**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK; CATHOLIC HEALTH CARE SYSTEM; THE ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE, NEW YORK; CATHOLIC CHARITIES OF THE DIOCESE OF ROCKVILLE CENTRE; and CATHOLIC HEALTH SERVICES OF LONG ISLAND,

Plaintiffs,

-against-

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.

No.: 1:12-cv-2542 (BMC)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

This case concerns important rights to religious freedom enshrined in the First Amendment and assured by Congress under the Religious Freedom Restoration Act. Defendants have finalized a regulation requiring employer health plans to offer coverage for abortion-inducing drugs, contraception, sterilization, and related counseling (the "Mandate"). *See* 45 C.F.R. § 147.130(a)(1)(iv). Plaintiffs, as entities affiliated with the Roman Catholic Church, cannot subsidize those services or speech in conformity with their religious beliefs. Despite many calls on the Defendants for a reasonable conscience clause, the only entities exempted from the Mandate are those that *Defendants* deem sufficiently "religious" by primarily employing and serving people who share the same tenets of faith. Plaintiffs cannot seek to meet this test without violating their religious mission. Defendants have thus put Plaintiffs in an impossible bind: (1) facilitate activity that violates their religious beliefs; (2) limit their operations in a manner that also does so; or (3) accept onerous consequences of non-compliance.

Defendants offer no justification for placing Plaintiffs in this position. Indeed, the first court to address the merits of this issue preliminarily enjoined the Mandate as applied to a *for-profit* company, reasoning that Defendants lacked a compelling interest to force even a private company to provide services contrary to the religious beliefs of its owners. *See Newland v. Sebelius*, No. 1:12-CV-1123, 2012 WL 3069154, at *5-8 (D. Colo. July 27, 2012). Defendants now make this motion to prevent this Court from reaching the merits. They argue both that Plaintiffs lack a sufficient injury for standing and that their challenge is unripe: on the ground that Defendants have indicated an intention to revise their final rule before August 2013 and have in the interim issued a temporary safe harbor from government enforcement for entities like Plaintiffs. But Defendants' justiciability arguments are misplaced. They ignore the present

impacts that their actions have had, and are having, on Plaintiffs' operations, and fail to account for the significance in the standing analysis of the important constitutional rights at issue.

At bottom, Defendants cannot demonstrate that Plaintiffs have failed to make the minimal showing necessary to establish standing "where First Amendment rights are involved." *See Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011). In any case, the Supreme Court has permitted challenges to legislation to go forward even where "the complaints were filed almost six years and roughly three years before the laws [at issue] went into effect." *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011). Here, all of the religious and economic harms that will befall Plaintiffs are, at most, less than a year away. Defendants' professed plans to change the law do nothing to eliminate this imminently impending injury.

Moreover, Defendants fail to address the fact that the *present* impact of even an uncertain future harm can establish sufficient injury for standing purposes. *See Lac Du Flambeau Band of Lake Sup. Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005). The Mandate is presently impacting Plaintiffs in a wide variety of ways, including by impacting current health insurance coverage decisions and precluding them from appropriately structuring their future health plans. Both the imminent injuries from the Mandate and the injuries currently being imposed on Plaintiffs suffice to establish Article III injury.

Defendants also rely on the safe harbor and their non-binding intentions to change the law to argue that Plaintiffs' challenges are unripe. Leaving aside that Defendants ignore the courts' special solicitude for protecting First Amendment rights, Plaintiffs have presented discrete and judiciable legal challenges to final agency action. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).[1] Given the Mandate's present impacts on "decisions" that must be "made

[1] Plaintiffs are not, as Defendants would have it, asking this Court to adjudicate a contingent disagreement regarding a rule that is "informal" or "tentative," *Abbott Labs.*, 387 U.S. at 151 (internal citations omitted). Rather Plaintiffs'

now or in the short future," hardship from delayed review would be considerable. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Moreover, Defendants' failure to adequately address the concerns of faith-based institutions in finalizing the Mandate provides little reason to accept their assurances that potential future changes will actually be undertaken or, if they are, will accommodate Plaintiffs' sincerely held religious beliefs. Defendants' argument that their final rule is not really "final" because they *might* change it in the future similarly ignores that a "mere contingency . . . 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). In this regard, Defendants "confuse[] mootness with standing." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Defendants have obvious reasons for not relying on mootness law for what is truly a mootness argument, because future plans to change the 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).

Because Defendants rushed to issue the Mandate in a final, binding form that has impacted Plaintiffs' current operations, this lawsuit is ripe. Defendants' arguments in favor of dismissal essentially amount to saying, "Trust us, changes are coming." But that is an insufficient ground for dismissal, and fails to address the present harms already being visited upon Plaintiffs and other claims of Plaintiffs that will not be impacted by any potential future changes to the Mandate. The Court should, accordingly, deny Defendants' motion to dismiss.

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claims concern very real harms actually and imminently imposed by a finalized government rule.

## BACKGROUND

### A. The Final Mandate and Religious-Employer Exemption

The Affordable Care 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, HHS issued interim final rules to implement this provision, noting that it was developing guidelines to define its scope. 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). 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 41,729.

In August 2011, without notice-and-comment rulemaking, HHS announced its "preventive care" guidelines, requiring 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] Mandated contraceptives include certain drugs that can cause an abortion. If Plaintiffs fail to comply with the Mandate for plan years beginning after August 1, 2012, they are subject to a fine of $100 a day per employee. *See* 26 U.S.C. § 4980D(b). 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).

Defendants later 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.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.

[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).

> (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)(A)-(B)). Despite intense opposition to the narrowest religious employer definition ever adopted in federal law, Defendants refused to alter it. Instead, in January 2012, they announced a temporary safe harbor for certain religious employers, giving them "until August 1, 2013, to comply."[3] As noted by Cardinal Timothy Dolan of Plaintiff the Archdiocese of New York, the announcement effectively gave objecting religious institutions "a year to figure out how to violate [their] consciences." (Compl. ¶ 139.)

In February 2012, Defendants finalized the religious employer exemption "without change." 77 Fed. Reg. 8725, 8728, 8730 (Feb. 15, 2012). Commentary accompanying the final rule noted that Defendants "plan[ned] to develop and propose changes" to the regulations before August 2013. *Id*. at 8727. Meanwhile, under public pressure, the White House proposed its version of a supposed "accommodation," by which insurers would "be required to directly offer . . . contraceptive care [to participants] free of charge."[4] Defendants then issued an Advance Notice of Proposed Rulemaking ("ANPRM") seeking comments on this proposed accommodation. 77 Fed. Reg. 16,501 (Mar. 21, 2012). The ANPRM, however, contains little more than a recitation of hypotheticals and "possible approaches." *Id.* at 16,507. The ANPRM offers almost no analysis of the relative merits of the various proposals, all of which would still

[3] News 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/01/20120120a.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.

force Plaintiffs to subsidize, facilitate, and/or accommodate activity and speech that violate their religious beliefs. *See* Compl. ¶¶ 141-145.[5] The ANPRM does, however, confirm that the narrow "religious employer" exemption will not be changed. *See* 77 Fed. Reg. at 16,501-08. At present Defendants have yet to announce proposed changes to 45 C.F.R. § 147.130(a)(1)(iv).

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

Plaintiffs are Catholic religious entities that provide a wide range of spiritual, educational, and social services to residents of New York, regardless of their faith. (Compl. ¶ 2.) Plaintiffs' work is guided by and consistent with Roman Catholic belief, including the requirement that they serve those in need, regardless of their religion. As Cardinal Dolan has taught: "We don't serve people because they're Catholic, we serve them because *we* are, and it's a moral imperative for us to do so." In accordance with these beliefs, Catholic individuals and organizations serve any and all in need, Catholic and non-Catholic alike—a mission that makes Plaintiffs insufficiently "religious" in the view of Defendants. (*Id.* ¶¶ 3-5, 7.)

As Plaintiffs allege, the Mandate and its narrow definition of "religious employer" in 45 C.F.R. § 147.130(a)(1)(iv) severely burden Plaintiffs' religious beliefs. Those beliefs treat abortion, sterilization, and contraception as immoral and prohibit Plaintiffs from paying for, providing, and/or facilitating those practices. (Compl. ¶¶ 4, 53, 89-94.) Yet the Mandate explicitly requires employer health plans, and thus Plaintiffs as employers, to cover such services. (*Id.* ¶¶ 111, 113.) Plaintiffs' religious beliefs also require them to serve all individuals regardless of religious faith. (*Id.* ¶¶ 28-30, 54, 66, 182.) Yet to qualify for the exemption to the Mandate, Plaintiffs must meet standards that require them to formally document the religious affiliation of their employees and those they serve. (*Id.* ¶¶ 5-7.) If, because of their religious

[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.

beliefs, Plaintiffs refuse to adhere to the Mandate, they are subjected to substantial fines. (*Id.* ¶¶ 113-117.)

Having been placed in this lose-lose situation, on May 21, 2012, Plaintiffs filed suit, alleging that the Mandate violates the Religious Freedom Restoration Act ("RFRA"), the First Amendment, and the Administrative Procedure Act ("APA"). At the same time, Plaintiffs began to prepare for the consequences of the Mandate. As alleged in the Complaint and described below and in the accompanying affidavits submitted in opposition to this motion, the Mandate impacts Plaintiffs' present operations and planning.[6] (*See, e.g.*, Compl. ¶¶ 22, 85, 154-61, 185-90.). As such, any change to existing law will come too late to alleviate these present and imminent harms. Plaintiffs therefore seek prompt resolution of this legal challenge.

**ARGUMENT**

The standards for a justiciable controversy do "not require 'detailed factual allegations.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Instead, to rebut a motion to dismiss on ripeness or standing grounds, "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 facts in supporting declarations. *See Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967).[7] Applying these standards, Plaintiffs' claims are justiciable.

[6] Further factual support for Plaintiffs' opposition to Defendants' motion is set forth in affidavits by the following individuals that are filed concurrently herewith: Michael Corrigan, Deacon John Coughlin, Anthony Pellicano, and Hugo Pizarro.

[7] *See also LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1250-51 (11th Cir. 2006); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc).

## I. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIMS

Article III standing, a jurisdictional requirement, exists if (1) a plaintiff has suffered an injury (2) that is fairly traceable to the defendant's actions and (3) that is 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 all of the Plaintiffs have failed adequately to allege an actual or imminent injury. (Mot. to Dismiss at 11.) They are mistaken.

### A. The Injury Requirement for Standing Is More Lenient in Pre-Enforcement Suits Seeking to Vindicate First Amendment Rights

For standing, 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). Because courts "should generally be receptive to anticipatory challenges" when First Amendment rights are at stake, *Int'l Soc. for Krishna Consciousness of Atl. v. Eaves*, 601 F.2d 809, 820-21 (5th Cir. 1979), these standards are applied loosely in pre-enforcement suits raising such claims, *see Bloedorn*, 631 F.3d at 1228. Specifically, standards related to both the *type* of injury required and the *timing* of that injury are relaxed in the First Amendment context.

***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). Article III injury also exists when a party must choose between refraining from exercising First Amendment rights or incurring penalties. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003); *Virginia 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. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (Alito, J.).

When First Amendment rights are at stake, Article III injury need not be economic. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182 (2000) (finding injury where challenged action threatened "aesthetic and recreational" enjoyment); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (same). Rather, injury can be "clearly conferred by non-economic religious values." *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012). 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). So too does government interference with religious speech, *see Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004), and government religious discrimination, *see Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1525 (11th Cir. 1993); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

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 found standing to challenge a government action where a contingent future liability presently impacted the plaintiff's "borrowing power, financial strength, and fiscal planning." *Clinton v. City of New York*, 524 U.S. 417, 431 (1998). Nearly every circuit, including the Second Circuit, has similarly held that injury caused by uncertainty suffices to confer standing.[8] Such harms may even "simply be the fear or anxiety of [the] future harm." *Denney*, 443 F.3d at 264.

***Timing of Injury***. Article III is obviously satisfied by a cognizable injury. *See, e.g.*, *Thomas More*, 651 F.3d at 536. But a potential future injury also supports standing if it is

[8] *See Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1299 (10th Cir. 2008) ("courts . . . have recognized that contingent liability may present an injury in fact"); *see also, e.g.*, *N.Y. Pub. Interest Res. Grp. v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003) (injury where agency created "personal and economic injury caused by uncertainty"); *Thomas More*, 651 at 536; *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 187 (4th Cir. 2007); *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006); *Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1253 (11th Cir. 2003); *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 431 (D.C. Cir. 1993).

"'certainly impending.'" *Friends of the Earth*, 528 U.S. at 190 (citation omitted). Moreover, a future injury can be impending even if it would not occur for many years 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). Indeed, the Supreme Court has allowed challenges even where the complaints were filed "almost six years and roughly three years before the laws went into effect." *Thomas More*, 651 F.3d at 537. And that sort of case is not an exception: "The 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.*, 433 F.3d at 963.[9]

Nor must a party show that the future injury will certainly occur. 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) (citation omitted); *see also LaRoque*, 650 F.3d at 788; *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1538 (11th Cir. 1994). This probability (and thus injury) can exist even if the government has suggested that it *will not* enforce a particular law, because "there is nothing that prevents the State from changing its mind." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000).

**1. Plaintiffs Have Standing Because the Mandate Will Imminently Impair Their First Amendment Rights.**

The government has forced Plaintiffs to choose among (1) abiding by the Mandate to cover services in health plans that violate their religious beliefs; (2) attempting to meet the unconstitutional exemption to the Mandate; or (3) facing onerous fines. This scenario inflicts concrete, imminent injuries on Plaintiffs, each of which establishes Article III standing.

[9] *See, e.g.*, *Vill. of Bensenville v. Fed. Aviation Admin.*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (regarding FAA rule to begin collecting certain fees "come 2017," "'the impending threat of injury is sufficiently real to constitute injury-in-fact.'" (citation omitted)); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996) (finding standing even though statute had "not yet been implemented").

To begin, the Mandate imposes non-economic, religious injuries on Plaintiffs. The requirement to provide coverage for abortion-inducing drugs, contraception, sterilization, and related counseling violates Plaintiffs' religious beliefs and compels them to support speech with which they disagree. (Compl. ¶¶ 4, 53, 89-94, 108, 139.) The Mandate's religious-employer definition does not cure this because it will force Plaintiffs to forgo their religious duty to serve all in need. (*Id.* ¶¶ 28-30, 54, 66, 182.). The exemption also discriminates against Plaintiffs by establishing criteria favoring religions that are not similarly structured to Plaintiffs and do not share their mission, while requiring an intrusive inquiry into Plaintiffs' practices. (*Id.* ¶¶ 163-67, 210-12; Count IV.) These are all concrete Article III injuries.

The "exposure to liability" Plaintiffs would face if they refuse to comply is also a concrete injury. *Chamber*, 594 F.3d at 758.[10] 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); Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012). 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 economic and religious injuries are also sufficiently imminent. The Mandate and its narrow definition of religious employer are final, binding agency actions. The rule took effect on August 1, 2012, and applies to "plan years" beginning after that date. And while Plaintiffs have attempted to fall within the safe harbor that Defendants have enacted, it expires in all events on August 1, 2013. Thus, the expiration of this safe harbor and the onset of injury is now less

[10] As the Congressional Research Service has noted, failure to provide the mandated coverage may subject an employer, an insurer, or a health plan to substantial monetary penalties. *See* Cong. Research Serv., RL 7-5700.

than a year away, a much shorter amount of time than in other cases that have found sufficient imminence to confer standing. *See Thomas More*, 651 F.3d at 537.

**2. Plaintiffs Have Standing Because the Future Harms from 45 C.F.R. § 147.130(a)(1)(iv) Are Causing Them to Suffer Actual Injuries Now**

On top of the *imminent* injury to Plaintiffs' religious freedoms, "the present impact" of the Mandate also establishes an "injury in fact for standing purposes." *Lac Du*, 422 F.3d at 498. Plaintiffs have incurred preparation costs and other burdens as they plan for the law as it exists. (Compl. ¶¶ 185-91.) They have also expended time and resources ensuring that they comply with the one-year safe harbor.

Moreover, the harm is "immediate" because Plaintiffs "need[] to plan the substance" of their health plans now. *Va. Soc'y*, 263 F.3d at 389. Health plans do not take shape overnight, but require significant advance planning, analysis, and negotiations. *See Newland*, 2012 WL 3069154, at *4 (noting the "extensive planning involved in preparing and providing [an] employee insurance plan"). Under normal circumstances, Plaintiffs need up to a year to analyze and implement changes to their group health plans. And Plaintiffs need even more time to decide how to respond to the Mandate, as it could force them to eliminate their health plans altogether. Indeed, one Plaintiff, Catholic Health Services of Long Island ("CHSLI"), is now dealing with a union administrator that has informed CHSLI it will no longer administer its health plan in compliance with Plaintiffs' religious beliefs due to the Mandate—which is forcing CHSLI to directly confront the Mandate now and has impacted its position in negotiations with the administrator.

Moreover, Defendants *themselves* conceded the necessity for advance planning when they discarded notice-and-comment rulemaking precisely because 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.*

Moreover, the looming potential for substantial fines has impacted Plaintiffs' "fiscal planning." *Clinton*, 524 U.S. at 431. To the extent that Plaintiffs decide to follow their religious beliefs by disregarding the Mandate and its exemption, they will need to plan for the fines that may occur if their challenge fails. Indeed, the imposition of fines would be potentially ruinous to Plaintiffs and will effect planning for new initiatives, and current services may be reorganized.

The uncertainty surrounding the legality of the religious employer exemption also raises questions regarding Plaintiffs' ability to hire and retain personnel. Not surprisingly, individuals are hesitant to seek or maintain employment at an entity that may need to drop its health plan altogether, and the threat of fines and sanctions may result in Plaintiffs having to make personnel cuts. *See Pierce v. Society of Sisters*, 268 U.S. 510, 529, 536 (1925) (finding challenge to law banning private schools justiciable well before its effective date due to its impact on schools' recruiting). These actual injuries more than suffice to establish Article III injury.

**B. The Government's Contrary Arguments Do Not Withstand Scrutiny**

The Government's arguments that Plaintiffs do not have standing lack merit.

**1. Defendants' Temporary Safe Harbor Does Not Undermine Standing**

Defendants' argument that Plaintiffs' injury is speculative because of the one-year safe harbor, (Mot. to Dismiss at 14-15), does not undermine standing for several reasons. As an initial matter, unlike the Mandate and exemption, the safe-harbor has not been codified in the CFR, and so does not have the force and effect of law. Thus, "there is nothing that prevents [Defendants] from changing [their] mind." *Vt. Right*, 221 F.3d at 384.

Regardless, the present impacts occasioned by the Mandate as it exists are themselves sufficiently concrete to support standing irrespective of the safe harbor. *See Clinton*, 524 U.S. at 431; *Thomas More*, 651 F.3d at 536. Defendants' reliance on the safe harbor is misplaced because it covers only "contraceptive services"[11] while other requirements of the Mandate, such as sterilization procedures and compelled speech regarding contraceptive services, equally violate Plaintiffs' religious beliefs.

Finally, because the safe harbor is set to expire, Defendants will have enforcement power against Plaintiffs no later than January 1, 2014, a comparatively short time away. *See Thomas More*, 651 F.3d at 537. Meanwhile, the Government conceded that a forty-month gap does not defeat standing in a nearly identical setting regarding a challenge to the Affordable Care Act's individual mandate, which does not become effective until 2014. *See Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011) ("the government expressly concedes that one of the individual plaintiffs . . . has standing"), *overruled on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566 (2012).

**2. Potential Changes to Existing Law Do Not Diminish Plaintiffs' Actual and Imminent Injuries**

Defendants also point to the ANPRM, suggesting that their non-binding *intention* to change the law eliminates standing. (Mot. to Dismiss at 15-16.) As with the safe harbor, the proposed rulemaking does nothing to eliminate "the present impact[s]" of the Mandate on Plaintiffs. *Lac Du*, 422 F.3d at 498; *see supra* at I.B.2. That rulemaking does not relieve the burden and costs of planning and preparing for the current law. The ANPRM merely indicates Defendants' unconfirmed intent to propose amendments to 45 C.F.R. § 147.130(a)(1)(iv). 77

[11] *See* Guidance on Temporary Enforcement Safe Harbor (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf.

Fed. Reg. at 16,501. It neither offers nor finalizes any changes, and in fact only adds to the "present injurious effect" on Plaintiffs' operations by increasing legal uncertainty. *Great Lakes Transmission LP v. FERC*, 984 F.2d 426, 430 (D.C. Cir. 1993).

The ANPRM also does not impact several of Plaintiffs' imminent injuries, because Defendants have stated that their rulemaking will not change the Mandate's definition of religious employer. *See* 77 Fed. Reg. at 8727. As Plaintiffs allege, this definition requires an unconstitutional investigation into whether Plaintiffs are sufficiently religious for an exemption, (Compl. ¶¶ 173-84), and unconstitutionally discriminates among religious institutions, (*Id.* ¶¶ 163-67, 210-12). Defendants also violated the APA by arbitrarily and capriciously adopting the narrow definition of religious employer. (*Id.* Counts VII-IX.) Because the definition of religious employer will not change at the end of the rulemaking, the injuries resulting from it are sufficiently imminent.[12]

### 3. Plaintiffs Archdiocese of New York and Diocese of Rockville Centre Have Standing to Bring This Suit

Defendants argue that the Archdiocese of New York and the Diocese of Rockville Centre lack standing because they "allege that it is unclear whether they qualify for the existing regulations' exemption for certain religious employers." (Mot. to Dismiss at 16 n.9.) However, the looming uncertainty regarding the status of these Plaintiffs under the Mandate triggers the

[12] In these respects, this case is distinguishable from *Belmont Abbey College v. Sebelius*, No. 11-1989, 2012 WL 2914417 (D.D.C. July 18, 2012), which dismissed a challenge to the Mandate on standing grounds. There, the court did not consider (let alone reject) the argument that "the future though uncertain harm" from the Mandate was causing the plaintiff *present* injuries. Rather, it held only that the *future* injuries from the Mandate were not certainly impending. *Id.* at *10. Nor did the court consider the argument that the injuries resulting from the narrow definition of religious employer were sufficiently imminent (as opposed to the injuries from the Mandate itself). Indeed, the court held "that the temporary-enforcement safe harbor does not render the alleged injury too remote to constitute an injury." *Id.* at *9. In any event, *Belmont Abbey* was wrongly decided. The argument that the rulemaking may change the law "confuse[s] mootness with standing." *Friends of the Earth*, 528 U.S. at 189. Defendants fail to cite a single case suggesting that a potential change in the 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. Speculation that Defendants may change the law cannot moot this case at this stage of the litigation. *See infra* Part II.C.1.

same injuries discussed above, *see supra* Part I.B, because among other things, it impacts their ability to structure their health plans and arrange their fiscal affairs and make other operational decisions. Even more significantly, the Archdiocese and the Diocese have alleged that in order to even attempt to qualify for the religious employer exemption, they would be required to make an intrusive, disruptive, and costly inquiry into the religious beliefs of its present and potential employees and the recipients of their services in a manner that runs counter to their religious practices. Thus, merely meeting the exemption itself imposes cognizable economic injuries and injuries to Plaintiffs' fundamental constitutional rights. *See, e.g.*, *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

## II. PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW

Plaintiffs' claims are also ripe because they present concrete legal challenges to a final rule, and delay would exacerbate the uncertainty plaguing their operations. Defendants' contrary argument rests on improper speculation regarding potential changes to the law and ignores the harms Defendants have already caused to Plaintiffs.

### 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 both constitutional and prudential considerations. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (citation omitted). Constitutional ripeness grows out of the case-or-controversy rule and largely duplicates the standing inquiry, *see Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978), while prudential ripeness is discretionary. *See Stolt-Nielsen*, 130 S. Ct. at 1767 n.2. For prudential ripeness, courts examine (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the

parties of" delaying a decision, *Abbott Labs.*, 387 U.S. at 149, and in doing so are "guided by [a] presumption of reviewability," *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

**1. Fitness for Judicial Decision**

Final rules in the Code of Federal Regulations are the prototypical example of final action fit for review. That is 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 (internal citations omitted); *see Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J.) ("[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations"). Interim final rules in the Code of Federal Regulations are "final" for purposes of judicial review because "'[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).

Additionally, when a case presents "purely legal" issues, courts have less reason to delay adjudication since "factual development in an as applied context" would not add further clarity. *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1120 (D.C. Cir. 2005). Even when some fact development is contemplated in a pre-enforcement suit, however, the case is still ripe if discovery will sufficiently "clarify the factual record" for a court to resolve the issues presented. *Sharkey v. Quarantillo*, 541 F.3d 75, 90 (2d Cir. 2008).

**2. Hardship From Delay**

The issue of 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). Even when a case may have some "fitness" problems, the hardship analysis may nevertheless illustrate that the case should be decided now. *Connecticut v. Duncan*, 612 F.3d

107, 115 (2d Cir. 2010). This 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). Courts find sufficient hardship when litigants are "faced with the choice between the disadvantages of complying with a[] [regulation] or risking the harms that come with noncompliance." *Metro. Milwaukee Ass'n of Commerce 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*, 461 U.S. at 201-02 (quoting *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1975)); *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). Courts "should have a very good reason for indulging [a] preference" "to resolve 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." *Continental*, 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), particularly when a party needs "adequate time to make effective . . . decisions," *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006).

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 rights. 13B Wright, *Federal Practice* § 3532.3, at 515.

### B. Plaintiffs' Claims Meet the Prudential-Ripeness Standards

Defendants do not claim that Plaintiffs fail to satisfy the constitutional ripeness test. Rather, they argue that Plaintiffs' claims do not meet the two prudential ripeness factors. (Mot. to Dismiss at 17-18, 24.) They are wrong.

#### 1. Plaintiffs Assert Clear Legal Challenges to Final Agency Action

Plaintiffs' claims challenge "final" action—*i.e.*, a regulation in the Code of Federal Regulations.[13] *See Abbott Labs.*, 387 U.S. at 149, 151. In addition, Plaintiffs allege specific statutory, constitutional, and administrative challenges to 45 C.F.R. § 147.130(a)(1)(iv), which would be just as easily resolved in this pre-enforcement suit as in a subsequent enforcement action by Defendants. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995).

Plaintiffs present a legal challenge under the RFRA, which bars a federal agency from substantially burdening "a person's exercise of religion" unless it demonstrates that 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). Whether Defendants can prove that the Mandate and its accompanying regulations are the least restrictive means to further a compelling interest presents 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).

Plaintiffs also present five constitutional claims that are purely legal questions. *See, e.g.*, *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206 (3d Cir. 2004) (Alito, J.) (noting that appellate courts "review de novo [the] interpretation of the Constitution"). Plaintiffs allege that the Mandate (i) is not a neutral law of general applicability and thus cannot withstand strict scrutiny (Compl. Count II); (ii) violates the Religion Clauses because it requires an intrusive investigation

[13] 45 C.F.R. § 147.130(a)(1)(iv) contains the requirement that health plans cover women's "preventive care and screenings provided for in . . . guidelines supported by the [HRSA]", as well as the "exemption[] from such guidelines" for narrowly defined "religious employer[s]." 45 C.F.R. § 147.130(a)(1)(iv) & (B).

into whether Plaintiffs are "*sufficiently* religious" for an exemption, *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1343 (D.C. Cir. 2002), (Compl. Count III); (iii) "discriminates among religious institutions" by establishing exemption criteria that favor some over others, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008), (Compl. Count IV); (iv) unconstitutionally interferes with internal matters of church governance by requiring compliance with its requirements, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012), (Compl. Count V); and (v) unconstitutionally forces Plaintiffs to subsidize speech with which they disagree by requiring Plaintiffs' health plans to cover counseling about abortion-inducing drugs, contraception, and sterilization, *see United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001), (Compl. Count VI).

Finally, Plaintiffs present concrete legal challenges under the APA. (Compl. Count VII-IX.) "Claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues," as do "claims that an agency . . . fail[ed] to provide notice and opportunity for comment." *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007).

**2. Delayed Resolution Will Harm Plaintiffs**

Plaintiffs' claims are also ripe because any "postponement of decision would likely work substantial hardship" on them. *Pac. Gas*, 461 U.S. at 201. Here again, because Plaintiffs' First Amendment rights are at stake, there is a lower threshold of hardship to establish ripeness. 13B Wright, *Federal Practice* § 3532.3, at 515. The harms that Plaintiff have articulated from delayed review readily meet this reduced standard.

Plaintiffs have urgent need to know their rights before being put to the "dilemma" that pre-enforcement review was designed "to ameliorate," *Abbott Labs.*, 387 U.S. at 152—*i.e.*, choosing between (1) abiding by the Mandate in violation of their religious beliefs; (2) attempting to meet the Mandate's religious-employer definition in violation of their religious

beliefs; or (3) "risking the harms that come with noncompliance" with either option. *See Metro. Milwaukee*, 325 F.3d at 883. This looming dilemma is having "a present concrete effect" on Plaintiffs' operations. *Id.* at 882. 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. Just as requiring political parties to wait "until the eve of [an] election" to challenge election laws would "severely diminish the effectiveness" of their "campaign decisions," *Miller*, 462 F.3d at 321, requiring Plaintiffs to wait until the safe harbor expires to resolve the important issues raised by this lawsuit would prevent them from making "informed decisions," *Peake*, 93 F.3d at 72, *Newland*, 2012 WL 3069154, at *4 (noting the "extensive planning involved in preparing and providing [an] employee insurance plan").[14] "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).[15]

Further, to the extent Plaintiffs decide to follow their religious beliefs and disregard both the Mandate and its exemption, they will need to plan for any potential fines. Delayed review would impede Plaintiffs' ability to "arrange [their] fiscal affairs" and to "nail down their plans for financial security" in the coming years. *Riva*, 61 F.3d at 1012. Plaintiffs must plan now for the possibility that they may be subject to substantial fines for noncompliance.[16]

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[14] *See also Retail Indus Leaders*, 475 F.3d at 188 (concluding a claim was ripe where plaintiff had to "alter its internal accounting procedures and healthcare spending *now*" (italics in original)).

[15] To take just one example, Plaintiffs do not know the religious faith of their employees or those whom they serve. To even attempt to qualify, therefore, Plaintiffs would both have to survey the religious beliefs of those that they employ and serve, and also change their applications for employment, for enrollment in school, for admission to their facilities, and the like, to identify their religious beliefs. This whole exemption process itself injures Plaintiffs, in that they should not be forced to undertake any such activities before their claims are resolved.

[16] "If [Plaintiffs] 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 [those they

Delayed review would impose additional hardships. For example, CHSLI has already had to forgo significant cost-saving measures regarding its health plan arrangements and may have to forgo even more on account of uncertainty regarding the Mandate, *cf. Town of Rye v. Skinner*, 907 F.2d 23, 24 (2d Cir. 1990) ("withholding a decision at this point would create a hardship for Westchester County because uncertainty surrounding the fate of the project may affect the County's ability to secure funding"), and that uncertainty has also had a palpable impact on its health insurance coverage decisions. The Mandate's strictures will also have adverse consequences on Plaintiffs' service missions, as they may be forced to eliminate or reduce a variety of social, health, educational, and religious services to comply with the Mandate. *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).

### C. Defendants' Contrary Arguments Lack Merit

Defendants' ripeness arguments duplicate their standing arguments: they assert that Plaintiffs' claims are unripe because they have proposed changes to 45 C.F.R. § 147.130 and announced a one-year safe harbor. (Mot. to Dismiss at 19, 23-24.) Both arguments lack merit.

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

*First*, Defendants misunderstand the difference between an agency's act to *finalize* regulations (a factor for *ripeness*) and an agency's *change* of regulations (a factor for *mootness*). "[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.[17]

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

[17] *See also, e.g.*, *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."); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410-11 n.11 (5th Cir. 1999); *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998); *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1484 (10th Cir. 1995); *Am. Paper*

Thus, an agency's plans to revisit issues that it has already addressed "cannot transform long-final orders into conditional ones," *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 398 (D.C. Cir. 2008) (per curiam), because "an agency *always* retains the power to revise a final rule through additional rulemaking," *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) (per curiam).

A change in the law raises, at most, a mootness question. *See* 13C Wright, *Federal Practice* § 3533.6. But Defendants' 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). Indeed, a lawsuit 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) ("[t]he new ordinance may disadvantage [plaintiffs] to a lesser degree than the old one, but . . . it disadvantages them in the same fundamental way").[18]

There is no dispute that Defendants have *finalized* the rule set forth in 45 C.F.R. § 147.130(a)(1)(iv), and that in the proposed rulemaking merely "plan to develop and propose changes to the[] final regulation[]." 77 Fed. Reg. at 8727. The regulations are thus ripe for review. Indeed, Defendants have yet to even propose any new final rule. All they have done is announce an intent to do so and request comments on its structure. In any event, Plaintiffs have alleged that "the promised 'accommodation' would not alter the fact that Plaintiffs would be required to facilitate practices that run directly contrary to their beliefs," (Compl. ¶ 158), and

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*Inst., Inc. v. EPA*, 996 F.2d 346, 355 n.8 (D.C. Cir. 1993).

[18] *See also Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006); *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262-63 (3d Cir. 2002) (Alito, J.); *Tallahassee Mem'l Reg'l Ctr. v. Bowen*, 815 F.2d 1435, 1450-51 (11th Cir. 1987); *Friends of the Earth*, 528 U.S. at 174.

that any potential accommodation does "nothing of substance to protect the right of conscience." (Compl. ¶ 141.) The non-binding plans of the government should not be permitted to moot Plaintiffs' challenge. *See CSI Aviation*, 637 F.3d at 411-14 (rejecting an attempt to moot plaintiffs' action through proposed rulemaking).

*Second*, postponing review of the accommodation will not eliminate entirely the Court's need to consider Plaintiffs' challenges. Defendants have not argued, nor can they, that the ANPRM impacts *all* of Plaintiffs' claims. Plaintiffs challenge the Mandate on the grounds that its narrow definition of "religious employer" burdens Plaintiffs' religious exercise, excessively entangles government and religion, discriminates among religions, and was enacted in violation of the APA. (*See* Compl. Count II-IX.) The proposed rulemaking will not impact these claims because Defendants have made clear that they will not revisit the religious-employer definition. *See* 77 Fed. Reg. at 8727; *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1031 n.1. (D.C. Cir. 2008) (per curiam). Because these claims are ripe, under the pragmatic balancing test for prudential ripeness, the Court should consider Plaintiffs' other claims as well. *See* 13B Wright, *Federal Practice* § 3532.6 ("[O]nce 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").

*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 (emphasis added); *see Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989) ("[I]t is irrelevant whether the case was ripe for review when the complaint was filed."). The Court has already ruled that Defendants have not made the "required showing" for a stay of discovery "[a]t this stage," (Order, Aug. 12, 2012), and Plaintiffs are commencing their discovery of Defendants. The ultimate merits of Plaintiffs' claims will likely not be considered for several months, and

*that* is the relevant time for a ripeness determination. *See Am. Motorists*, 876 F.2d at 302 n.4. Moreover, Defendants claim that they will finalize new regulations by August 2013. 77 Fed. Reg. 16,503. It would be imprudent to dismiss this case, only to have Plaintiffs "perforce return here shortly" with the same claims, *Neb. Pub. Power Dist.*, 234 F.3d at 1039-40, but on a basis that burdens the Court "by requiring [it] to expedite the litigation," *LaRoque*, 650 F.3d at 788.

**2. Defendants' Safe Harbor Does Not Eliminate the Hardship Currently Imposed on Plaintiffs from Delayed Review**

Defendants also argue that delayed review would not harm Plaintiffs because their safe harbor has relieved Plaintiffs of the obligation to make "direct and immediate" changes to their "day-to-day business" operations. (Mot. to Dismiss at 22.) For the same reasons discussed above, however, this safe harbor is irrelevant to Plaintiffs' *present* hardships. *See supra* Part III.B.2. 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 major expenses, or reorganizing Plaintiffs' services requires significant advance planning that must be undertaken well before the safe harbor expires. 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.

Plaintiffs' current 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). If Defendants want to forestall adjudication of Plaintiffs' claims, they should not have binding rules on the books that force Plaintiffs to choose, now, between violating their religious beliefs and violating the law.

## CONCLUSION

Defendants' motion to dismiss should be denied.

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New York, New York

Respectfully submitted,

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