to the specific site at issue in

[10] Moreover, the plaintiffs in *Texas Indep. Producers* 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." 413 F.3d at 483. Defendants here have conceded the need for "regulations [to] be published and available . . . well in advance," so that parties (like Plaintiffs) have sufficient "lead time" to structure their health plans. 75 Fed. Reg. at 41,730.

[11] The Court in *Am. Petroleum* also 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. But it found that the case's unique facts called for a narrow exception. The agency's rulemaking was not subject to its discretion, but resulted from a settlement agreement that required it "to take final action" within a specific period. *Id.* at 389. Moreover, the agency's proposed rule was a "complete reversal of course." *Id.* at 388. So the Court found that "'[i]f we do not decide [the issue] now, we may never need to.'" *Id.* at 387 (citation omitted).

the lawsuit (which had not yet occurred), ***not*** because the agency had promised to change the final rule as it would apply to the site in some unarticulated fashion at some point in the future. 83 F.3d at 390-91.

Here, even if the Government changes the law in a timely fashion, it is uncertain whether that change will alleviate Plaintiffs' concerns or redress any of Plaintiffs' injuries, especially since the Government's only mentioned change thus far (requiring payment by a third-party insurance provider) would afford ***no relief*** to self-insured entities such as Plaintiffs. On the contrary, to assume that the rulemaking will vindicate Plaintiffs' rights would require precisely the sort of "speculation" the Defendants accuse Plaintiffs of engaging in. The ANPRM is merely a commitment to consider possible solutions. *E.g.*, 77 Fed. Reg. at 16,503 ("The Departments suggest multiple options"); *see also* Doc 27-1 at 39 ("The ANPRM offers ideas and solicits input on potential, alternative means" of providing the objectionable coverage without cost-sharing but "does not preordain" how that will be achieved). Further, the ANPRM will not change the Mandate (the requirement that the objectionable services be covered at no cost to employees) or the Exemption. Therefore, the ANPRM does not change the fact that Plaintiffs' claims are ripe. *See, e.g., 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"); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 355 n.8 (D.C. Cir. 1993) (claims were ripe even though EPA was "currently considering" changes to its regulations).

Defendants also claim that delayed review "would not result in any hardship" because the Safe Harbor means that Plaintiffs "face no imminent enforcement action by defendants." (Doc 27-1 at 40.) But the Safe Harbor is irrelevant to Plaintiffs' ***present*** hardships. Hardship 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. Modifying health care plans, budgeting for potential fines, or reorganizing an organization's structure and mission require significant advance planning that must be undertaken well before the Safe Harbor expires in six months. 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. The extended uncertainty continues to, among other things, make it impossible for Plaintiffs to engage in any kind of advanced planning. (Am. Compl. ¶¶ 118-120, 122-129.) *See CSI Aviation*, 637 F.3d at 412 (finding 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 and "actually harm[ed] the company now"); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 263 (D.C. Cir. 2007) (hardship related to planning exists when plaintiffs engage in "long-term transactions [as] a matter of course").

Plaintiffs need to know their obligations now because they require time to assess and negotiate their budgets and health plans. (Compl. ¶¶ 119-120, 122-127.) These harms are real, and Plaintiffs and the communities they serve are harmed now. (Thibaudeau Decl. ¶¶ 16, 19; Green Decl. ¶¶ 9, 11-13); *see, e.g., Pac. Gas & Elec. Co.*, 461 U.S. at 201-02 (when "decisions to be made now or in the short future may be affected" by a regulation, delayed review qualifies as "palpable and considerable hardship"); *New York v. United States*, 505 U.S. 144, 175 (1992) (holding claim ripe, in part because "[i]t takes many years to develop a new disposal site"); *Commonwealth of Pa. Dep't of Pub. Welfare v. HHS*, 101 F.3d 939, 946-47 (3d Cir. 1996) (where the law creates "uncertainty," harm that changes the borrowers' conduct is cognizable because it has a current effect on plaintiff).

Nor has the Government "made clear" that its on-going, prolonged and inconclusive regulatory process will be completed with sufficient time for Plaintiffs to react and litigate. Plaintiffs are ***now*** faced with a decision of whether to overhaul their operations or risk exposure to crippling fines. "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).

In sum, Defendants seek to have it both ways. On the one hand, they rushed to implement the Mandate and its narrow Exemption without proceeding through traditional notice-and-comment rulemaking—***conceding that health plans would require an extended period to plan their compliance***—and without withdrawing the regulations pending their new anticipated rulemaking. On the other hand, they seek to insulate these final regulations from judicial review by proceeding through a protracted notice-and-comment proceeding that may (or may not) change the law. Whatever the merits of Defendants' novel "regulate first, think later" manner of rulemaking, the regulation that exists ***now*** is fit for pre-enforcement review. It is Defendants, not Plaintiffs, that engage in speculation about hypothetical events that might later moot a challenge to 45 C.F.R. § 147.130(a)(1)(iv).

CONCLUSION

For these reasons, the Court should deny Defendants' motion to dismiss in its entirety.[12]

[12] In the alternative, if the Court finds that Defendants' standing and ripeness arguments have merit, Plaintiffs respectfully request that the Court hold the case in abeyance—rather than dismiss the case outright—to hold Defendants to the promises they have made. *See Wheaton Coll. v. Sebelius*, -- F.3d --, 2012 WL 6652505 (holding case in abeyance and requiring status reports to be filed by the Government every 60 days).

Respectfully submitted, this the 31st day of January, 2013.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

I hereby certify that the foregoing *MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED AND RECAST COMPLAINT* uses Times New Roman 14 point, as approved by the Northern District of Georgia in Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, I caused Plaintiffs' Response to Defendants' Motion to Dismiss to be electronically filed by way of the Court's CM/ECF system, which will give notice of filing to the following counsel of record.

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