**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF NEBRASKA**

**STATE OF NEBRASKA, by and through JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA;**

**STATE OF SOUTH CAROLINA, by and through ALAN WILSON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA;**

**Case No. 4:12-cv-03035-CRZ**

**BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF MICHIGAN;**

**STATE OF TEXAS, by and through GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS;**

**STATE OF FLORIDA, by and through PAM BONDI, ATTORNEY GENERAL OF THE STATE OF FLORIDA;**

**STATE OF OHIO, by and through MICHAEL DeWINE, ATTORNEY GENERAL OF THE STATE OF OHIO;**

**STATE OF OKLAHOMA, by and through SCOTT PRUITT, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA;**

**SISTER MARY CATHERINE, CK, an individual;**

**STACY MOLAI, an individual;**

**CATHOLIC SOCIAL SERVICES, a Nebraska non-profit corporation;**

**PIUS X CATHOLIC HIGH SCHOOL, a Nebraska non-profit corporation**

**and**

**THE CATHOLIC MUTUAL RELIEF SOCIETY OF AMERICA, a Nebraska non-profit corporation;**

**Plaintiffs,**

**v.**

**UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor,**

**Defendants.**

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

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## INTRODUCTION

This case involves a First Amendment and statutory challenge to a "Final Rule" promulgated by the federal government that will coerce religious organizations, care providers, socials service agencies, and others to subsidize contraception, abortifacients, sterilization, and related services in contravention of their religious beliefs. Plaintiffs' Complaint ("Compl."), at ¶¶ 1, 70 (doc. 1). By its explicit terms, the Final Rule does not accommodate the religious beliefs of religious organizations that do not restrict their services primarily to people who share their religious tenets, or that do not restrict employment primarily to people who share their religious tenets, or that do not have "the inculcation of religious values" as their primary operational purpose. *Id.* at 78. The Final Rule is unconstitutional and also violates the Religious Freedom Restoration Act. *See* U.S. Constitution, Amend. 1; 42 U.S.C. § 2000bb. It also will have the effect of causing individuals and institutions to drop their health care coverage, and of causing religious organization employers to restrict services to people who share their religious faith. *See, e.g.,* Compl. at ¶¶ 20, 30, 41, 76.

In response to Plaintiffs' Complaint, Defendants have brought a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, accompanied by a Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def. Mem."), at 32 (doc. 31). Defendants make no effort in these filings to defend the constitutionality of their Final Rule. Rather, starting on page 1 of their Memorandum, and continuing for some 30 pages, they center their defense on an ethereal and undefined promise of some future action to reform their conduct to "address religious concerns such as those raised by plaintiffs in this case." Def. Mem. at 1. Among other things, Defendants argue that their "Final Rule" is not all that final; that the federal government will correct its position at some future point; that having failed appropriately to

accommodate the religious beliefs of the non-State Plaintiffs in their Final Rule, their promise to do so by means of some unspecified future action should be viewed nonetheless as dispositive of and fatal to Plaintiffs' case; and that these Plaintiffs should not at this stage be permitted to advance the important religious liberty issues implicated here. In the course of that argument, Defendants stand ripeness analysis on its head by arguing that undefined and conjectural contingencies posited as a defense can render a claim nonjusticiable, while also seeking to alter pleading standards by disputing (without cited foundation) factual allegations of the Complaint. Defendants' analysis also ignores the particular First Amendment context of this case. For the following reasons, Plaintiffs respectfully request this Court deny Defendants' Motion to Dismiss.

## BACKGROUND

In this action, Plaintiffs challenge the constitutionality of a regulation promulgated by the U.S. Departments of Health and Human Services, Labor, and the Treasury (collectively, the "Federal Government") that would coerce religious organizations, institutions, care providers, outreach groups, and social service agencies, among others, to directly subsidize contraception, abortifacients, sterilization, and related services in contravention with their religious beliefs. Such coercion – which would direct individuals and organizations to subsidize, promote, or affirm products, services, and activity in direct contravention with the tenets of their religious faith – is forbidden by the First Amendment to the United States Constitution, which protects the free exercise of religion and the freedom of speech.

Important and venerable constitutional principles protecting religious liberty are at stake in this case. Should the Federal Government's Final Rule be upheld, countless additional religious freedoms would be vulnerable to government intrusion and negation through coercion.

It is in that context that Plaintiffs object to Defendants' Motion to Dismiss and ask this Court to overrule it.

The Final Rules on Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act (the "Final Rule"), 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. Pt. 54; 29 C.F.R. Pt. 2590; 45 C.F.R. Pt. 147 and the amendments thereto), promulgated pursuant to the Patient Protection and Affordable Care Act ("ACA"), are federal mandates that require all employers that provide health insurance to their employees to include coverage for contraceptives, sterilization, and related patient education and counseling. [1] However, the provision of contraceptives, sterilization, and related patient education and counseling is in direct conflict with the religious beliefs of certain religious organization employers and individuals. *See* Compl. at ¶¶ 18, 25, 40, 48, 57. The Final Rule forces organization Plaintiffs Catholic Social Services, Pius X Catholic High School, and Catholic Mutual and individual Plaintiffs Sister Mary Catherine and Stacy Molai to choose between religious observance and the violation of a regulatory mandate.

Under the Final Rule, there are two ways in which religious organization employers may circumvent the requirement to cover contraceptives: by declining to provide health insurance altogether (and incurring substantial civil penalties as a result) or by satisfying *all* of the following criteria to qualify for the "religious employer" exemption:

> (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.

[1] "Final Rule" refers only to the requirement to cover contraceptives, abortifacients, sterilization, and related patient education and counseling; not the entire list of preventive services for women. Additionally, the relief requested from HHS applies to all three departments that issued the interim final rule.

> (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. 46621, 46626 (Aug. 3, 2011) ("Religious Employer Exemption").

**STANDARD OF REVIEW, AND DEFENDANTS' ASSERTION OF UNSPECIFIED PLANNED CORRECTIVE ACTION**

In assessing Defendants' Motion to Dismiss, the Court must "accept as true the factual allegations" of the Complaint. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 986-87 (2010), citing *Leatherman v. Tarrant Co. Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 164 (1993). A complaint that states "a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A complaint need not set forth detailed factual allegations, but must make a '"showing,' rather than a blanket assertion, of entitlement to relief;" it must provide "some factual allegation" to provide "fair notice" of the claim and the "grounds" on which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 555, n. 3 (2009). And of course, "Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

In this case, it should be noted from the start that Defendants purport not only to be on notice of and to understand Plaintiffs' claims, they also assert that they will take future action "to address religious concerns such as those raised by plaintiffs in this case," and they promise to undertake "amendments to the challenged regulations to accommodate the religious objections of organizations like the organization plaintiffs." Def. Mem. at 1, 2-3. The gravamen of this defense is that Defendants appreciate and understand Plaintiffs' claims so well that they can be relied upon to remedy the problem even absent further Court proceedings. Because Defendants have not specified or committed to any particular such amendment, however, there exists no standard against which to judge this formless *defense* representation. The rule now on the books

is the Final Rule, and it is that Rule that the allegations in the Complaint address. Defendants' Motion to Dismiss the Complaint should be assessed under a standard recognizing that: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. It will be for the Court to judge whether that plausibility exists in this context where Defendants aver by way of defense that they "intend[ ] to address the very issue that plaintiffs raise in this case" through "forthcoming" remedial activity. *See* Def. Mem. at 29.

## ARGUMENT

### I. THE ORGANIZATION AND INDIVIDUAL PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS.

Defendants have argued Plaintiffs lack standing because they do not face imminent injury. However, the organizational and individual Plaintiffs face an imminent decision to either compromise their religious beliefs or violate the law. Accordingly, Plaintiffs have standing to pursue their claim. Moreover, and because Defendants merge ripeness arguments into their attack on standing, *see, e.g.,* Def. Mem. at 16 ("In light of the forthcoming [unspecified] amendments, … there is no reason to suspect that the organization plaintiffs will be required [after those unspecified changes] to sponsor a health plan that covers contraceptive services in contravention of their religious beliefs"), 19 (" by that time, defendants will have finalized amendments … that will accommodate … religious objections. … Those amendments are likely to affect the individual plaintiffs as well, by providing them with a mechanism …."), Plaintiffs are constrained to note here that Defendants again fail to account for the special nature of the First Amendment rights advanced in this case. *See, e.g., New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995) ("First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of

irretrievable loss. In a wide va riety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill;" ripeness dismissal reversed).

### A. The Organization and Individual Plaintiffs have Stated a Concrete and Imminent Injury in Fact Resulting from the Operation of the Final Rule.

Plaintiffs Catholic Social Services, Pius X Catholic High Sc hool, Catholic Mutual, Sister Mary Catherine and Stacy Molai are at imminent risk of injury. Plaintif f Catholic Socia l Services', Pius X Catholic High School's, Catho lic Mutual's, Sister Mary Catherine's and Stacy Molai's plans have b een specifically contracted to exclude coverage for purposes of contraception, abortifacients, sterilization, and related services. Compl. at ¶¶ 19, 26, 41, 49, 56. Plaintiffs will be coerced into purchasing or subsidizing coverage in direct contravention of their beliefs or dropping coverage outrigh t if the Fina l Rule is up held. This coercion con stitutes an injury-in-fact.

To establish standing, a "plainti ff must have suffered an injury in fact, m eaning that the injury is (a ) concrete and par ticularized and (b) actual or imm inent, not conjectural or hypothetical. Second, the injury must be traceable to the defendant's challenged action. Third, it must be 'likely' rather than 'speculative' that a favorable decision will redress the injury." *South Dakota Farm Bureau, Inc. v. Hazeltine* , 340 F.3d 583, 591 (8th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 ( 1992)). Plaintiffs meet all three requirements. As a res ult of the Final Rule, each and every Plaintiff has suffered or will imminently suffer injury-in-fact.

As a component of establishing standing to bring such a claim, Plaintiffs must show they have been or are at im minent risk of being act ually injured by the operat ion of the Final Rule.

Toward that end, at least several of the individual and organization Plaintiffs have alleged the fact that they do not meet the criteria to be grandfathered (i.e., exempt) from the Final Rule's Requirements and, thus, are at especially imminent risk of injury by the Final Rule's operation.

The health plans of Plaintiffs Catholic Social Services, Pius X Catholic High School and Sister Mary Catherine do not qualify to be grandfathered from the ACA requirements. Compl. at ¶¶ 21, 43, 50. And even a grandfathered plan loses its grandfather status if it significantly cuts or reduces benefits, raises co-insurance charges, significantly raises co-payment charges, significantly raises deductibles, significantly lowers employer contributions, or imposes or tightens an annual limit on the dollar value of any benefits. 26 C.F.R. § 54.9815-1251T(a), (g)(1); 29 C.F.R. § 2590.715-1251(a), (g)(1); 45 C.F.R. § 147.140(a), (g)(1).

Plaintiffs' non-grandfathered health plans are immediately and directly affected by the operation of the Final Rule. These plans *must* comply with the Final Rule on April 16, 2012. That date is fixed definitively in the law. Even if Plaintiffs Catholic Social Services, Pius X Catholic High School and Catholic Mutual qualify for the temporary enforcement safe harbor, they *must* comply with the Final Rule upon the expiration of the temporary enforcement safe harbor on August 1, 2013.

To the extent Plaintiff Catholic Mutual is providing a health insurance plan and Plaintiff Molai is purchasing health insurance that are grandfathered by the ACA, they are required to retain such plans precisely as they were at their inception to avoid losing grandfather status. Compl. at ¶¶ 31, 59. Upon which time such plans are substantially modified, they become a "new plan" subject to the full gamut of ACA requirements, including the Final Rule itself. By the Federal Government's own admission, this is bound to occur.

HHS acknowledges there is "considerable uncertainty" surrounding employer plans and their grandfather status beginning in 2011. U.S. Department of Health and Human Services ("HHS"), *Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans.* (accessed Feb. 20, 2012) < http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html>. In fact, based on HHS "mid-range" assumptions of the number of plans that would remain grandfathered if they made changes consistent with changes made in 2008 and 2009, only 55% of large employer and 34% of small employer plans would remain grandfathered by 2013. *Id.* To this extent, for plans that currently qualify for grandfather status, HHS recognizes that loss of that status is imminent.

1. **Defendants' "Temporary Enforcement Safe Harbor" and "Promise of Future Rulemaking" Do Not Deprive Plaintiffs of Standing to Bring Their Claims.**

Defendants contend that Plaintiffs lack standing due to the Defendants having imposed a "temporary enforcement safe harbor" during which limited time the Federal Government has unilaterally promised to "not take any enforcement action." Def. Mem. at 14-15, 19. By the expiration of the safe harbor on the fixed date of August 1, 2013, Defendants, pursuant to an *Advance* Notice of Proposed Rulemaking, promise they will have promulgated unspecified "regulatory amendments" that will "accommodate additional religious organizations' religious objections" to subsidizing products and services violative of organization and individual Plaintiffs' religious beliefs. Def. Mem. at 15-16, 19-20. Neither of these factors deprives Plaintiffs of standing to bring their claims.

Courts repeatedly have found standing to pursue a pre-enforcement constitutional challenge where the alleged harm will occur in the future. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 521-23, 127 S.Ct. 1438 (2007) (standing based on rise in sea levels *by the end of this century*); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536, 45 S.Ct. 571 (1925) (standing to

challenge education act at leas t two years and five m onths before effective date); *Dep't of Commerce v. U.S. House of Reps.* , 525 U.S. 316, 332, 119 S.Ct. 765 (1999) (standing in February 1998 to challenge sa mpling method for 2000 Census); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (standing to contest fees not collectible for 13 years). Standing "depends on the probability of harm, not its temporal proximity." *See 520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006).

"[I]mmediacy requires only that the antic ipated injury occu r with som e fixed period of time in the future, not that it ha ppen in the colloquial sense of s oon or precisely within a certain number of days, weeks, or m onths." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). Given that standing "depends on the probability of harm, not its temporal proximity," *Devine*, 433 F.3d at 962, Plaintiffs' standing is not undermined by the imposition o f the temporary enforcement safe harbor.

This analysis and the imminence of the injury faced by Plaintiffs is not m itigated by either Defendants' tem porary enforcement safe harbor or the March 21, 2012 release of the information gathering A dvance Notice of Propo sed Rulemaking Regarding Certain Preventive Services Under the Affordable Care Ac t ("ANPRM"). 77 Fed. Reg. 16503 (Mar. 21, 2012). Defendants contend that Plaintiffs' injuries , though stemm ing from wh at they them selves promulgated as a *Final* Rule, are speculative and conjectural, depriving Plaintiffs of standing to pursue their claims. In support of this position, Defendants cite th eir "promises" of som e future regulatory relief, despite there being no rulem aking process currently underway. It is upon these promises Defendants w ould have Plaintiffs rely to their in evitable detriment. This sort of 'we really didn't m ean it, an d please tru st us' defen se, however, has no basis in law or applicable precedent. Defendants would have this Court turn away Plaintiffs' claim s, forcing Plaintiffs to

watch the clock run out on Defendants' self-imposed "temporary enforcement safe harbor" (the expiration of which will immediately subject non-grandfathered individual and organizational Plaintiffs to a mandate in violation of their religious beliefs at a fixed and certain date), all on the basis of hypothetical speculation about the possible outcome of a potential future NPRM-initiated rulemaking process – a process that holds out no assurance of mitigating the harm Defendants' current and *Final* Rule poses.

It is impossible for Plaintiffs to discern whether the "anticipated changes to the preventive services coverage regulations," Def. Mem. at 16, will ever materialize, let alone what they may be. The only regulatory language currently operational and carrying the force of law is that of the Final Rule, which Defendants themselves promulgated. Any reference Defendants make to future changes to the Final Rule, including changes that could hypothetically lead to "plaintiffs' claim of injury . . . differ[ing] substantially from their current claim of injury," *id.*, is a reference to something that exists only in the realm of speculative possibility.

Indeed, Defendants themselves discuss these possible future amendments in speculative terms. They can do no more than describe the changes as having been "promis[ed]," *Id.* at 15, "anticipated," *Id.* at 16, and "forthcoming." *Id.* Unlike the Final Rule, of course, such promised accommodations *do not yet exist*. The proposed language of such accommodations has not yet even been released. It was certainly not included in Defendants' much-hyped ANPRM which, as Defendants themselves concede, is merely an "opportunity to, among other things, comment on ideas suggested by defendants for accommodating religious organizations, offer new ideas to 'enable religious organizations to avoid . . . objectionable cooperation when it comes to the funding of contraceptive coverage,' and identify considerations defendants should take into account when amending the regulations." *Id.*; *see also* 77 Fed. Reg. at 16503, 16507.

The case of *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), advanced by Defendants to support their contention that this Court should refrain from considering the merits of Plaintiffs' Complaint, Def. Mem. at 16 n. 8, cuts directly against Defendants and exposes the critical flaws of their defense by speculation approach. The *Boyle* decision is categorically unhelpful to Defendants' Motion to Dismiss. The *Boyle* plaintiffs were found to lack standing to challenge certain data collection regulations promulgated by the Minnesota Department of Health because, though they were of a class of entities "encouraged" to comply with the data collection, they were expressly excluded from the requirement. *Boyle*, 68 F.3d at 1100. The plaintiffs had contended "that the State of Minnesota *might at some point in the future change its position* and require compliance with the data requirements" but the court rejected this hypothetical posture as insufficient for establishing standing. *Id* (emphasis added). To quote Defendants themselves: "The court … refused to issue 'an advisory opinion to deal with the possibility that at some point in the future the State' might 'reverse [its] position'." Def. Mem. at 17, n.8, quoting *Boyle*, 68 F.3d at 1100. There, it was the *Boyle* plaintiffs whose case was predicated on the uncertain potential of future change, whereas here, it is the *Defendants* who seek to hide behind vague promises of future remedies for the current unconstitutional Final Rule. The conjecture in which they seek to engage does not warrant dismissal.

Here, Plaintiffs have sufficiently pleaded that *at least several* of the individual and organization Plaintiffs *are* subject to the operation of the Final Rule. Compl. at ¶¶ 21, 43, 50. This, unlike the status of the *Boyle* plaintiffs, is hardly conjecture about a "possible" future injury. Moreover, Plaintiffs are not alleging that Defendants "might at some point in the future change [their] position and require compliance." Rather, Plaintiffs *have been guaranteed* a requirement to comply with the Final Rule by virtue of the fact that the *temporary* enforcement

safe harbor *expires* on a fixed date: August 1, 2013. Whereas the *Boyle* plaintiffs claimed they would only be harmed if the state changed its mind regarding a regulatory requirement, here, the Federal Government *has already* specified its Final Rule and Plaintiffs are at imminent risk of injury as a result.

Similarly unhelpful to Defendants are the Eighth Circuit's decisions in *United States v. Metro St. Louis Sewer Dist.*, 569 F.3d 829 (8th Cir. 2009) and *Johnson v. Missouri*, 142 F.3d 1087 (8th Cir. 1998), which Defendants offer to buttress their contention that the injuries Plaintiffs complain of are somehow speculative or conjectural. In those cases, standing was not established because litigants could not sufficiently allege a current or imminent concrete and particularized injury unless a certain series of events occurred first. In each case, the occurrence of such events was found to be too speculative to justify standing.

Here, no such series of events must take place for Plaintiffs' complained of injury to occur. All that must occur is the expiration of the temporary enforcement safe harbor, which is guaranteed to occur on August 1, 2013. Again, the occurrence of this event is not conjectural or speculative. No operational regulatory language currently exists upon which Plaintiffs could rely for the notion that such injuries will *not* occur. The only speculation at issue is the speculation advanced by *Defendants* that they somehow will remedy the wrongs through amendments that they cannot or will not now recite and that they assert are to be based on "ideas" not yet offered and on "considerations" not yet taken into account. Def. Mem. at 16.

Defendants make a number of speculative and hypothetical representations to cloud the actual and imminent injury posed by Defendants' already promulgated Final Rule. Def. Mem. at 15-16, 19-20. Defendants claim that by the expiration of the temporary enforcement safe harbor, they "will have finalized amendments to the [Final Rule] that will accommodate additional

religious organizations' religious objections to providing contraception coverage." Def. Mem. at 19. They go on to note that the "amendments are likely to affect the individual plaintiffs as well" and that the ANPRM suggests, among other options, "that amendments might require health insurance issuers to offer health insurance coverage without contraceptive coverage to religious organizations that object to such coverage on religious grounds." *Id.*

It is difficult to conceive of language more speculative than this. Of course, it is these vague assurances, about a future rulemaking that may or may not occur, upon which Defendants claim Plaintiffs must rely for future relief, while simultaneously claiming that, somehow, Defendants' Final Rule is apparently not *actually* final. Not surprisingly, Defendants offer no legal basis for their conclusion that their "Final Rule" is not to be analyzed as a final rule. And Defendants' implicit proposition that Plaintiff religious organizations and their employees can defer all thought, work, and planning now on their 2013 insurance needs, despite the existence of an unamended Final Rule that Plaintiffs promulgated and have not rescinded, is as remarkable as their legal analysis. One certainly could imagine a revamped rule along the lines at which Defendants hint that would maintain all the constitutional infirmities of the current Final Rule and that in no way would ameliorate the constitutional problems that Defendants impose. To undertake a constitutional analysis of such a hypothetical amendment, however, is worse than a mug's game – it is an impossibility, for no one can analyze language that has not been specified. What has been specified, and published by Defendants, is their indefensible Final Rule. Having put forth their Final Rule, Defendants cannot now be heard to argue that it can evade review. Plaintiffs have established they will suffer a concrete injury to core First Amendment and RFRA-protected rights at a specified time in the near future. Defendants' arguments regarding

speculative remedies are simply without merit and accordingly their Motion to Dismiss should be denied.

## II. THE STATE PLAINTIFFS HAVE STANDING

### A. Plaintiff States Face an Actual, Imminent, and Concrete Injury Because the Final Rule Will Result in a Substantial Enrollment Increase in Plaintiff States' Medicaid Programs.

Plaintiff States have standing to bring suit because the Final Rule will force the reduction of private health insurance enrollment among organizations and individuals like Plaintiffs Catholic Social Services, Pius X Catholic High School, Catholic Mutual, Sister Mary Catherine and Stacy Molai, thereby substantially increasing the burden imposed on Plaintiff States' budgets via enrollment in Plaintiff States' Medicaid Programs. Though the Federal Government's stated purpose for the Final Rule is to expand access to coverage, *see generally,* U.S. Department of Health and Human Services, *A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (last modified Jan. 20, 2012) <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>, its practical effect is to induce individuals and organizations to *drop* coverage, either for themselves or for their employees, respectively. Without an exemption for Plaintiffs Catholic Social Services and Pius X Catholic High School, whose religious beliefs forbid the subsidization of contraceptives through their employer-based health plans, such organizations will simply drop coverage for their employees rather than pay for services which are antithetical to their moral beliefs. Compl. at ¶ 42.

The effect of religious organization employers, like Catholic Social Services and Pius X Catholic High School, dropping coverage for their employees will be an immediate and substantial spike in the number of enrollments in Plaintiff States' Medicaid programs, as many of the employees will invariably shift to Medicaid to remain in compliance with the ACA's

individual coverage mandate. Compl. at ¶ 85. Increased Medicaid enrollment as a result of the ACA's overall mandate already threatens the States' budgetary stability. Compl. at ¶ 86. Forcing another round of enrollment resulting from religious organization employers dropping coverage will magnify this concern substantially. *Id.*

Through a combination of mandatory and voluntary expansions to eligibility and coverage, as well as demographic and economic changes over the past half-century, Medicaid has expanded exponentially and is now the single largest federal grant-in-aid program to the states. Medicaid presently accounts for more than 40% of all federal funds dispersed to states and approximately 7% of all federal spending. *See Florida v. United States HHS*, 780 F.Supp.2d 1256 (N.D. Fla. 2011). In 2009 alone, states received more than $250 billion in federal Medicaid spending, with the average State receiving at least $1 billion, and many states receiving significantly more. The ACA envisions expanding Medicaid spending substantially. Federal funding continues to cover no less than 50% and as much as 83% of each state's Medicaid costs, 42 U.S.C. § 1396d(b), and combined state and federal Medicaid spending is the equivalent of 20% of an average State's *total* annual spending. Nat'l Ass'n of State Budget Officers, *2008 State Expenditure Report* ("NASBO Report"), Table 5 (*State Spending by Function as a Percent of Total State Expenditures, Fiscal 2008* ) (Fall 2009). Moreover, all of those numbers reflect federal and state spending *before* the significant increases envisioned by the ACA. Accordingly, increases in Medicaid enrollment resulting from the Final Rule would drive spending higher even than that resulting from the ACA's other requirements.

Medicaid spending has become such a cost to the states that, concurrent with its mandating a significant *increase* in state Medicaid spending, the Federal Government has recognized that the fiscal stability of states over the next decade will largely depend on their

ability to *reduce* the seemingly ever-increasing costs of the program. *See* Cong. Budget Office, *The Long-Term Budget Outlook* (June 2010) 27 ("state governments—which pay a large share of Medicaid's costs and have considerable influence on those costs—will need to reduce spending growth in order to balance their budgets"); U.S. Gov't Accountability Office, *State and Local Governments: Fiscal Pressures Could Have Implications for Future Delivery of Intergovernmental Programs* (GAO-10-899) 6 (July 2010) (recommending that States immediately and persistently cut Medicaid costs "for each and every year going forward [to achieve] equivalent to a 12.3 percent reduction in state and local government current expenditures").

Accordingly, the fiscal impact of increased Medicaid enrollments on state budgets brought about by *any* reason is beyond doubt. Plaintiff States have already demonstrated an interest in opposing the ACA as a whole due, in part, to the law's massive effect on the States' Medicaid program. An interest in opposing the Final Rule, promulgated pursuant to the ACA itself, rests in part on related grounds. The States have alleged a "concrete and particularized" injury that is "fairly traceable" to the Final Rule and redressed by the relief requested. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142 (2009).

Finally, Plaintiffs' injuries can be redressed by a decision holding the Final Rule unconstitutional and unlawful, thereby preventing unnecessary interference with Plaintiff Catholic Social Services', Pius X Catholic High School's, Catholic Mutual's, Sister Mary Catherine's and Stacy Molai's religious liberty and substantial increases to Plaintiff States' budgets via enrollment in Plaintiff States' Medicaid Programs.

**B. Plaintiff States Will Suffer an Actual Injury by Imposition of the Final Rule and Are Not Bringing this Suit as a *Parens Patriae* Action.**

Defendants assert that State Plaintiffs lack standing to challenge the Final Rule because they are impermissibly suing the federal government in a *parens patriae* action in violation of the rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 (1923). Def. Mem. at 21. In *Mellon,* the Supreme Court held that states cannot sue the federal government in a representative capacity to protect their citizens from the operation of an allegedly unconstitutional federal law. 262 U.S. at 485–86.

Despite Defendants' claims to the contrary, State Plaintiffs are not in violation of the *Mellon* rule. Rather, the States have standing to challenge the Final Rule because the increased enrollment in state Medicaid programs spurred by the Final Rule will further threaten Plaintiff States' already strained budgetary stability. Compl. at ¶¶ 84-87. This allegation of fiscal injury to State Plaintiffs, described in greater detail in Section A, *infra*, of this Part should be accepted as true by this Court and utilized to draw the reasonable inference that Defendants are liable for the misconduct alleged to cause State Plaintiffs' imminent injury. *Hamilton v. Palm,* 621 F.3d 816, 817 (8th Cir. 2010). Accordingly, State Plaintiffs are *not* bringing this action under the doctrine of *parens patriae*.

Alternatively, if the Court first finds that any of the individual or organization Plaintiffs has standing, it need not determine whether Plaintiff States likewise have standing. As the Eleventh Circuit recognized in a challenge to the same statute from which the Final Rule sprung, in the event a particular Plaintiff may not have standing, the law is abundantly clear that "so long as at least one plaintiff has standing to raise each claim—as is the case here—[the court] need not address whether the remaining plaintiffs have standing." *Florida v. United States HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011); *See, also, Watt v. Energy Action Educ. Found.*, 454 U.S. 151,

160, 102 S. Ct. 205 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S. Ct. 555 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain suit."); *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1195 (11th Cir. 2009) ("Because Balzli has standing to raise those claims, we need not decide whether either of the organizational plaintiffs also has standing to do so."); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1536 (11th Cir. 1994) ("In order for this court to have jurisdiction over the claims before us, at least one named plaintiff must have standing for each of the claims."); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232, 320 U.S. App. D.C. 87 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.").

As Plaintiff States have articulated a concrete injury that will be redressed by the Court's review of the unconstitutionality of the Final Rule, Plaintiffs States have standing to bring their claims and Defendants' Motion to Dismiss should be denied.

## III. THE RULE IS FINAL AGENCY ACTION AND RIPE FOR REVIEW

Defendants' Motion to Dismiss should further be denied because the Final Rule is final agency action and ripe for judicial resolution. Ripeness turns on two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507 (1967), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980 (1997).

In *Abbott*, the Court determined a pre-enforcement challenge to Federal Food, Drug and Cosmetic Act regulations was ripe because the regulations were "quite clearly definitive," *Abbott*

*Labs.,* 387 U.S. at 151; the regulations "were made effective upon publication," *id.* at 152; and "[t]here [was] no hint that th [e] regulation [was] informal. *Id.* at 151. Like the regulations in *Abbott*, the Rule is a "Final Rule." 77 Fed. Reg. 8725. There is no indication that the Final Rule is informal. In determining finality, "[s]uch regulations have the force of law before their sanctions are invoked as well as after." *Abbott*, 387 U.S. at 150 (quoting *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418-19, 62 S.Ct. 1194 (1942)). "When, as here, [regulations] are promulgated . . . and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . ." *Id.* Plaintiffs' injury in this case is imminent and actual and enforceable as the Final Rule against the non-grandfathered Plaintiffs on August 1, 2013. If "the enforcement of a statute is certain, a pre-enforcement challenge *will not be rejected on ripeness grounds*." *Browning*, 522 F.3d at 1164 (emphasis added).

Plaintiffs' claims are also ripe for review because delaying judicial review will result in hardship for Plaintiffs. "The plaintiffs need not wait until the threatened injury occurs, but the injury must be certainly impending." *Public Water Supply Dist. No. 10 v. City of Peculiar,* 345 F.3d 570, 573 (8th Cir. 2003) (remanding the case with instructions to dismiss as not impending because the city's involvement in a hypothetical dissolution could only occur after a citizen petition drive that had no indication of occurring). Plaintiffs' injury is certainly imminent, and they must take immediate account of the Final Rule and its coercive impact on religious liberties.

The Final Rule requires Plaintiffs Catholic Social Services, Pius X Catholic High School, Catholic Mutual, Sister Mary Catherine and Stacy Molai to make immediate and significant changes to their health care coverage arrangements in contravention of their religious and moral beliefs, or forego health insurance altogether and face a steep civil penalty in doing so. Injury to

Plaintiffs Catholic Social Services, Pius X Catholic High School, Catholic Mutual, Sister Mary Catherine and Stacy Molai is inevitable and, "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect." *Blanchette v. Ct. Gen. Ins. Corps.*, 419 U.S. 102, 143, 95 S.Ct. 335 (1974).

The Defendants suggest that the Plaintiffs may not have to be forced to comply with the Final Rule until August 1, 2013. Def. Mem. at 32. They contend that the Plaintiffs are grandfathered, and "even if [Plaintiffs] are not grandfathered, [Plaintiffs] can qualify for the temporary enforcement safe harbor . . ." *Id.* This argument presupposes that the Plaintiffs object to the Final Rule solely on the grounds of possible enforcement before August 1, 2013. The fact that the Final Rule will not be enforced against religious organization employers that qualify under the guidelines until August 1, 2013 does not mean that the Final Rule will not be felt now or in the immediate or near future. Plaintiffs must start making plans now to comply with the Final Rule and any inability to offer health insurance coverage will have severe impact on Plaintiff religious organization employers' ability to retain and recruit employees. *See, e.g., Retail Indus. Leaders Ass'n v. Fielder,* 475 F.3d 180, 188 (4th Cir. 2007) (finding ripeness where plaintiff had to alter "accounting procedures and healthcare spending *now*" in planning to comply with new act) (emphasis in original).

While Defendants repeatedly deride Plaintiffs' claims as speculative, they assert that Plaintiffs should rely on the promise of future rulemaking they concede is "too speculative for review." Def. Mem. at 31. After all, the Federal Government admits that the ANPRM is meant only to "offer ideas and solicit input." Def. Mem. at 2, 31. The ANPRM ostensibly promises future rulemaking but this mere promise does not affect the finality of the current Final Rule and

its current applicability to Plaintiffs. 77 Fed. Reg. 8725, 8728; *See Columbia Broadcasting System,* 316 U.S. at 420 ("The regulations' applicability to all who are within their terms does not depend upon future administrative action."). Similar to the agency order in *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 582-83 (8th Cir. 2007), the speculative promises in the ANPRM to possibly take some future action do "not purport to actually do so and until that day comes it is only a mere prediction." *See also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 594 (D.C. Cir. 2004) (holding a general prediction set forth in order does not constitute final agency action).

Further, Defendants' contention that the "promises and ideas" solicited by the ANPRM "will likely moot" Plaintiffs' challenge to the Final Rule, is not supported in the authorities cited by Defendants. Def. Mem. at 31. In *Vorbeck v. Schnicker*, 660 F.2d 1260 (8th Cir. 1981), plaintiffs' claims were dismissed on ripeness grounds where the plaintiffs were unable to "articulate any protected activities from which they had been deterred under the regulations" or specify "the kinds of activity that they desire to engage in." *Id.* at 1264-65. In contrast with the *Vorbeck* plaintiffs, Plaintiffs Catholic Social Services, Pius X Catholic High School, Catholic Mutual, Sister Mary Catherine and Stacy Molai have specifically articulated such activities. Compl. at ¶¶ 92-94, 96-104, 106- 107, 109-117. Despite Defendants' contention to the contrary, the mere promise to take future action has no impact on the finality of the current Final Rule.

In addition, Defendants advance *Lake Pilots Ass'n v. United States Coast Guard,* 257 F. Supp. 2d 148 (D.D.C. 2003) to support their position that a challenged rule is "not ripe where the agency undertook a new rulemaking to address [the] issue raised." Def. Mem. at 30. However, Defendants fail to point out that the court in *Lake Pilots Ass'n* dismissed the claim because the Coast Guard had "admitted its error" and issued a "temporary final rule" that withdrew the

challenged rule for the time period at issue. *Id.* at 154, 161. Here, sadly, perhaps inexplicably, but tellingly, Defendants have taken no such action. *See, e.g., Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257 (1998) (denying review where plaintiff has "not pointed to any particular" application of the law that was "currently foreseen or even likely."); *Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc.,* 344 U.S. 237, 244, 73 S.Ct. 236 (1952) (dismissing claims where plaintiff did not seek a judgment or specific order but merely a declaration that its conduct constituted interstate commerce); *Wyoming Outdoor Council v. United States Forest Serv.,* 165 F.3d 43, 46 (D.C. Cir. 1999) (dismissing claim on ripeness grounds where action was brought before leases subject to the regulation had even been issued); *Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley,* 112 F.3d 1332 (8th Cir. 1997) (dismissing the claim as premature where certain "what-ifs" had to occur before plaintiff would suffer any injury); *Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (dismissing claims where "in the peculiar circumstances of this case" the agency action was "not sufficiently final" because *both parties agreed* the dispute was the subject of an ongoing agency proceeding) (emphasis added).

Defendants would have the Court believe that this is a case like *Texas Independent Producers v. U.S. Environmental Protection Agency*, 413 F.3d 479, 484 (5th Cir. 2005), which involved future actions regarding matters as to which the plaintiffs there were "unable to plan far in advance," and where the partial regulations provided "no sense of what oil and gas construction activities would fall under EPA's permitting requirements." Here, however, Defendants frankly acknowledge the sweep of the Final Rules as "against certain non-profit organizations with religious objections to covering contraception – like the organization plaintiffs and the employers of the individual plaintiffs," Def. Mem. at 29, and any implication by these Defendants that employer-based insurance does not require prior planning (with or

without mandates) seems passing strange for them. By the same token, Defendants invoke *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733, 734 (1998) – a case in which the Sierra Club was not able to identify how the generalized "plan" it challenged inflicted any "significant practical harm" on its interests, or point "to any other way in which the Plan could now force it to modify its behavior in order to avoid future adverse consequences …." In that context, the Court noted that: "the provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm." *Id.* at 733. Here, by contrast, the injuries alleged qualify as harm under any standard (to the point where Defendants concede that "plaintiffs' complaint raises largely legal claims," Def.Mem. at 30, and express the intent to adopt undefined remedial measures). And the harms alleged by the individual and institutional Plaintiffs here are of a sort to which ripeness analysis is especially sensitive. *See, e.g., Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008) ("ripeness analysis is 'relaxed somewhat' in the context of a First Amendment facial challenge"); *Greyson Currence v. City of Cincinnati*, 28 Fed. Appx. 438, 441 (6th Cir. 2002) ("Ripeness analysis is relaxed for First Amendment cases involving a facial challenge to a regulation because courts see a need to prevent the chilling of expressive activity").

In sum, Plaintiffs seek review of a *Final* Rule. Any delay will result in imminent hardship for Plaintiffs. Accordingly, the Final Rule is ripe for judicial resolution.

## IV. PLAINTIFFS HAVE MADE SUFFICIENT FACTUAL ALLEGATIONS TO SHOW THEY WILL BE INJURED BY THE OPERATION OF THE FINAL RULE.

Plaintiffs have alleged sufficient facts to show they will be injured by the operation of the Final Rule. The allegations set forth in Plaintiffs' Complaint are neither "naked assertions" nor "devoid of further factual enhancement." Def. Mem. at 13. Consistent with the principles of

notice pleading, Plaintiffs' factual allegations are more than sufficient to overcome Defendants' Motion to Dismiss.

In considering a motion to dismiss under Rule 12(b)(6), the court assumes that all facts alleged in the complaint are true, construes the complaint liberally in the light most favorable to the plaintiff, and grants dismissal only if "it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief." *Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir. 1994); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683 (1974), overruled on other grounds by *Davis v. Scherer,* 468 U.S. 183, 191, 104 S. Ct. 3012 (1984).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir. 2010). The U.S. Supreme Court's *Twombly* and *Iqbal* decisions clarified the "short and plain statement of the claim" that a plaintiff must set forth in a complaint, but it did not abrogate the notice pleading standard of Rule 8(a)(2). *Id.*; *see also Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955 (2007) (regarding pleading standards for antitrust parallel conduct violations) ; *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009) (arising from pleadings in *Bivens* action). Rule 8(a)(2) is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*, *quoting Iqbal*, 556 U.S. at 663; *Twombly*, 550 U.S. at 556. However, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Id.* Determining whether a claim is plausible is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Hamilton*, 621 F.3d at 818, quoting *Iqbal*, 556 U.S. at 679.

In the context of the instant case and pursuant to even the minimum application of common sense, Plaintiffs have satisfied this heightened pleading standard. The legal conclusion that individual and organization Plaintiffs advance is that the operation of the Final Rule will force them to subsidize activity in contravention with their religious beliefs. Compl. at ¶¶ 18-21, 25-26, 31-33, 39-43, 48-50, 56-60. The facts of the promulgation and existence of the Final Rule, the purpose and principles of the individual and organization Plaintiffs, and the nature of their beliefs all are explicitly alleged. Again, Defendants themselves purport to understand the conflict between the Final Rule and those beliefs full well, and say they will plan at some future point "to accommodate the concerns expressed by Plaintiffs" and by other "non-profit organizations with religious objections to covering contraception – like the organization plaintiffs and the employers of the individual plaintiffs." Def. Mem. at 29. Thus not only are the requisite facts alleged, they are to that extent conceded by the Defendants.

The principles of notice pleading require no further detail be set forth in the Complaint on this point. The allegation that several of the individual and organization Plaintiffs are *not* grandfathered and, thus, subject to the Final Rule's requirements upon its taken effect, must be accepted as true by the Court. *Hamilton, supra,* 621 F.3d at 817, *quoting Iqbal*, 556 U.S. at 663; *Twombly*, 550 U.S. at 556. Plaintiffs' allegations are more than sufficient to permit the Court to draw the reasonable inference that Defendants are liable for the misconduct alleged. *Id.* Plaintiffs' Complaint sets forth a claim for relief which is plausible on its face, consistent with the *Twombly-Iqbal* pleading standard. Accordingly, Defendants' contentions that Plaintiffs have failed to allege sufficient factual material to support Plaintiffs' legal conclusions is without merit.

Likewise, Plaintiff States have alleged sufficient facts to entitle them to relief. As a result of the Final Rule's compulsory violation of Plaintiff individuals' religious beliefs, Plaintiff

individuals will drop their private health insurance coverage. Compl. at ¶¶ 20, 30, 76. The only health insurance coverage options for Plaintiff individuals will be to enroll in Medicaid or enroll in state-based health insurance exchanges. Compl. at ¶ 76. "[T]he decision by the uninsured to forego insurance results in a cost-shifting scenario." *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services,* 648 F.3d 1235, 1244 (11th Cir. 2011).

When religious organization employers cease provision of health insurance in Plaintiff States in order to avoid the requirements of the Final Rule, an immediate and substantial spike in the number of enrollments in Plaintiff States' Medicaid programs will result, as many affected employees will invariably shift to Medicaid to remain in compliance with the ACA's individual coverage mandate. Compl. at ¶ 85. In addition, religious organization employers operating in Plaintiffs States will cease providing charitable services to persons who do not share their religious tenets, in an effort to qualify under the Religious Employer Exemption. Those people no longer served by such charitable services will place further pressure on Plaintiff States' Medicaid programs as they inevitably increase reliance on public resources for support. Compl. at ¶ 87. Courts have recognized states' economic interests as adequate to support a claim. *See Dixon v. Heckler*, 589 F.Supp. 1512 (D.C.N.Y. 1984); *Avery v. Heckler*, 584 F.Supp. 312 (D. Mass. 1984) (holding that Massachusetts could intervene to challenge regulations where the state possesses a proprietary interest in minimizing the number of beneficiaries on its welfare rolls).

Section 1311 of the ACA requires that "each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange ("Exchange") that facilitates the purchase of qualified health plans . . ." 42 U.S.C. 18031. Consequently, many Plaintiff States are currently contemplating and researching state-based health care exchanges based on current projections. Any addition to these projections will harm Plaintiff States' economic interest.

At the same time, Plaintiff States' Medicaid programs are facing the acute strain of dramatically increased enrollments due to the ACA's individual coverage mandate. Compl. at ¶ 86. The ACA envisions expanding Medicaid spending substantially. Increases in Medicaid enrollment resulting from the Final Rule would drive spending higher even than that resulting from the ACA's other requirements. Quite simply, any increase in the number of citizens who are no longer insured by their employer, as a result of the Final Rule, will harm Plaintiff States' economic interest. Accordingly, State Plaintiffs have stated a claim upon which relief may be granted by this Court.

## CONCLUSION

For the foregoing reasons, this Court should reject Defendants' Motion to Dismiss. Defendants' promises of unspecified future remedial action to address the wrongs done by their rulemaking cannot shield them from answering the constitutional and statutory challenges to the Final Rule that they themselves promulgated and that – to this day – remains the unaltered, if indefensible, Final Rule at issue.

Dated: May 24, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 24th, 2012, I electronically filed the foregoing document with the Clerk of the U.S. District Court for the District of Nebraska using the CM/ECF system, causing notice of such filing to be served on Plaintiffs' counsel of record.

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