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

PRIESTS FOR LIFE,

Plaintiff,

v.

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. 1:12-cv-00753-FB-RER

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Hon. Frederic Block

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INTRODUCTION

This case presents a legal challenge to the federal government's unprecedented assault on religious liberty—an assault that has resulted in numerous lawsuits filed by major religious organizations all across the United States.[1] Yet, Defendants ask this court to ignore the important legal questions presented by the merits of this challenge and instead to dismiss the case for lack of subject matter jurisdiction. Defendants' position is wrong as a matter of fact and law.

As set forth in the amended complaint and in the declaration filed in support of this opposition,[2] Priests for Life ("Plaintiff") has presented a real and substantial controversy between parties with adverse legal interests, and this controversy can be resolved through a conclusive judicial decree. Indeed, the legal question presented by this case is straightforward: can the federal government compel a private employer to provide its employees with a certain benefit (*i.e.*, healthcare coverage for contraception, sterilization, and abortifacients) when doing so violates the employer's sincerely held religious beliefs? Resolving this question is not only in the interests of the parties, but it is clearly in the public interest as well as demonstrated by the many lawsuits filed in this matter and the national attention this controversy has garnered. *See, e.g., G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

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[1] As Defendants note in their memorandum of law, there are approximate "24 cases across the country challenging the" contraception mandate. (Defs.' Mem. at 3). Each of these cases presents a unique set of facts insofar as some plaintiffs are non-profit organizations while others are for-profit; some include factual allegations in their respective complaints that bring them within certain exemptions and safe-harbors, while others have manifestly alleged no such immunity from the reach of the statutory and regulatory regimes at issue in this case. As set forth in the text that follows, Plaintiff here falls squarely in this latter category.

[2] In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the court may consider evidence outside of the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

Moreover, courts in the many challenges to the minimum coverage provision of the Patient Protection and Affordable Care Act ("Affordable Care Act") rejected almost uniformly the arguments presented here by Defendants that the court lacks jurisdiction because the challenged provision will not be enforced immediately and thus there is no imminent injury. This lack-of-injury argument routinely failed in these cases even though the Affordable Care Act's minimum coverage provision had not taken effect (and indeed will not take effect until 2014). *See Fla. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1244 (11th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012) (holding that the plaintiffs had standing and stating, "this case is justiciable, and we are permitted, indeed *we are obliged*, to address the merits of each") (emphasis added). And those arguments should be rejected here as well. *See, e.g., Belmont Abbey Coll. v. Sebelius*, No. 11-1989 (JEB), 2012 U.S. Dist. LEXIS 99391, at *19-*23 (D.D.C. July 18, 2012) (rejecting the government's argument that the "temporary enforcement safe harbor" provision deprives the court of jurisdiction).

In the final analysis, this case presents a justiciable "case" or "controversy" arising under the Constitution and laws of the United States that is ripe for review. Therefore, this court has subject matter jurisdiction and is thus "obliged" to decide the federal questions presented.

STATEMENT OF FACTS

Plaintiff, an international, pro-life, Catholic organization, is challenging the implementing regulations of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), that require it, as an organization, to provide healthcare coverage for contraception, sterilization, and abortifacients contrary to its sincerely held religious beliefs. (First Am. Compl. at ¶¶ 54-70, 79-145).

Pursuant to 42 U.S.C. § 300gg-13, "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage *shall, at a minimum provide coverage for* and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional *preventive care* and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4) (emphasis added). (First Am. Compl. at ¶ 23). This regulation sets forth the mandate that private health insurance plans include contraception, sterilization, and abortifacient coverage (hereinafter "HHS mandate"). And it is important to highlight here that there is no proposal by Defendants to rescind 42 U.S.C. § 300gg-13(a)(4), which is the offending regulation. Indeed, as noted below, Defendants have steadfastly maintained that this regulation will remain in effect.[3] (*See* First Am. Compl. at ¶¶ 44-51).

On July 19, 2010, the Department of Health and Human Services ("HHS"), along with the Department of Labor and the Department of the Treasury, published interim final regulations "implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services." 75 Fed. Reg. 41726 (July 19, 2010). Among other things, the interim final regulations required health insurers to cover "preventive care" for women "as provided for in guidelines supported by the Health Resources and Services Administration." *Id*. at 41759. (First Am. Compl. at ¶ 24).

[3] When developing these regulations, Defendants had no interest whatsoever in what religious organizations or pro-life groups had to say about the matter. (First Am. Compl. at ¶¶ 25-28). And nothing has changed. Indeed, notwithstanding Defendants' stated intention to provide a one-year temporary enforcement safe harbor, the challenged mandate is currently federal law. There is no condition precedent necessary, nor is there any subsequent regulation required to make it so. In fact, when asked whether the temporary enforcement safe harbor was giving the Obama administration time to reconsider its position on the contraceptive services mandate or employers a year to comply, a senior administration official stated, without equivocation: "It gives them [*i.e*., employers] a year to comply." (First Am. Compl. at ¶ 45).

On July 19, 2011, the Institute of Medicine ("IOM") published a report of its study regarding preventive care for women. Among other things, IOM recommended that preventive services include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." (*See* IOM, Clinical Preventive Services for Women: Closing the Gaps (2011)). (First Am. Compl. at ¶ 29). FDA-approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the "morning after pill"), and ulipristal (also known as "ella" or the "week after pill").[4] (First Am. Compl. at ¶ 30; *see also* Defs.' Mem. at 7).

On August 1, 2011, HHS's Health Resources and Services Administration ("HRSA") announced that it was supporting "the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines." HRSA entitled the recommendations, Women's Preventive Services: Required Health Plan Coverage Guidelines. Among other things, HRSA's Guidelines include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (*See* http://www.hrsa.gov/womensguidelines). (First Am. Compl. at ¶ 32).

On August 3, 2011, HHS, along with the Department of Labor and the Department of the Treasury, published interim final regulations which, among other things, mandate that every "group health plan, or a health insurance issuer offering group or individual health insurance coverage health plans . . . provide benefits for and prohibit the imposition of cost-sharing: . . . . With respect to women, preventive care and screening provided for in comprehensive guidelines

[4] Plan B and ella can prevent the implantation of a human embryo in the wall of the uterus and can cause the death of an embryo. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus or to cause the death of an embryo each constitute an abortion. Consequently, Plan B and ella are abortifacients. (First Am. Compl. at ¶ 31).

supported by HRSA . . . which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130. (First Am. Compl. at ¶ 33).

The August 3, 2011, interim final regulations noted that "several commenters asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." Accordingly, "the Departments seek to provide for a religious accommodation that respects the unique relationship *between a house of worship* and its employees *in ministerial positions*. . . [T]he Departments are amending the interim final rules to provide HRSA additional *discretion* to exempt certain religious employers from the Guidelines where contraceptive services are concerned." (emphasis added). 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); (*see* First Am. Compl. at ¶ 35).

For purposes of this "discretionary" exemption, a "religious employer is one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii)." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130. Plaintiff does not qualify as a "religious employer." (First Am. Compl. at ¶¶ 36-37).

On February 10, 2012, President Obama announced that his Administration intends to propose and finalize a new regulation that "will require insurance companies to cover contraception if the non-exempted religious organization chooses not to. . . . Contraception coverage will be offered to women by their employers' insurance companies directly, with no role for religious employers who oppose contraception." (http://www.whitehouse.gov/the-press-

office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions). However, this so-called "compromise," which is currently not the law and which was rejected by the Catholic Bishops because it fails to protect religious freedom and the right to conscience, is a distinction without a difference, and it does not remedy the constitutional and statutory defects of the challenged mandate. (First Am. Compl. at ¶ 46).

In conjunction with this announcement by the President, Defendants created a "temporary enforcement safe harbor,"[5] which is a self-imposed stay that is not binding as a matter of law and *for which Plaintiff does not qualify*.[6]

Despite the announcement of a "compromise," Defendants reject considering a "broader exemption" from the challenged mandate because they believe that such an exemption "would lead to more employees having to pay out of pocket for contraceptive services, *thus making it less likely that they would use contraceptives*, which would undermine the benefits [of requiring the coverage]." According to Defendants, "Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to

[5] HHS, Guidance on Temporary Enforcement Safe Harbor ("Guidance on Safe Harbor"), at 3 (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Aug. 28, 2012); 77 Fed. Reg. 16501, 16504 (Mar. 21, 2012).

[6] The "temporary enforcement safe harbor" only applies if (1) the organization is a non-profit; (2) "[f]rom February 10, 2012 onward, contraceptive coverage has not been provided *at any point* by the group health plan sponsored by the organization"; (3) "[t]he group health plan sponsored by the organization . . . provides to plan participants a prescribed notice indicating that the plan will not provide contraceptive coverage for the first plan year beginning on or after August 1, 2012"; and (4) "[t]he organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribe procedures." (*See* Guidance on Safe Harbor at 3 [emphasis added]; Defs.' Mem. at 8-9, n.6). Plaintiff does not qualify for the temporary enforcement safe harbor for several reasons. Due to a grave administrative error and oversight, for a period of time following February 10, 2012, the healthcare plan purchased by Plaintiff provided "contraceptive coverage." That error was promptly remedied following its discovery, but that correction was well after February 10, 2012. As a consequence, Plaintiff does not qualify for the temporary stay of enforcement and, thus, cannot and will not "self-certify" that it does. (Jones Decl. at ¶¶ 9-12 at Ex. 1). Moreover, Plaintiff does not intend to provide the "prescribed notice" set forth above. (Jones Decl. at ¶ 12 at Ex. 1).

use contraceptives. Including these employers within the scope of the exemption *would subject their employees to the religious views of the employer*, limiting *access* to contraceptives, *thereby inhibiting the use of contraceptive services and the benefits of preventive care*." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added). Thus, the ultimate goal of Defendants is to increase the "use of contraceptive services" by compelling *access* to these services and to ensure that employees, including employees of religious organizations such as Plaintiff, are not "subject" to the employer's religious beliefs regarding such "contraceptive services." (First Am. Compl. at ¶ 50).

Consequently, despite beginning the process of amending the regulations by publishing an Advance Notice of Proposed Rule Making in the Federal Register, *see* 77 Fed. Reg. 16501 (Mar. 21, 2012), Defendants have made it clear that they do not intend to provide a "broader exemption" that would in any way "inhibit[] the use of contraceptive services" by employees or subject . . . employees to the religious views of the employer." In short, Defendants do not intend to extend the exemption from the mandate to organizations such as Plaintiff in a manner that would protect and respect Plaintiff's religious beliefs and convictions. (First Am. Compl. at ¶ 51).

Indeed, according to Defendants, they are seeking "to develop alternative ways of providing contraceptive coverage" that would require "contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it." Defendants contend that there would "be no charge for the contraceptive coverage." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). However, even under this proposed regulation, Plaintiff will still be purchasing a healthcare plan that provides "contraceptive coverage directly to [its] plan participants (and their beneficiaries)," which is unacceptable to Plaintiff. Indeed, Plaintiff will still be paying for a

healthcare plan that provides these services "directly to" its employees in violation of Plaintiff's sincerely held religious beliefs. And as Defendants' proposed regulations make plain, the government is inserting itself into Plaintiff's business practices so that, according to the government, Plaintiff's employees would not be "subject" to Plaintiff's "religious views." Consequently, Defendants, through the mandate and its "proposed" regulations, are directly undermining and interfering with Plaintiff's religious beliefs and its business practices. (First Am. Compl. at ¶¶ 71, 72).

Because Plaintiff provides its employees with a healthcare plan, the government mandate forces Plaintiff to provide access to contraception, sterilization, and abortifacients, which is unacceptable to Plaintiff because it violates Plaintiff's sincerely held religious beliefs. (First Am. Compl. at ¶ 73).

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. Employers who offer health insurance do not pay for individual benefits and products as they are provided. Rather, they pay a premium for a policy that gives their employees access to covered benefits and products when they need them.[7] Under the extant regulation, including the proposed "revised" exemption to it, Plaintiff's health plan must include contraceptive services among the covered benefits. Defendants are thus providing

[7] Insurance companies do not donate products and services to covered employees. Drug makers will still charge insurers for birth control pills, IUD's, and other contraceptive devices. Doctors will still bill insurers for reproductive treatment. The reality, as with all mandated benefits, is that these costs will be borne eventually via higher premiums paid by those who purchase the insurance. *See, e.g.*, Congressional Budget Office, Key Issues in Analyzing Major Health Insurance Proposals, at 59, *et seq*. (Dec. 2008), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/99xx/doc9924/12-18-keyissues.pdf (last visited Aug. 27, 2012). Insurers may amortize the cost differently over time, but eventually prices will find equilibrium. Thus, Plaintiff will still pay for contraceptive services, including abortifacients, even if it is nominally carried by a third-party corporation—its health insurance provider. (First Am. Compl. at ¶ 48).

Plaintiff with a Hobson's choice: provide its employees with access to "preventive care" (*i.e.*, contraceptives, sterilization, and abortifacients), which violates Plaintiff's religious convictions, or stop providing any healthcare benefits and accept the consequences. Many of Plaintiff's valued employees, without whom Plaintiff could not provide its much needed services, will be forced to leave Plaintiff and seek other employment that provides healthcare benefits.[8] (*See* Jones Decl. at ¶¶ 16-20 at Ex. 1). In short, Defendants are forcing religious employers, including Plaintiff, out of the healthcare market because of the employers' sincerely held religious beliefs, which is both a direct harm in and of itself and an indirect harm in that it will put Plaintiff at a competitive disadvantage vis-à-vis employers offering healthcare plans in the employee marketplace. (First Am. Compl. at ¶¶ 49, 76; *see* Jones Decl. at ¶¶ 16-20 at Ex. 1).

STANDARD OF REVIEW

When resolving Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court must accept as true the factual allegations contained in the complaint. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). The court may also consider evidence outside of the pleadings, including affidavits and declarations. *Id.* Plaintiff has the burden of proving by a preponderance of the evidence that jurisdiction exists. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

ARGUMENT

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. In an effort to give meaning to Article III's "case or controversy" requirement, the courts have developed several "justiciability doctrines," including

[8] Pursuant to the minimum coverage provision of the Affordable Care Act, many, if not all, of Plaintiff's employees will be subject to the "penalty" tax for not having healthcare coverage since they will no longer be eligible for the "employer-sponsored" healthcare plan exemption, *see* 26 U.S.C. § 5000A(f)(1)(B), once Plaintiff drops its healthcare coverage in order to follow its sincerely held religious beliefs. (*See* Jones Decl. at ¶¶ 16-20 at Ex. 1).

"standing" and "ripeness." Standing focuses on *who* may bring the action, and ripeness is concerned with *when* an action may be brought.[9]

The existence of an "actual controversy" in a constitutional sense is necessary to sustain jurisdiction in this court. As described by the U.S. Supreme Court:

> A *justiciable controversy* is . . . distinguished from a difference or dispute of a *hypothetical* or *abstract* character, from one that is *academic* or *moot*. The controversy must be definite and concrete, touching the legal relations of parties having *adverse legal interests*. It must be a *real and substantial controversy* admitting of specific relief *through a decree of a conclusive character*, as distinguished from *an opinion advising what the law would be upon a hypothetical state of facts*. Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, *the judicial function may be appropriately exercised* . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

Here, there is nothing "hypothetical," "abstract," "academic," or "moot" about the constitutional or statutory claims advanced in this case. Instead, this case presents "a real and substantial controversy" between parties with "adverse legal interests," and this controversy can and should be resolved "through a decree of a conclusive character." *See id*. Consequently, this case will not require the court to render "an opinion advising what the law would be upon a hypothetical state of facts." *See id*. The challenged mandate is currently the law, and Defendants have disavowed making any changes to this mandate that remedy its constitutional

[9] Defendants do not frame the jurisdictional issue related to their *proposed* rulemaking in terms of mootness. However, as discussed in section III., *infra*, it might be helpful to do so to fully understand the implications of what Defendants are asserting here. Essentially, a regulation (*i.e.*, the contraception mandate) is in place, and it is currently the law. Plaintiff is subject to this regulation, which violates Plaintiff's federal statutory and constitutional rights. Yet, Defendants want this court to avoid striking down this mandate based on their entirely unbelievable (*i.e.*, not even rising to the level of speculative) claim that they are going to voluntarily cease their illegal conduct by adopting a new exemption, which, if we take them at their word, is an exemption that does <u>not</u> even remedy the constitutional and statutory defects of the regulation. (*See* First Am. Compl. at ¶¶ 46-51). Consequently, for the same reasons why this case is <u>not</u> moot and will not become moot based on any new proposed rule (*i.e.*, voluntary cessation of illegal conduct), <u>this case is certainly ripe for adjudication</u>.

and statutory defects. Thus, this case presents a "justiciable controversy" in which "the judicial function may be appropriately exercised." *See id.*; *see also Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012) (issuing a preliminary injunction, enjoining the enforcement of the HHS mandate).[10]

I. Plaintiff Has Standing to Challenge the HHS Mandate Because It Has Alleged a Personal Injury that Is Fairly Traceable to the Act and Likely to Be Redressed by this Court.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In order to invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Here, Plaintiff can demonstrate *both* present harm and a significant possibility of future harm that are unquestionably traced to the challenged mandate and can be redressed by the requested relief. Thus, Plaintiff has standing.[11]

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[10] Because Plaintiff will be required to include "preventive care" in its healthcare plan beginning in January 2013, and must now decide for the benefit of its employees and its own benefit whether it will drop its healthcare coverage as a result (*see* Jones Decl. at ¶¶ 14-20 at Ex. 1), Plaintiff intends to file a motion for a preliminary injunction to enjoin the enforcement of the contraception mandate pending a final decision on the merits. *See* Fed. R. Civ. P. 65.

[11] Not only is Plaintiff directly affected by the HHS mandate as an employer such that it has standing in its own right, but it is also a pro-life organization that has associational standing. "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Here, there are employees of Plaintiff that share its religious objections to the HHS mandate and who, by operation of the "minimum coverage provision" of the Affordable Care Act, *see* 26 U.S.C. § 5000A, are required to have insurance under "penalty" of federal law. (*See* Jones Decl. at ¶¶ 1-8, 14-20 at Ex. 1). These employees can meet that insurance requirement and avoid a penalty by having an "employer-sponsored" healthcare plan, *see* 26 U.S.C. § 5000A(f)(1)(B), such as the one they receive from Plaintiff, and if they purchase an individual plan to satisfy this provision, that plan will be subject to the HHS mandate. 42 U.S.C. § 300gg-13. The religious liberty interests that Plaintiff seeks to protect are unquestionably germane to the organization's purpose. And since this case presents a pure legal claim that seeks only prospective relief,

While the necessary injury-in-fact to confer standing is not susceptible to precise definition, *see, e.g., Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (stating that the "rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable"), it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical, " *see Allen*, 468 U.S. at 751; *Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983) (finding that the plaintiff's "assertion that he may again be subject to an illegal choke hold does not create the actual controversy that must exist for a declaratory judgment to be entered"); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (holding that because it was "most unlikely" that the plaintiff would be subject to the proscriptions of the statute in the future, he lacked standing to seek declaratory relief). Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a *personal* and *individual* way," as in this case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

"It is well established that consumers injured by impermissible regulations satisfy Article III's standing requirements." *Harvey v. Veneman*, 396 F.3d 28, 34 (1st Cir. 2005) (citing cases). Indeed, the courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (holding that consumers who suffer economic injury from a regulation prohibited under the Constitution satisfy the standing requirement of Article III); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (stating that there was "no question that petitioners have sufficient standing" to challenge a regulation that would require "changes in their everyday business practices"); *see also Friends*

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the individuals are not required to participate in the action. In short, Plaintiff also has associational standing through its employees, who are integral to and help promote Plaintiff's pro-life objectives and who are similarly harmed by the HHS mandate.

of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "recreational, aesthetic, and economic interests" create the necessary injury-in-fact to confer standing).

Moreover, "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute."[12] *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997) (finding that gun manufacturers and dealers had standing to make a pre-enforcement challenge to a criminal statute that "targeted [them] for regulation"); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *see also Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that is sufficient to confer standing). Consequently, when the plaintiff is an object of the challenged action "there is ordinarily little question that the action or inaction has caused him injury." *Defenders of Wildlife*, 504 U.S. at 561-62.

Plaintiff in this case alleges a personal injury: it is subject to an unlawful regulation that burdens its religious beliefs and practices and that causes present economic injury and adverse effects to its business practices. In fact, the challenged mandate adversely affects one of the most fundamental aspects of any business: the employer/employee relationship. This injury is unquestionably traceable to the HHS mandate and likely to be redressed by the relief requested in this lawsuit (declaratory and injunctive relief). Absent judicial relief, the HHS mandate hangs over Plaintiff's head "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S.

[12] There is no dispute that employers, such as Plaintiff, who object to providing contraceptive services to their employees are *the* principal target of the challenged regulation. (First Am. Compl. at ¶ 50) (acknowledging that Defendants do not intend to provide a "broader exemption" that would in any way "inhibit[] the use of contraceptive services" by employees or "subject . . . employees to the religious views of the employer").

252, 265 n.13 (1991). Indeed, the inevitable action causing harm—the passage of the HHS mandate—has arrived. *See generally Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that the exercise of governmental rule-making power "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such *in advance of the imposition of sanctions* upon any particular individual," observing that "[i]t is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails") (emphasis added). As a result, Plaintiff is compelled to change its behavior to comply with a federal law that impermissibly burdens its right to the free exercise of religion. And Plaintiff need not wait for the inevitable future harm to seek relief from this court. *See generally Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The *threat of sanctions* may deter . . . almost as potently as the actual application of sanctions.") (emphasis added). Therefore, Plaintiff has standing because it has alleged a "personal injury" that is "fairly traceable" to the Act and is "likely to be redressed by the requested relief." *See Allen*, 468 U.S. at 751.

Defendants claim that Plaintiff "cannot transform the speculative possibility of future injury into a current concrete injury for standing purposes by asserting that it must plan now for its future needs." (Defs.' Mem. at 14) (arguing that "[s]uch reasoning would gut standing doctrine"). Defendants are mistaken. Indeed, it was this "reasoning" that many of the federal courts found that the plaintiffs had standing to challenge the "minimum coverage" provision of the Affordable Care Act. *See, e.g., Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011) (changing present behavior to comply with the future mandate requirement causes a present injury in fact). Moreover, there is nothing speculative about the current impact of the mandate on Plaintiff and its business practices. In *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d

272 (6th Cir. 1997), for example, the court rejected the "contention . . . that greater specificity in pleading is required" to assert an economic injury sufficient to confer standing, stating that "it is a matter of commonsense" that businesses forced by the challenged regulation to make changes to their everyday business practices would sustain "a concrete economic injury." *Id.* at 281, n.7 (citing *Abbot Labs.*, 387 U.S. at 152-54). Similarly here, it is "commonsense" that a non-profit organization that is forced by the challenged regulation to adversely change its business practices would sustain "a concrete economic injury." A non-profit organization must still be competitive to sustain its operations—and that includes the ability to attract and maintain quality employees to help run the organization. By forcing Plaintiff to drop a significant benefit that it provides to its employees, and thus further placing its employees in a bind since they must now purchase insurance out-of-pocket to comply with the "minimum coverage" mandate or seek other employment, Defendants are *now* causing a significant, negative economic impact (*i.e.*, injury) upon Plaintiff's business practices. Plaintiff must decide sooner, rather than later, whether (1) it is going to comply with the HHS mandate come January 2013, which is a mere four months and two days away, and thus violate its religious beliefs so that its employees can maintain the same employment benefits or (2) suffer the loss of valuable employees. In short, the HHS mandate places Plaintiff between a rock and a hard place, causing a present injury in fact.

II. Plaintiff's Claims Are Ripe for Review.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs.*, 387 U.S. at 148). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness

of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.

A. Fitness of the Issues for Judicial Decision.

A case that presents a purely legal issue, such as Plaintiff's challenge to the HHS mandate, is unquestionably a case fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (holding challenge to regulatory provisions ripe where the issue presented was legal and would not be clarified by further factual development); *Abbot Labs.*, 387 U.S. at 149 (finding the issues appropriate for judicial resolution because "the issue tendered is a purely legal one"); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290-91 (finding case fit for judicial resolution and noting that "the bare text of the unenforced statute indicates the harm the Act will engender"); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1171 (6th Cir. 1983) (finding question of law which requires no further fact-finding fit for judicial resolution); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3rd Cir. 1996) (finding constitutional challenge to a federal statute ripe for review because it presented a purely legal issue). In short, the question here is a legal one that requires no additional fact finding to resolve: can the federal government compel a private employer to modify its contract with a private insurance company to provide access to contraception, sterilization, and abortifacients to its employees when doing so would violate the employer's sincerely held religious beliefs? This is a legal question that this court can and should answer.

B. Hardship to the *Parties* of Withholding Review.

"In assessing the possible hardship to the parties resulting from withholding judicial resolution, we ask whether the challenged action creates a direct and immediate dilemma for the parties." *Marchi v. Bd. of Coop Educ. Servs.*, 173 F.3d 469, 478 (2d Cir. 1999).

In the present case, the hardship factor weighs in Plaintiff's favor. In fact, it is also in Defendants' interest to know sooner, rather than later, whether the government can mandate contraception coverage in the face of a constitutional and statutory challenge. Not only does this indecision affect Plaintiff adversely, it is also reasonable to conclude that it adversely affects the healthcare market and thus the public in general. *See Thomas*, 473 U.S. 581 ("To require the industry to proceed without knowing whether the [arbitration scheme] is valid would impose a palpable and considerable hardship.") (quotations and citation omitted).

Nonetheless, as demonstrated previously, Plaintiff is presently harmed by Defendants' unlawful mandate. This mandate is causing a present economic injury to Plaintiff by forcing it to make a choice between providing its employees with healthcare insurance, an important employee benefit, which violates Plaintiff's sincerely held religious beliefs, or dropping the coverage and thus losing valuable employees who will be forced to find alternative employment that provides employer-sponsored healthcare insurance to avoid the "minimum coverage" provision penalty. In short, the government is directly interfering with and adversely affecting Plaintiff's business practices, and that adverse effect is occurring now. *See Abbott Labs.*, 387 U.S. at 152-53 (finding hardship in a pre-enforcement challenge caused by new regulations that had the status of law and that caused a present economic impact on the day-to-day operations of the petitioners' businesses); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 284 (finding hardship in a pre-enforcement challenge based on economic injury); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1172 (finding hardship to a company by requiring it to wait to challenge proposed changes in the testing of cigarettes); *see also Columbia Broad. Sys., Inc.*, 316 U.S. at 417-19 (finding challenge ripe prior to the imposition of sanctions and noting that when regulations are promulgated "and the expected conformity to them causes injury cognizable by a court of equity,

they are appropriately the subject of attack"). Indeed, the enforcement of the unlawful mandate against Plaintiff come January 2013 is inevitable, if not presently effective in fact. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) (finding challenge to statute ripe because its obligations were presently effective in fact, even though the plaintiffs had not been threatened with criminal prosecution). Thus, there are no advantages to the parties or this court to be gained from withholding judicial review. In fact, Plaintiff is already suffering harm and, as noted earlier, will be filing a motion for a preliminary injunction to maintain the *status quo* prior to and following January 2013, until the matter is finally resolved. *See Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, at *28 (preliminarily enjoining the enforcement of the HHS mandate in order to maintain the *status quo*).

Indeed, as the U.S. Supreme Court stated in *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1942), "When 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." *See also Riva v. Ma.*, 61 F.3d 1003, 1011 (1st Cir. 1995) ("The demise of a party or the repeal of a statute will always be possible in any case of delayed enforcement, yet it is well settled that a time delay, without more, will not render a claim of statutory invalidity unripe if the application of the statute is otherwise sufficiently probable."). In short, the application of the challenged mandate is "sufficiently probable," if not inevitable such that the case is ripe for review.

C. Other Factors.

Courts have also identified a number of other factors that demonstrate the ripeness of Plaintiff's claims. For example, as noted previously, courts find ripeness where the plaintiff's contemplated course of action falls within the scope of a statute and the statute adversely affects

the plaintiff's current actions. *See Va. v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 393 (1988) (holding that the plaintiff had standing to bring a pre-enforcement challenge to a regulation of booksellers and that the claim was ripe given that the statute created a pull towards self-censorship).

Doe, *supra*, and countless cases like it demonstrate that one reason courts entertain pre-enforcement challenges is fundamental fairness—the notion that a plaintiff should not be forced to choose between complying with an unlawful regulation or exercising a liberty interest. *See, e.g., Metro. Wash. Airports Auth.*, 501 U.S. at 265, n.13 (stating that the claim was ripe where the challenged veto power "hangs . . . like the sword over Damocles, creating a 'here-and-now subservience'"); *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (holding challenge ripe given that a contrary finding "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding challenge ripe where respondents were "faced with a Hobson's choice" of compliance with the law or penalty); *Navegar, Inc. v. United States*, 103 F.3d 994, 998-99 (D.C. Cir. 1997) (holding challenge ripe because a threat of prosecution can put the threatened party "between a rock and a hard place").

Some courts have also recognized that allowing such pre-enforcement challenges promotes the rule of law. *See, e.g., Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 530 (6th Cir. 1998) (holding the plaintiffs' challenge to the assault-weapons ban ripe and stating that "we believe a citizen should be allowed to prefer official adjudication to public disobedience") (quotations omitted); *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (stating that the plaintiff's decision to obey the statutes and bring a declaratory action challenging their

constitutionality, rather than to violate the law, "was altogether reasonable and demonstrates a commendable respect for the rule of law").

In the final analysis, Plaintiff has standing to advance its claims, which are ripe for review.

III. Defendants' Proposed New Rule Does Not Deprive this Court of Its Jurisdiction to Hear and Decide the Important Legal Claims Presented.

While Defendants frame their proposed intention of making a "new" rule as creating a ripeness issue, there is yet another, and perhaps more accurate, way to frame the jurisdictional question. There is no dispute that the HHS regulation mandating coverage for contraception, sterilization, and abortifacients *is currently the law*. There is no dispute that the only exemption currently permitted under the law does not cover Plaintiff. And there is no dispute that Plaintiff must decide (for itself and its employees) *well in advance of January 2013*—the date the mandate affects Plaintiff's healthcare plan—whether it is going to end its healthcare coverage for its employees and thus suffer the consequences or violate its sincerely held religious beliefs. Defendants now claim that they are going to make a *new* regulation that will deprive this court of jurisdiction *to decide the current challenge to the extant regulation*. Consequently, the issue is not necessarily one of ripeness so much as it is an issue of mootness. Indeed, this 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 is frowned upon by the courts, and for good reason: the government could always avoid legal challenges by momentarily ceasing the illegal conduct (*e.g.*, providing a "*temporary* enforcement safe harbor" or making a false promise and creating a false hope that change is coming) and then once the legal challenge is dismissed, return to its old ways. Consequently, the Supreme Court has long recognized that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of

power to hear and determine the case." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 499 (S.D.N.Y. 2008) (same). The Court made it very clear that the "[v]oluntary cessation of *challenged conduct* moots a case . . . *only if it is absolutely clear* that the allegedly wrongful behavior could *not reasonably be expected* to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (quotations omitted) (emphasis added). As the Court noted, not only is a defendant "free to return to his old ways," *but also the public has an interest "in having the legality of the practices settled*." *W. T. Grant Co.*, 345 U.S. at 632 (emphasis added); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways.") (alterations and quotation marks omitted).

Consequently, the party that ceased the unlawful conduct (or promises to cease the unlawful conduct in the near future) bears the burden of showing that "'(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events *have completely and irrevocably eradicated the effects of the alleged violation*.'" *N.Y. Civ. Liberties Union v. Grandeau*, 453 F. Supp. 2d 800, 805 (S.D.N.Y. 2006) (quoting *Lamar Adver. v. Town of Orchard Park*, 356 F.3d 365, 375 (2d Cir. 2004)) (emphasis added). This burden is a "heavy one." *Tiffany*, 576 F. Supp. 2d at 499 (quoting *W. T. Grant Co.*, 345 U.S. at 633); *see also M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 438 (S.D.N.Y. 2006) ("'The defendant's burden is a heavy one to ensure the allegedly illegal activities do not temporarily cease only to resume after the claims have been dismissed.'") (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003)).

Therefore, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. Consequently, a court will lack jurisdiction to hear a claim for injunctive relief based on a change in behavior only "*if the defendant can demonstrate* that 'there is no *reasonable expectation* that the wrong will be repeated.' *The* [*defendants'*] *burden is a heavy one*." *Id.* at 633 (emphasis added); *see also Rivers v. Doar*, 638 F. Supp. 2d 333, 337 (E.D.N.Y. 2009) ("'A case is not to be dismissed as moot if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time.'") (quoting Erwin Chemerinsky, *Fed. Jurisdiction* § 2.5.4 (4th ed. 2003)); *see also M.K.B.*, 445 F. Supp. 2d at 438 ("It is true that defendants have undertaken extensive and commendable ameliorative measures since the filing of this lawsuit, but not to the point where this action is thereby rendered moot, nor the Court deprived of its authority to grant injunctive relief or determine the other questions before it.") (citing *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 185 (2d Cir. 2005)). Indeed, the Supreme Court warned the lower courts to be particularly vigilant in cases such as this, stating, "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit [or perhaps an election, as in this case], and there is probability of resumption." *Id*. at 632, n.5.

Here, the announcement of the so-called "compromise," which does not remedy the constitutional defects of the extant regulation in the first place, cannot be used as a basis to deprive this court of jurisdiction to hear this case. As noted above, this is particularly true for two reasons. One, the current "safe harbor" and the proposed "compromise" will not remedy the harm to Plaintiff. Two, the overwhelming and undisputed evidence shows that Defendants have

no intention of proposing a new rule or regulation that would rescind the HHS mandate for private employers. In sum, this court has jurisdiction to hear and decide the merits of this case.

CONCLUSION

For the foregoing reasons, Plaintiff hereby requests that the court deny Defendants' motion to dismiss for lack of subject matter jurisdiction.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2012, a copy of the foregoing, with Exhibit 1, was served via email on opposing counsel, Michelle R. Bennett, Trial Attorney, U.S. Department of Justice, michelle.bennett@usdoj.gov.

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