IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PRIESTS FOR LIFE,

Plaintiff,

vs.

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

Defendants.

Case No. 12-00753-FB-RER

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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INTRODUCTION

Plaintiff challenges regulations that defendants are not enforcing against it, as well as forthcoming amendments to those regulations that do not even exist yet. Plaintiff argues that it does not qualify for the enforcement safe harbor because its employee health plan covered contraceptive services after February 10, 2012 and therefore—according to plaintiff—it may not sign the required certification. But defendants recently issued additional guidance on the safe harbor that clarified the language of the certification. Under the additional guidance, an organization that provided contraceptive services after February 10, 2012, may nonetheless qualify for the safe harbor so long as it took some action to try to exclude or limit contraceptive coverage prior to February 10, 2012. Plaintiff alleges nothing to suggest that it is unable to self-certify in light of this clarification. Given plaintiff's apparent eligibility for the safe harbor, and the lack of merit in plaintiff's remaining arguments, this Court should not prematurely adjudicate the merits of plaintiff's claims.

Indeed, since defendants served their opening brief, another court has joined the two that have already dismissed nearly identical challenges to the preventive services coverage regulations for lack of standing and for lack of ripeness. *See Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162 (D.D.C. Aug. 24, 2012). Like the court in *Belmont Abbey College v. Sebelius*, Civil Action No. 11-1989 (JEB), 2012 WL 2914417 (D.D.C. July 18, 2012), the *Wheaton College* court concluded that the plaintiff lacked standing in light of the temporary enforcement safe harbor and the forthcoming accommodations and that the plaintiff's claims were not ripe because "the regulations [the plaintiff] challenges are being amended precisely in order to accommodate [the plaintiff's] concerns." 2012 WL 3637162, at *8; *see also Nebraska v. HHS*, No. 4:12CV3035, 2012 WL 2913402 (D. Neb. July 17, 2012).

Plaintiff makes no effort to distinguish any of these decisions.[1]

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF STANDING BECAUSE THE ENFORCEMENT SAFE HARBOR LIKELY PROTECTS PLAINTIFF UNTIL AT LEAST JANUARY 2014

A. Plaintiff likely qualifies for the enforcement safe harbor.

At the outset, plaintiff contends that its injury is imminent because it does not qualify for the safe harbor. Plaintiff is wrong. As stated in the original version of the guidance, in order to qualify for the safe harbor, an organization is required to self-certify that it has not provided contraceptive coverage because of its religious beliefs, consistent with any applicable state law, as of February 10, 2012. HHS, Guidance on the Temporary Enforcement Safe Harbor, at 3 (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/ 20120210-Preventive-Services-Bulletin.pdf. Plaintiff reasons that, because its employee health plan included coverage for contraception after February 10, 2012, allegedly due to a "grave" error, it cannot make that certification. Pl.'s Resp. in Opp'n to Mot. to Dismiss ("Opp'n") at 6 & n.6.

On August 15, 2012, however, defendants issued additional guidance clarifying the scope of the enforcement safe harbor. *See* HHS, Guidance on the Temporary Enforcement Safe Harbor ("Guidance") (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf. Under the additional guidance (which plaintiff does not cite), so long as

[1] Instead, plaintiff repeatedly cites the preliminary ruling in *Newland v. Sebelius*, Civil Action No. 1:12-CV-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012). But *Newland* has no bearing on the jurisdictional issues raised in defendants' pending motion to dismiss this action. In *Newland*, the plaintiffs—a for-profit, secular company and its owners—are not eligible for the temporary enforcement safe harbor, which by its terms applies only to non-profit entities. *See* Department of Health and Human Services, Guidance on the Temporary Enforcement Safe Harbor, at 3 (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Sept. 10, 2012). Nor are the *Newland* plaintiffs likely to benefit from the forthcoming amendments to the regulations, which contemplate further accommodations to the religious objections of religious organizations. *See* 77 Fed. Reg. 16,501 (Mar. 21, 2012). Thus, the *Newland* case does not present—and the court's preliminary ruling does not address—the standing and ripeness defects evident here, where plaintiff *is* protected by the safe harbor and likely to benefit from forthcoming amendments to the challenged regulations.

the organization "took some action to try to exclude or limit such coverage that was not successful as of February 10, 2012," *id*., an organization may qualify for the safe harbor even if it provided contraceptive coverage after February 10, 2012. The "took some action" threshold is not demanding. For example, plaintiff could qualify by attesting that it asked its health insurance issuer prior to February 10, 2012, for a plan that did not cover contraception but that, on account of some error, its issuer did not provide such a plan.

Because it is plaintiff's burden to establish jurisdiction, *see Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), plaintiff must show that it does not qualify for the safe harbor. But neither plaintiff's opposition nor the Jones Declaration shows that plaintiff does not qualify. Plaintiff's opposition refers to a "grave administrative error and oversight," Opp'n at 6 n.6, that "was promptly remedied following its discovery," but says nothing about what occurred prior to February 10, 2012. Similarly, the Jones Declaration asserts that this "very grave oversight and administrative error . . . was remedied as quickly as possible with our health insurance provider by issuing new Certificates of Coverage to remove the offending provisions." Jones Decl. ¶ 9.[2] If Priests for Life or its health insurance issuer made an error or an oversight in obtaining a plan that, contrary to Priests for Life's instruction, covered contraceptive services, it seems likely that Priests for Life does qualify. In any event, plaintiff has made no showing to the contrary.

[2] Undersigned counsel provided the additional guidance to plaintiff's counsel before the filing of this brief. Plaintiff's counsel continued to insist that Priests for Life does not qualify for the safe harbor even in light of the additional guidance, but did not explain whether Priests for Life took some action prior to February 10, 2012, to try to exclude or limit contraceptive coverage, or provide any other information about what happened prior to February 10, 2012. The government would not oppose allowing plaintiff to submit a short supplemental brief addressing those questions. Given Priests for Life's representation that it believes "contraception . . . [and] sterilization . . . involve gravely immoral practices," Am. Compl. ¶ 63, ECF No. 12, the government assumes that Priests for Life asked its health insurance issuer for a plan that did not cover such services and that Priests for Life accordingly qualifies for the safe harbor. If Priests for Life represents that it did not seek a plan without contraceptive coverage, the government respectfully requests the opportunity to take limited jurisdictional discovery to probe such a representation. *See Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010) ("When deciding a motion to dismiss pursuant to Rule 12(b)(6), courts focus primarily on the allegations in the complaint . . . . However, if subject matter jurisdiction is contested, courts are permitted to look to materials outside the pleadings."). *See also* Opp'n at 1 n.2.

Inexplicably, plaintiff insists that it would not make the required certification or provide the prescribed notice "regardless of whether it did qualify" for the safe harbor. Jones Decl. ¶ 12. These requirements are minimal and ministerial. *See* Guidance at 3 (organization, health insurance issuer, or third-party administrator must provide a notice indicating that "some or all contraceptive coverage will not be provided under the plan" and must self-certify that it complies with the prerequisites to invoke the safe harbor). So the failure to comply with them makes sense only if plaintiff is trying to manufacture standing to sue in this case. But a plaintiff cannot open the courthouse doors by wounding itself; such an injury is not fairly traceable to nor caused by the defendant's conduct. *See Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("The supposed dilemma is particularly chimerical here because the association's asserted injury appears to be largely of its own making. We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing."); *Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) ("This injury was not in any meaningful way 'caused' by the Board; rather, it was entirely self-inflicted and therefore insufficient to confer standing upon the Union.").[3]

B. Because the enforcement safe harbor likely protects plaintiff until the forthcoming accommodation is finalized, any injury is not imminent.

As defendants explained in their opening brief, no injury is imminent here because the safe harbor will likely protect plaintiff until defendants finalize new rules designed to accommodate the religious objections of organizations like plaintiff. Plaintiff offers several arguments in an effort to avoid this conclusion. None is persuasive.

[3] The "national attention this controversy has garnered" (Opp'n at 1) and plaintiff's view that resolving this case now is "in the public interest" (*id.*) do not provide a basis to disregard plaintiff's lack of standing or the absence of ripe claims. This Court has an obligation to determine whether it has subject-matter jurisdiction before addressing the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

First, despite its apparent eligibility for the safe harbor, plaintiff urges that, "'[w]hen 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 provision will come into effect.'" Opp'n at 18 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1942)). But this case involves more than delay. Defendants intend to amend the challenged regulations during the safe harbor period to accommodate religious organizations' religious objections to covering contraceptive services like plaintiff's. Nothing is therefore inevitable about the operation of the regulations in their current form against plaintiff. Moreover, this is not a case where defendants are relying on the general authority of an agency to change regulations whenever it desires. The advance notice of proposed rulemaking ("ANPRM") goes much further, promising regulatory amendments intended to address the very concerns raised by organizations like plaintiff.

Second, plaintiff relies on the cases that found standing to challenge the minimum coverage provision of the Affordable Care Act. *See* Opp'n at 14 (citing *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011)). But plaintiff omits the decisions that dismissed challenges to the minimum coverage provision where the plaintiffs could not show that the provision was certain to injure them. *See, e.g.*, *Baldwin v. Sebelius*, 654 F.3d 877, 879 (9th Cir. 2011); *N.J. Physicians v. Obama*, 653 F.3d 234, 239-40 (3d Cir. 2011). More importantly, the circumstances here differ markedly from those in cases challenging the minimum coverage provision. There was no hint that Congress would amend the minimum coverage provision, or that regulations would be promulgated that would eliminate the controversy; the only question in those cases was whether the provision would injure the plaintiff. *See, e.g.*, *Baldwin*, 654 F.3d at 879. Indeed, in concluding that the plaintiffs in *Thomas*

More Law Center had standing, the court specifically noted that "there is no reason to think the law will change." 651 F.3d at 538. In contrast, here, the challenged regulations will change in material ways; defendants have publicly announced their intent to amend the regulations to accommodate concerns of the type at issue here and have in fact begun that process. Because the forthcoming amendments may foreclose any injury to plaintiff entirely, or at least alter the nature of that injury (and therefore the substance of plaintiff's legal claims), plaintiff has not established standing.

Third, plaintiff insists that the proposed accommodations will not alleviate its religious concerns. *See* Opp'n at 8 ("There is no logical or moral distinction between the extant contraceptive services mandate, with its limited employer exemption, and the proposed 'revised' exemption, which was announced on February 10, 2012."). This argument only further illustrates why the Court lacks jurisdiction over this case. Plaintiff is asking the Court to assess the lawfulness (and feasibility) of regulations that do not even yet exist because the ideas defendants have suggested to date are not satisfactory to plaintiff. Plaintiff's theory appears to be that, no matter what accommodations defendants ultimately adopt, they will not be satisfactory. But plaintiff has opportunities—throughout the pending rulemaking, which is still in its early stages—to express its concerns and to help shape the forthcoming amendments. And defendants have made clear that the ideas suggested in the ANPRM do not represent the full universe of ideas that they will consider adopting and have expressly invited alternative ideas. 77 Fed. Reg. at 16,508. Plaintiff's assumption that the accommodations will not satisfy its religious concerns is "speculative," and "[i]t would . . . be premature" for a court to "find that the [forthcoming] amendment will not adequately address [p]laintiff's concerns." *Belmont Abbey*, 2012 WL 2914417, at *13; *see also Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d

930, 932 (8th Cir. 2005) (courts should not issue "an opinion advising what the law would be upon a hypothetical state of facts" (quotation omitted)); *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conserv.*, 79 F.3d 1298, 1305 (2d Cir. 1996).

Finally, plaintiff's attempt to recast defendants' standing argument as a question of mootness (Opp'n at 20-23) also should be rejected. The standing and mootness doctrines serve distinct interests. "Standing doctrine functions to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000). "In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years." *Id.* The mootness doctrine serves to avoid "abandon[ing] [a] case at an advanced stage" where doing so "may prove more wasteful than frugal." *Id.* at 192. Because this case has obviously not been litigated "for years" and is not at "an advanced stage," *id.* at 191-92, the interests served by the mootness doctrine are not implicated here. Accordingly, the Court should reject plaintiff's attempt to shift its burden to establish standing by requiring defendants to show that under no set of circumstances would plaintiff be adversely affected by the challenged regulations. Plaintiff has it backwards. It is plaintiff's burden – not defendants' – to demonstrate current or imminent injury stemming from the regulatory actions it seeks to challenge. "[A]lthough the burden lies with the party *asserting* mootness . . . the fact that a case *becomes* moot when plaintiff loses standing . . . does not mean that it is somehow defendant's burden to show that plaintiff no longer faces imminent injury. To the contrary, the party asserting federal jurisdiction bears the burden of establishing that it has standing at every stage of the litigation." *Wheaton Coll.*, 2012

WL 3637162, at *4 n.6 (internal citations, quotation marks, and alterations omitted).[4]

II. IN LIGHT OF THE FORTHCOMING ACCOMMODATIONS, THIS CASE IS NOT RIPE FOR REVIEW

Plaintiff contends that its claims are "unquestionably . . . fit for judicial resolution" because this case "presents a purely legal issue" and because "the HHS regulation mandating coverage for contraception, sterilization, and abortifacients *is currently the law*." Opp'n at 16, 20 (italics and underlining in original). Defendants agree that plaintiff's claims are largely legal,[5] but one unknown and essential fact is what the regulations will require of plaintiff, if anything. Until that is known---and it will not be known until the rulemaking is complete---the Court cannot know what it is reviewing. *See Nebraska*, 2012 WL 2913402, at *24.

Furthermore, although the "possibility of unforeseen amendments [is not] sufficient to render an otherwise fit challenge unripe," *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990), there is nothing *unforeseen* about defendants' intent to amend the regulations at issue. *See Tex. Indep. Prod. v. EPA*, 413 F.3d 479, 483 (5th Cir. 2005) (dismissing challenge as unripe where agency announced its intent to consider issues raised by plaintiff in new rulemaking). Nor is plaintiff's insistence that it will not be satisfied with whatever amendments result from the pending rulemaking, *see* Opp'n at 8, grounds for this Court to issue an advisory opinion on the lawfulness of the ideas proposed in the ANPRM. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("The interest in postponing review is powerful when the agency position is tentative. Judicial review at that stage improperly intrudes into the agency's

[4] Plaintiff briefly suggests that it has associational standing to assert the rights of its employees. Opp'n at 11 n.11. But even if plaintiff had associational standing, this argument would be irrelevant. The safe harbor protects plaintiff until at least January 1, 2014; thus, its employees need not participate in an employer-sponsored health insurance program that covers contraceptive services until at least January 1, 2014. And the forthcoming accommodation renders any opinion now advisory, whether with respect to plaintiff or its employees.

[5] Defendants note, however, that the substantial burden analysis under RFRA is a fact-specific inquiry. *See, e.g., Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319 (D. Mass. 2006).

decisionmaking process. It also squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind.") (citation omitted). Plaintiff cannot maintain that nothing flowing from the ANPRM could possibly alter its challenge to the regulations, when the ANPRM is a mere starting point, and plaintiff has ample opportunity to express its concerns and help shape the forthcoming amendments.

Plaintiff also maintains that it will suffer hardship if judicial review is delayed, arguing that it must begin planning for the possibility that it will have to drop health insurance coverage. Opp'n at 17. But as explained in defendants' opening brief, plaintiff's alleged desire to plan for future contingencies does not constitute a hardship. *See, e.g.*, *Bethlehem Steel v. EPA*, 536 F.2d 156, 163 (7th Cir. 1976). These allegations do not demonstrate a "direct and immediate" effect on plaintiff's "day-to-day business" with "serious penalties attached to noncompliance," as required to establish hardship. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-53 (1967). Instead, they are contingencies that may arise in the future. "Costs stemming from [a plaintiff's] desire to prepare for contingencies are not sufficient . . . to constitute a hardship for purposes of the ripeness inquiry---particularly when the agency's promises and actions suggest the situation [the plaintiff] fears may not occur." *Belmont Abbey*, 2012 WL 2914417, at *14; *see also Nebraska*, 2012 WL 2913402, at *23 ("[T]he plaintiffs' desire to plan for future contingencies that may never arise does not constitute the sort of hardship that can establish the ripeness of their claims[.]"). Plaintiff makes no effort to distinguish *Belmont Abbey* or any of the other cases cited in defendants' opening brief. And the temporary enforcement safe harbor likely ensures that the government will not enforce the regulations against plaintiff until at least January 1, 2014, showing that any planning plaintiff is engaged in cannot be attributed to defendants.

Finally, plaintiff is wrong to accuse the government of adopting a "tactic of shifting rules

and regulations to postpone what is inevitable by making an incredible (if not demonstrably false) plea of repentance and reform so as to avoid a legal challenge." Opp'n at 20. Plaintiff acts as though it is dealing with a seasoned thief who will do and say anything to trap plaintiff in his snare. But plaintiff is dealing with the federal government, which is entitled to a presumption that it acts in good faith. *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) ("government officials are presumed to act in good faith"); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) ("[C]essation of [] allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.").

The enforcement safe harbor was announced in formal guidance issued by the Secretary of Health and Human Services. Defendants have repeatedly referenced the safe harbor in the Federal Register when explaining their intention to amend the challenged regulations before the safe harbor expires. *See, e.g.*, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012); *id.* at 16,502-03. And defendants have never withdrawn—or done anything to suggest that they may withdraw—the safe harbor before it expires. In light of these facts and the presumption of good faith accorded government officials, plaintiff's speculation that "there is probability of resumption" (Opp'n at 22) (citation omitted) is not only dubious, it is also insufficient to establish standing. *See Schutz v. Thorne*, 415 F.3d 1128, 1134-35 (10th Cir. 2005) ("Standing is not conferred by 'conjecture' or 'speculation' about future [events]."). Indeed, courts have found similar promises not to enforce by the government sufficient to defeat jurisdiction. *See, e.g.*, *Winsness v. Yocom*, 433 F.3d 727, 732-33 (10th Cir. 2006); *Presbytery of N.J. v. Florio*, 40 F.3d 1454, 1470-71 (3d Cir. 1994). And as the *Belmont Abbey* and *Wheaton College* courts concluded, "[t]he ANPRM is 'clearly not some non-substantive, thinly veiled attempt [by defendants] to evade review.'" *Wheaton Coll.*, 2012 WL 3637162, at *8 (citing *Belmont Abbey*, 2012 WL 2914417, at *13).

CONCLUSION

For all the foregoing reasons, this Court should grant defendants' motion to dismiss plaintiff's complaint.

Respectfully submitted this 12th day of September, 2012,

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CERTIFICATE OF SERVICE

I certify that on September 12, 2012, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

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