IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BELMONT ABBEY COLLEGE, *Plaintiff*, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*.	)	Civ. Action No. 1:11-cv-01989-JEB

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case concerns a regulatory mandate (the "Mandate") issued by Defendants under the Patient Protection and Affordable Care Act, the new national health-care law enacted in 2010. The Mandate will force Plaintiff Belmont Abbey College to offer, at its own expense, employee health insurance coverage for contraceptives, abortion-inducing drugs, sterilization procedures, and related education and counseling.

Belmont Abbey cannot offer insurance coverage for, pay for, support, or otherwise facilitate access to these drugs and services without violating its sincerely held religious beliefs. Accordingly, Belmont Abbey seeks to have the Mandate declared unlawful and unconstitutional under the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedures Act.

The Mandate is a final rule and, by its own terms, begins governing Belmont Abbey's insurance policies in January 2013. Nevertheless, Defendants argue that Belmont Abbey lacks standing and that its claims should be dismissed as unripe. Defendants' arguments rely upon a series of non-binding and unenforceable press conferences, promises, and possible future rule-makings that Defendants claim might eventually resolve the Mandate's obvious constitutional and statutory deficiencies.

None of these measures is sufficient to defeat this court's jurisdiction. For example, Defendants point to non-binding promises they have made to stay enforcing the Mandate against certain entities for one year. But a short-term promise to delay enforcement—which was offered several months after this litigation began, and which could be reneged unilaterally tomorrow without notice and comment—does not change the jurisdictional analysis. Among other things, the promise does nothing to protect Belmont Abbey against enforcement from third parties, does nothing to eliminate Belmont Abbey's pre-

sent burden of planning for a future in which it must bear severe financial penalties and try to attract employees and students without offering health insurance, and merely delays rather than eliminates the harm from government enforcement of the Mandate itself. Indeed, even if Belmont Abbey were guaranteed to suffer no harm until 2014, the court would have jurisdiction to hear the case. This is presumably why in the analogous context of the "individual mandate" cases, these same Defendants ultimately conceded standing and ripeness over a mandate that would not take effect until 2014.

Nor can Defendants deprive this court of jurisdiction with the claim that they *might* use the intervening time to correct their unconstitutional Mandate. Every unconstitutional law under the sun "might" be changed in the future, either because new officials are elected or old ones recognize their constitutional duties. But this possibility does not mean that courts lack jurisdiction to hear challenges to the actually enacted laws that "might" later be fixed. Such a theory would permanently insulate all laws from judicial review. If Defendants want to make their Mandate unreviewable they need to withdraw it; unless and until they do, it remains the law and courts have jurisdiction to review it.

Here, rather than withdraw the unconstitutional Mandate, the Defendants actually have expressly adopted it "as a final rule ***without change***." Group Health Plans and Health Insurance Issues Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-01, 8729 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (emphasis added). Defendants seek to insulate that final rule from this court's review by issuing an "Advance Notice of Proposed Rulemaking" calling for comments on various ideas to attempt to transfer the burden imposed by the Mandate away from religious institutions like Belmont Abbey and onto third parties such

as Belmont Abbey's insurers. *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (cited hereafter as "ANPRM"). The ANPRM floats a variety of possible regulatory schemes for shifting the Mandate's burdens to allegedly willing third parties—ostensibly insurance issuers or third-party administrators—and even suggests that, all else failing, a government agency or private charity might be willing (or, if not, then compelled) to pick up the tab. *See id*. at 16503-04. Yet Defendants concede that no particular solution will definitely be embraced, and the ANPRM, by its own terms, merely presents "questions and ideas to help shape these discussions" and is an "early opportunity for any interested stakeholder to provide advice and input." *Id*. at 16503.

In these circumstances, the law is clear that a mere delay in enforcement is not grounds for prohibiting judicial review. And promises of future rulemaking cannot thwart federal court jurisdiction to review a rule that is already final and binding, particularly where—as here—the possible future rules being contemplated would not resolve the underlying conflict. For these reasons, and as set forth more fully below, the Court should reject Defendants' standing and ripeness arguments and deny their motion to dismiss.

BACKGROUND

1. Belmont Abbey College

Belmont Abbey College was founded in 1876 by an order of Benedictine monks who built the campus with bricks they formed by hand. Today, their monastery remains at the center of campus, where the current Abbey monks live and continue to sponsor the College. Am. Compl. ¶¶ 20-21. Obedience to the teachings of the Catholic Church is central to the College's identity and mission. *Id*. ¶¶ 22-23. Consequently, the College sincerely believes that Catholic teachings regarding the proper order of human sexuality and the

protection of nascent human life forbid it from providing employees with insurance coverage for contraceptives, abortion-inducing drugs, sterilizations, or related education and counseling. *Id.* ¶¶ 24-25.

2. The Affordable Care Act and HHS Mandate

The Mandate was first enacted in July 2010, amended to add a narrow exemption for religious employers in August 2011, and then finalized without change in February 2012. The Mandate derives from the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act"), which became law in March 2010.[1] One of the Act's many provisions requires group health plans to provide women with "preventive care and screenings" without cost-sharing. The Act specified that "preventive care and screenings" would be detailed in guidelines issued by the Health Resources and Services Administration (HRSA), a division of Defendant Department of Health and Human Services (HHS).[2] 42 U.S.C § 300gg–13(a)(4).

On July 19, 2010, HHS and the other Defendant agencies issued an "interim final rule" implementing the Act's preventive care provision and confirming that HRSA would define "preventive care" "no later than August 1, 2011." 75 Fed. Reg. 41726-01, 41728 (2010). On that date, HRSA issued guidelines stating that preventive services would include, among other things, "[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with

[1] The national health-care law was enacted through two separate measures passed within one week of each other: The Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (Mar. 30, 2010). Throughout this brief, the terms "Affordable Care Act" or "Act" refer collectively to both laws.

[2] Unless context indicates otherwise, all references to HHS include Defendants Department of Labor and Department of Treasury.

reproductive capacity."[3] FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices such as IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill."[4]

3. The Mandate's narrow "religious employer" exemption

Also on August 1, 2011, HHS issued an amended interim final rule reiterating the mandate and adding a narrow exemption for some "religious employer[s]." 76 Fed. Reg. 46621-01, 46623 (published Aug. 3, 2011). To be exempt, a "religious employer" must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization;
>
> (2) The organization primarily employs persons who share the religious tenets of the organization;
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4) (HHS); *see also* 26 C.F.R. § 54.9815-2713T (Treasury); 29 C.F.R. § 2590.715-2713 (Labor). Belmont Abbey cannot satisfy these requirements. Am. Compl. ¶¶ 98-106.

4. Public Outcry

The Mandate and its religious employer exemption were greeted by significant public outcry. Over 200,000 public comments were submitted. Belmont Abbey filed this lawsuit

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[3] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Mar. 19, 2012).

[4] *See* FDA, *Birth Control Guide* (Oct. 19, 2011), http://www.fda.gov/forconsumers/byaudience/ forwomen/ucm118465.htm (last visited Mar. 16, 2012) (describing various FDA-approved contraceptives, including the "emergency contraceptives" Plan B and ella).

on November 10, 2011, and at least seven other suits have followed.[5] Objections by non-exempt religious organizations were taken to the highest levels, including directly to the President of the United States.[6]

More than two months after this case was filed, Defendant Secretary Sebelius issued a press release on January 20, 2012 to address the mounting concerns.[7] Although Secretary Sebelius conceded "the important concerns some have raised about religious liberty," she offered no change to the Mandate or its narrow "religious employer" exemption. Instead, she announced that non-exempt religious institutions would be given one additional year "to adapt to this new rule." *Id.* And during that year, objecting institutions would still be required to advise their employees where, when, and how they could obtain the objected-to services. *Id.*

5. The February 10, 2012 Press Conference

On February 10, 2012, Defendants held a press conference—this time with the President of the United States—to further address concerns about the Mandate. Three relevant announcements were made at, or immediately following, the conference. First, at the press conference, the President announced his intent, at some point in the future, to create

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[5] *See Colo. Christian Univ.* v. *Sebelius*, Case No. 11-3350 (D. Colo. Dec. 22, 2012); *Eternal Word Television Network, Inc.* v. *Sebelius*, Case No. 12-501 (N.D. Ala. Feb. 9, 2012); *Priests for Life* v. *Sebelius*, Case No. 12-753 (E.D.N.Y. Feb. 15, 2012); *La. Coll.* v. *Sebelius*, Case No. 12-463 (W.D. La. Feb. 18, 2012); *Ave Maria Univ.* v. *Sebelius*, Case No. 12-88 (M.D. Fla. Feb. 21, 2012); *Geneva Coll.* v. *Sebelius*, Case No. 12-207 (W.D. Pa. Feb. 21, 2012); *Bruning* v. *Sebelius*, Case No. 12-3035 (D. Neb. Feb. 23, 2012); *O'Brien* v. *HHS*, Case No. 12-476 (E.D. Mo. Mar. 15 2012).

[6] *See* Robert Pear, *Democrats Urge Obama to Protect Contraceptive Coverage in Health Plans*, N.Y. Times, Nov. 19, 2011, available at http://www.nytimes.com/2011/11/20/us/politics/democrats-urge-obama-to-defend-birth-control-rules.html?scp=9&sq=dolan%20%20obama&st=cse (last visited Mar. 16, 2012) (describing meeting between Archbishop Timothy M. Dolan and President Obama).

[7] *See* January 20, 2012 Statement of HHS Secretary Kathleen Sebelius, available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Mar. 16, 2012).

a new mandate on insurance issuers who would pay for the objected-to drugs and services themselves. Second, that afternoon, HHS issued a bulletin describing a "Temporary Enforcement Safe Harbor" for certain organizations.[8] The bulletin advises that, under the safe harbor, Defendants will not enforce the Mandate for one additional year against at least some non-exempt, religiously-opposed, non-profit entities, as long as they have not provided contraceptive coverage since February 10, 2012, "consistent with any applicable State law." HHS Bulletin at 3. And third, also that afternoon, Defendants issued "final regulations" adopting the Mandate and its narrow "religious employer" exemption "as a final rule ***without change***." 77 Fed. Reg. 8725-01, 8729 (published Feb. 15, 2012) (emphasis added).

Under the final rule, the Mandate takes effect beginning the first plan year after August 1, 2012. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. at 46623. Belmont Abbey's plan runs from January of each year. Am. Compl. ¶ 33. Thus, although the safe-harbor purports to stay enforcement in certain instances, the Mandate takes effect against Belmont Abbey beginning January 2013.

6. The "Advance Notice of Proposed Rulemaking"

On March 16, 2012, Defendants announced an "Advance Notice of Proposed Rulemaking. Press Release, U.S. Dep't of Health and Human Servs., Administration releases Advance Notice of Proposed Rulemaking on preventive services policy (Mar. 16, 2012),

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[8] *See* Center for Consumer Information and Insurance Oversight and Centers for Medicare & Medicaid Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, And Section 9815(a)(1) of the Internal Revenue Code 3, 6, available at http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Mar. 16, 2012) [hereinafter HHS Bulletin].

available at http://www.hhs.gov/news/press/2012pres/03/20120316g.html. The Advance Notice does not propose amending the Mandate or its "religious employer" exemption in any way. Rather it suggests creating an additional new mandate that would force insurers to assume the financial and administrative burdens of providing the Mandate's services made available through the insurance plans of non-exempt religious organizations. ANPRM at 16503 (stating that proposed insurer mandate will seek "alternative ways" to address religious liberty concerns of "non-exempt, non-profit religious organizations with religious objections"). The Advance Notice expressly emphasizes that the Mandate will remain in full force and effect. *Id*. at 16502.

LEGAL STANDARD

In evaluating a motion to dismiss, the Court "must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in [the College's] favor." *LaRoque* v. *Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (internal quotation marks omitted). The College bears the burden of demonstrating the Court's subject matter jurisdiction. *U.S. Ecology, Inc.* v. *U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). *See generally Citizens for Responsibility & Ethics in Wash.* v. *FEC*, 799 F. Supp. 2d 78, 84-85 (D.D.C. 2011) (Boasberg, J.) (setting forth 12(b)(1) standards).

ARGUMENT

Defendants' standing and ripeness challenges are unfounded.

I. Belmont Abbey has standing to challenge the Mandate.

To show Article III standing, Belmont Abbey must allege (1) it suffers an actual or imminent injury (2) that is fairly traceable to the Defendants' actions and (3) likely to be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Ord* v. *Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009); *Mylan Pharm.*

Inc. v. *FDA*, 789 F. Supp. 2d 1, 6 (D.D.C. 2011). Defendants do not challenge the second and third prongs. Rather, they argue only that the College has failed to allege an actual or imminent injury from the Mandate. This argument is untenable.

The complaint contains detailed allegations showing that the Mandate coerces Belmont Abbey to violate its religious beliefs under threat of heavy fines and other severe penalties. Specifically, it asserts that Belmont Abbey (1) offers health insurance coverage to its employees and students; (2) has more than fifty employees and is therefore subject to penalties for failing to offer health insurance; (3) cannot qualify for the "religious employer" exemption; and (4) cannot offer coverage for the prescribed goods and services without violating its faith. Am. Compl. ¶¶ 24-30, 98-106. The complaint likewise expressly alleges that the Mandate applies to Belmont Abbey and requires Belmont Abbey to "provide coverage or access to coverage for contraception, sterilization, abortion, and related education and counseling against its conscience in a manner that is contrary to law." Am. Compl. ¶ 74. Belmont Abbey also states it has already devoted considerable time and resources to determine how to respond to the Mandate, and must continue doing so. Am. Compl. ¶ 96. Finally, Defendants themselves have made clear that, even if the temporary safe harbor applies, Belmont Abbey will be subject to enforcement under the Mandate by January 1, 2014. These allegations easily demonstrate that Belmont Abbey faces both actual and imminent injury from the Mandate. *See, e.g.*, *Lujan*, 504 U.S. at 561-62 ("[T]here is ordinarily little question that the action or inaction has caused [the plaintiff] injury" if "the plaintiff is himself an object of the action . . . at issue.").

Defendants offer three arguments against standing. First, they claim the complaint fails to allege adequately that the Mandate applies, because it does not eliminate the possibility that the College's insurance plan is "grandfathered." Defs.' Br. at 12-14. Second,

Defendants say that—even if the College's plan is not grandfathered (which it is not)—the alleged injury is insufficiently "imminent" because the safe harbor ensures the Mandate will not be enforced against Belmont Abbey until January 1, 2014. *Id.* at 14-16. Finally, Defendants contend that eventual enforcement is speculative because the promised new rulemaking could someday completely exempt the College from compliance. *Id.* at 16-17. Each of these arguments fails to defeat standing.

A. The College's plan is not and cannot be grandfathered.

Under the Affordable Care Act, group health plans in existence before March 23, 2010, and continuously covering individuals since that date, can be "grandfathered." 42 U.S.C. § 18011. Grandfathered plans are exempt from most of the Act's provisions, including the preventive care requirement. *See id.* To maintain grandfathered status, however, a plan must have existed and had enrollees on March 23, 2010, must provide annual notices of grandfathered status and must—among other things—avoid any significant changes to the plan's coverage, annual limits, or cost-sharing provisions. *See* 45 C.F.R. § 147.140(a), (g); 26 C.F.R. § 54.9815–1251T(a), (g); 29 C.F.R. § 2590.715–1251(a), (g). Defendants argue that Belmont Abbey has failed to adequately allege an actual injury because the complaint does not establish that Belmont Abbey's plan is ineligible for "grandfather" status. Defs.' Br. at 12-14.

Defendants are mistaken for two reasons. First, Belmont Abbey need not plead matters of such specificity to allege an actual injury for standing purposes. Rather, "[a]t the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice,' and the court 'presum[es] that general allegations embrace the specific facts that are necessary to support the claim." *Sierra Club* v. *EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (quoting *Lujan*, 504 U.S. at 561). It is therefore sufficient that Belmont

Abbey alleges generally that it is subject to, and injured by, the Mandate. Am. Compl. ¶¶ 74-93. Put another way, the *only* reasonable inference from the many allegations in the Amended Complaint that the Mandate affects Belmont Abbey, is that the College's plan is not grandfathered.[9]

But more importantly, Belmont Abbey's amended complaint expressly clarifies that its "employee health insurance plan is not eligible for grandfather status." Am. Compl. ¶¶ 34, 94-95. In particular, the amended complaint alleges that Belmont Abbey began offering a "new . . . *plan*" in 2011. Am. Compl. ¶34 (emphasis supplied).

Defendants argue that these allegations are conclusory and insufficient. Defs.' Br. at 13-14. Defendants' argument rests largely on their interpretation of 45 C.F.R. 147.140(a)(1)(i), which says that "a group health plan . . . does not cease to be a grandfathered health plan merely because the plan (or its sponsor) enters into a new policy, certificate, or contract of insurance after March 23, 2010." *Id*. at 13. But the Amended Complaint does not allege that Belmont Abbey merely entered into a new policy, certificate, or contract of insurance in 2011—it alleges that the College adopted a new *plan*. Am. Compl. ¶ 34. Grandfathered status simply cannot exist for a "new plan" that did not exist—and therefore did not cover *anyone*—on March 23, 2010. *See* Defs.' Br. at 12 ("A grandfathered plan is a health plan ***in which at least one individual was enrolled on March 23, 2010*** and that has ***continuously covered at least one individual since that***

[9] *See, e.g.,* Am. Compl. ¶74 (Mandate "requires that Belmont Abbey College provide coverage or access to coverage for . . ."); ¶ 75 (Mandate "constitutes government-imposed pressure and coercion on Belmont Abbey College . . ."); ¶76 (Mandate "exposes Belmont Abbey College to substantial fines . . ."); ¶ 77 (Mandate "imposes a burden on Belmont Abbey College's employee and student recruitment efforts . . ."); ¶ 79 (Mandate "forces Belmont Abbey College to provide coverage . . . in violation of its religious beliefs.").

date.") (emphasis supplied). The Amended Complaint establishes that Belmont Abbey does not have such a plan—it created a "new plan" in 2011. Am. Compl. ¶ 34; *see also id.* ¶ 94 ("Belmont Abbey College's current employee health insurance plan was instituted after March 23, 2010.").[10]

Nevertheless, to the extent there is any doubt about whether Belmont Abbey's plan is grandfathered, Belmont Abbey has included a copy of its current employee health plan with this filing. *See* Declaration of Dr. William K. Thierfelder, Exhibit 1.[11] That plan clearly does not contain the required representations for a grandfathered plan described in Defendants' Brief at 14, n.7; *see also* 45 C.F.R. 147.140(a)(2) ("To maintain status as a grandfathered health plan, a plan or health insurance coverage ***must include a statement, in any plan materials provided to a participant or beneficiary . . . that the plan or coverage believes it is a grandfathered health plan . . .")***(emphasis added). Accordingly, Belmont Abbey's plan is not (and could not be) grandfathered. *Id.*

Thus, the general availability of grandfathering for other entities cannot deprive this court of jurisdiction.

B. The one-year "safe harbor" against enforcement does not make Belmont Abbey's injury any less imminent.

Defendants also try to defeat standing on the ground that "the earliest [Belmont Abbey] could be subject to any enforcement action . . . is January 1, 2014." Defs.' Br. at 15. Defendants claim this makes Belmont Abbey's asserted injury "too remote temporally"

[10] As the Amended Complaint makes clear, Belmont Abbey made this change in January 2011, before the Defendants announced their intention to force religious objectors such as Belmont Abbey to provide or facilitate access to drugs that Plaintiff understands to terminate early human life and otherwise conflict with Belmont Abbey's religious obligations. Am. Compl. ¶ 24, 25, 34.

[11] The district court may consider materials outside the pleadings when deciding whether to grant a motion to dismiss for lack of jurisdiction. *Jerome Stevens Pharm., Inc.* v. *FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *see also Vanover* v. *Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C.1999).

and thus lacking "imminence." *Id*. But Belmont Abbey is likely not eligible for the safe-harbor grace period. And even if it is, a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted).

To qualify for the one-year, no-enforcement safe harbor, an organization must certify that, "at any point from February 10, 2012 onward, contraceptive coverage has not been provided by the plan." HHS Bulletin at 3, 6. Belmont Abbey, however, does *not* object to providing coverage for drugs typically used for contraceptive purposes when they are instead used for purely medical purposes other than birth control, such as treating ovarian cysts. Am. Compl. ¶ 118. Hence, Belmont Abby may not be able to make the certification necessary to qualify for the one-year safe harbor.[12]

Moreover, even if Belmont Abbey did qualify, the safe harbor does not make the Mandate's enforcement uncertain—it merely delays that enforcement by one year. Indeed, Defendants concede that the safe harbor is "temporary" and that enforcement will commence immediately after the one-year grace period expires, *i.e.*, in the case of Belmont Abbey, on January 1, 2014. *See* HHS Bulletin at 3 (providing that "[t]he temporary enforcement safe harbor will be in effect until the first plan year that begins on or after

[12] The Defendants claim that they "have clarified" that entities that only object to some contraceptives will be protected by the safe harbor. Defs.' Br. at 15. First, the alleged "clarification" does not change the substance of the certification Belmont Abbey would be required to make, namely that contraceptive coverage "has not been provided." HHS Bulletin at 6. Belmont Abbey may not be able to make that representation because, as the Amended Complaint explains, Belmont Abbey has no objection to covering contraceptive drugs for non-contraceptive purposes.

In any case, the ease with which Defendants "clarified" the guidance document demonstrates why its promise is so utterly meaningless: the guidance document is not law, is not binding in any way, and can be changed, unilaterally and without notice and comment, at any time. Thus, Defendants could just as easily drop their mid-litigation decision not to prosecute some religious objectors tomorrow.

August 1, 2013); *id.* at 2 (stating that the safe harbor "provides *an* additional year"). Thus, as the Supreme Court has explained, "it is irrelevant . . . that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 143 (1974).

In a nearly identical legal setting, Defendants recently conceded that an even longer time gap than presented here cannot defeat standing. In their defense of the Affordable Care Act's "individual mandate"—which also does not take effect until 2014—Defendants initially argued that the individual plaintiffs' alleged injuries were not imminent because the mandate's impact would not be felt for forty months. *See Fla. ex rel. McCollum* v. *HHS*, 716 F. Supp. 2d 1120, 1145-46 (N.D. Fla. 2010). The argument failed, however, *id.* at 1146-47, and on appeal, Defendants expressly conceded the individual plaintiffs' standing. *See Fla. ex rel. Att'y Gen.* v. *HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011) ("Notably, the government does not contest the standing of the individual plaintiffs or of the NFIB to challenge the individual mandate.").

Defendants' recycled argument fares no better here. The Supreme Court has found standing to challenge laws that won't go into effect for as many as three and even six years. *See Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 536-37 (6th Cir. 2011) (citing cases). The D.C. Circuit has found a thirteen-year gap not to defeat standing. *Vill. of Bensenville* v. *FAA*, 376 F.3d 1114, 1190 (D.C. Cir. 2004). The Mandate here will take effect no later than January 1, 2014—a short period of time by comparison—and thus is imminent for purposes of standing.[13] Indeed, the D.C. Circuit could not have reached the

[13] Defendants' cited authorities are inapposite. *See* Defs.' Br. at 15-16. In *McConnell* v. *FEC*, the plaintiff politicians challenged a statute setting broadcasting rates that would not impact them unless and until they ran for re-election in five years. 540 U.S. 93, 226 (2003). In *Whitmore* v.

merits in Seven-Sky v. Holder if a delay until 2014 eliminated jurisdiction. *See* Seven-Sky v. Holder, 661 F.3d 1, 4 (D.C. Cir. 2011) (addressing constitutionality of provision of Affordable Care Act that takes effect "beginning in January 2014.").

Moreover, a mere promise not to enforce the law is non-binding and cannot be relied upon to destroy standing. In *Chamber of Commerce of U.S.* v. *FEC,* the plaintiffs were "not faced with *any* present danger of an enforcement proceeding" under the challenged statute because the Commission lacked the votes to implement one. 69 F.3d 600, 603 (D.C. Cir. 1995) (emphasis added). The Court nonetheless found that the plaintiff's claims were ripe on the ground that nothing could stop the Commission "from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners." *Id.*; *see also BBK Tobacco & Foods, LLP* v. *FDA*, 672 F. Supp. 2d 969, 975 (D. Ariz. 2009) (noting that agencies are "free to abandon" at any time their "current thinking" as found in "guidance documents").

Similarly here, the HHS Bulletin's safe-harbor assurances are temporary, have not undergone rulemaking or otherwise been made binding, and could be changed at any time. Thus, Defendants cannot rely upon them to thwart judicial review. *Va. Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 388 (4th Cir. 2001) (holding that "policy of nonenforcement," though "more formal than [a] promise," was "not contained in a final rule that underwent the rigors of notice and comment rulemaking," did "not carry the binding force of law," and thus could not defeat standing); *Flake* v. *Bennett*, 611 F. Supp. 70, 74 (D.D.C. 1985) (holding that policy to stay enforcement was temporary and of no impact where "not formally rescinded . . . by rulemaking or otherwise").

Arkansas, a death row inmate was denied standing to challenge the validity of a death sentence imposed on another inmate. 495 U.S. 149 (1990).

C. The promise of an additional mandate does not make the current Mandate's impending harm speculative.

Defendants have claimed that, during the safe-harbor period, they "plan to initiate" a new mandate forcing insurance issuers to provide contraceptives for employees of "non-exempted, non-profit religious organizations with religious objections"..."to covering contraceptive services." 77 Fed. Reg. at 8728-29; Defs.' Br. at 16-17. The Advance Notice of Proposed Rulemaking "suggest[s] multiple options" for how this might be accomplished and invites the public to comment on them. ANPRM at 16503. Defendants insist there is "no reason to suspect" that Belmont Abbey will ever be subject to the Mandate and that "any suggestion to the contrary is entirely speculative at this point." Defs.' Br. at 16-17. Defendants' self-serving and speculative argument fails for many reasons.

First, "[s]tanding is determined at the time the complaint is filed," not in the course of litigation after the defendant seeks to cure its wrongful conduct. *Natural Law Party of U.S.* v. *FEC*, 111 F. Supp. 2d 33, 40 (D.D.C. 2000); *see also Lujan*, 504 U.S. at 571 ("The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*"). Neither the safe harbor provision nor the promise of future rulemaking existed when the case commenced. Hence, they are irrelevant to the question of standing. The Defendants cannot defeat this court's jurisdiction by making non-binding mid-litigation promises about possible future rulemakings.

Defendants' argument is more akin to one of mootness. *See Natural Law Party*, 111 F. Supp. 2d at 40 ("[M]ootness ensures that the requisite personal stake necessary at the outset of litigation continues throughout its course."). But even that doctrine fails to support dismissal in any way. A case becomes moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Fund for Ani-*

mals v. *Jones*, 151 F. Supp. 2d 1, 5 (D.D.C. 2001) (citations omitted). But "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (voluntary cessation "does not make the case moot."). This is true especially where the alleged "cessation" fails to cure the underlying harm. *See, e.g., Am. Petroleum Inst.* v. *EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). Indeed, the standard for determining whether a dispute has been mooted by a defendant's voluntary conduct is "stringent." *Friends of the Earth*, 528 U.S. at 189. A court must make "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. This "'heavy burden' . . . lies with the party asserting the mootness." *Id*. (internal citations omitted).

Defendants cannot meet this burden, because the mere promise of a possible future rulemaking is never sufficient to overcome a regulation that is already final and binding. "[A]n agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *Am. Petroleum Inst.*, 906 F.2d at 739-40 (emphasis in original). Indeed, even a plaintiff's own "request [to the agency] for a new rulemaking . . . would not pose any problem for [a court's] subject matter jurisdiction." *32 Cnty. Sovereignty Comm.* v. *Dep't of State*, 292 F.3d 797, 798-99 (D.C. Cir. 2002). This is because a final rule is binding, and "an agency can amend it only through a new rulemaking." *Id*. "[A]gencies cannot avoid judicial review of their final actions merely because they have opened another docket that may address some related matters."

Am. Bird Conservancy, Inc. v. *FCC*, 516 F.3d 1027, 1031 (D.C. Cir. 2008) (citations omitted).[14]

Here, Defendants have done no more than open another docket to propose addressing related matters. They do not propose to amend the Mandate, but rather expressly confirm its binding force, ANPRM at 16502, and promise only to create a new mandate on insurance companies, *see, generally, id*. And, indeed, in February they formally confirmed the existing Mandate with its narrow "religious employer" exemption "as a final rule without change." 77 Fed. Reg. at 8729.

Even more significantly, the protections proposed in the Advance Notice would not resolve the underlying religious conflict. Belmont Abbey would still be required to purchase insurance that grants access to services that violate its deeply held religious convictions. Although its insurer ostensibly would administer those services, Belmont Abbey would still have to provide the issuer "access to information necessary to communication with the plan's participants," ANPRM at 16506. And Belmont Abbey's offering of the policy would be the triggering act that would facilitate access to the contested services, which Belmont Abbey cannot do.[15]

Indeed, the ANPRM appears to constitute no change from the status quo at all. Like most employers, Belmont Abbey does not directly provide health-care services to its em-

[14] Defendants have not cited any authority to the contrary. The only case they do cite on this issue—*Animal Legal Def. Fund, Inc.* v. *Espy*—is irrelevant. *See* Defs.' Br. at 16. It holds that a former researcher lacked standing to contest a federal animal-testing regulation where her research no longer addressed the regulated subject and where the likelihood of her future research into that subject was entirely within her control. 23 F.3d 496, 501 (D.C. Cir. 1994) (reasoning that plaintiff "suffers no injury and will not do so unless she makes a further choice to subject herself to [research]").

[15] *See* Am. Compl. ¶30 ("Nor would Belmont Abbey College's religious beliefs permit it to deliberately provide health insurance that would facilitate access to artificial contraception, sterilization, abortion, or related education and counseling—even if those items are paid for by an insurer and not by Belmont Abbey College.").

ployees. The services are always provided by some third party—typically the employee's medical doctor or hospital. Belmont Abbey selects and pays for the plan, but the attendant medical care, payment, and other administrative matters are handled directly between the insurer and the employee's personal medical providers. Thus, even under the promised new rulemaking, Belmont Abbey would still be making the objectionable services available to employees through a plan that it sponsors and pays for, in exactly the same way it would be under the Mandate, and in the manner it alleges violates its constitutional rights. *See, e.g.,* Am. Compl. ¶30.

Similarly, the Advance Notice's assurances that religious institutions like Belmont Abbey will no longer be paying for the objectionable services are purely speculative. There is no guarantee that covering contraceptives, abortion-drugs, sterilization procedures, and related counseling and education services will reduce overall costs, or that the savings will be passed on to Belmont Abbey. In fact, the Advance Notice explicitly suggests that insurance issuers and third-party administrators can fund the costs of providing contraceptive coverage for religious institutions through "drug rebates, service fees, disease management programs, or other sources" even though these programs would otherwise ultimately benefit the religious institution. ANPRM at16507 ("These funds may inure to the third-party administrator rather than the plan or its sponsor . . . ."). Thus even if one of the suggestions in the Notice someday does become law, it will not resolve Belmont Abbey's claims.

For these reasons, the Notice cannot operate to deprive this Court of jurisdiction. The Mandate is an existing, binding, and final rule. It will remain an existing, binding, and final rule unless and until Defendants revoke it. The Defendants' mid-litigation non-

binding invitation to brainstorm about a possible additional issuer mandate that doesn't resolve the underlying injury changes nothing. *Flake*, 611 F. Supp. at 75 (rejecting jurisdictional argument that "reevaluation . . . may yield something quite different from what the plaintiff's are challenging"; "This claim appears to be no more than a variation on defendants' mootness argument and is answerable in the same way: a practice is not *less* likely to recur because the defendants promise to reconsider the program, rather than to abolish it altogether.").

II. Belmont Abbey's claims are ripe for adjudication.

"[I]f a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied" as well. *Casanova* v. *Marathon Corp.*, 256 F.R.D. 11, 13 (D.D.C. 2009) (citing *Nat'l Treasury Employees Union* v. *United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996)). As set forth in the preceding section, Belmont Abbey faces an imminent injury under the Mandate more than sufficient to establish standing. Thus, it is unnecessary to separately consider Defendants' ripeness challenge. Nevertheless, a full analysis of the ripeness issues serves to confirm that Defendants' motion to dismiss must be denied.

Courts apply a two-pronged test to determine whether a case is ripe for adjudication. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967); *Vill. of Bensenville*, 376 F.3d at 1119-20. First they evaluate "the fitness of the issues for judicial decision." *Abbott Labs.*, 387 U.S. at 149. Then they consider "the hardship to the parties of withholding court consideration." *Id*. If the fitness prong is satisfied, "[lack of] hardship cannot tip the balance against judicial review." *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2005) (citations omitted). But if there are doubts as to fitness, a showing of "hardship to the parties" can "outweigh[] the competing institutional interests

in deferring review." *Eagle-Picher Indus.* v. *EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985). Here, analysis of both prongs compels the conclusion that Belmont Abbey's claims are ripe for adjudication.

A. The Mandate is fit for review.

"An issue is 'fit for judicial resolution' under the ripeness test, if it is (a) essentially legal, and (b) 'sufficiently final.'" *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 783 F.2d 237, 249 (D.C. Cir. 1986) (citation omitted). Both requirements are satisfied here.

1. The Mandate is a final rule that is legally binding.

The Mandate is unquestionably final. Under the ripeness analysis, a regulation is "final" when it has been "promulgated in a formal manner" and is "quite clearly definitive," not "tentative" or "only the ruling of a subordinate official." *Abbot Labs.*, 387 U.S. at 151. Where a regulation comes "at the end of a rulemaking proceeding in which [the agency] solicited and received public comments" the resulting rule clearly "represents the agency's 'final' position on the issue." *See Consol. Rail Corp.* v. *United States*, 896 F.2d 574, 577 (D.C. Cir. 1990) (internal citation omitted). On February 10, 2012, following an interim final rule, an amended interim final rule, and extensive public comments, Defendants issued a final regulation emphasizing that the Mandate was being "adopted as a final rule without change." 77 Fed. Reg. at 8730. Under these circumstances, Defendants cannot reasonably dispute that the new "Final Rule" is truly ***final*** for purposes of the ripeness doctrine. *See Abbott Labs.*, 387 U.S. at 151 ("The regulation challenged here,

promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive.")[16]

2. Belmont Abbey's claims raise questions that are essentially legal.

The ripeness doctrine favors disputes that are "purely legal" over those that would "benefit from a more concrete setting." *Vill. of Bensenville*, 376 F.3d at 1120. The latter category covers disputes raised "in the context of a specific attempt to enforce the regulations," *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967), that may become "more concrete from further ***factual*** development." *Brock*, 783 F.2d at 250 (emphasis added). In contrast, a challenge to the constitutionality of a regulation is "a relatively pure legal one that subsequent enforcement proceedings will not elucidate." *See Chamber of Commerce*, 69 F.3d at 603-04.[17]

Belmont Abbey's challenge to the Mandate unquestionably raises questions of law that are largely independent of any context-specific facts. Its Free Exercise claim alleges that the Mandate violates the First Amendment because it is not neutral or generally applicable *on its face*. It is not neutral because it exempts a favored class of religious objec-

[16] Even "interim" final rules are generally ripe for adjudication. *See Ark. Dairy Co-op Ass'n, Inc.* v. *U.S. Dep't of Agric.*, 573 F.3d 815, 827 (D.C. Cir. 2009) ("[T]he *Interim Rule* they challenge constitutes final agency action."); *Career Coll. Ass'n* v. *Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996) ("The key word in the title 'Interim Final Rule,' . . . is not interim, but *final*. 'Interim' refers only to the Rule's intended duration-not its tentative nature.").

[17] As the D.C. Circuit explained in *Chamber of Commerce*:

> We must bear in mind also that appellants claim that the rule infringes on their First Amendment rights. A party has standing to challenge, pre-enforcement, even the constitutionality of a *statute* if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution. Since an agency rule, unlike a statute, is typically reviewable without waiting for enforcement, *Abbott Labs. v. Gardner,* 387 U.S. at 139-41, this case is *a fortiori* to the statutory cases. We conclude that the Commission's standing argument is rather weak and easily reject it. For similar reasons, we discard the Commission's even weaker claim that the question of the validity of the rule is not ripe. The issue presented is a relatively pure legal one that subsequent enforcement proceedings will not elucidate.

tors and expressly excludes from that exemption a disfavored class. 45 C.F.R. § 147.130(a)(iv)(A)-(B). Also, the Mandate is not generally applicable because it does not apply to numerous categories of employers, *see e.g.*, 26 U.S.C. § 4980H(A) (exempting small employers); 42 U.S.C. § 18011(a)(2) (exempting employers with grandfathered plans), and creates—again, on its face—a system for granting individualized exemptions, *see* 45 C.F.R. § 147.130(a)(1)(iv)(A) (stating that the agency "***may*** establish exemptions") (emphasis added).

Similarly, Belmont Abbey's Establishment Clause claim raises the purely legal question of whether the Mandate—by favoring some religious organizations over others—violates "[t]he clearest command of the Establishment Clause"—that "one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). And the APA and RFRA claims likewise turn on questions of law. *See Eagle-Picher Indus.*, 759 F.2d at 916 (review under APA is "a purely legal question"); *Hamilton* v. *Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) ("[T]he ultimate conclusion as to whether [a] regulation deprives [the plaintiff] of his free exercise right [under RFRA] is a question of law.").

Thus Belmont Abbey's claims are fit for adjudication. *See McCollum*, 716 F. Supp. 2d at 1149 ("In the context of a facial challenge, … 'a purely legal claim is presumptively ripe for judicial review.'"); *Eagle-Picher Indus.*, 759 F.2d at 915 ("[I]f the issue raises a purely legal question . . . we assume its threshold suitability for judicial determination").

3. The promise of possible future rulemaking has no impact on the Mandate's finality or legality.

Defendants' argument that the Mandate is unfit for review because they have promised to engage in possible additional future rulemaking is unavailing for the same reasons set forth above with respect to standing.

First and foremost, the mere promise of possible future rulemaking does not change the fact that the Mandate has been adopted as a *final* rule, and will remain a final, binding, and enforceable rule unless and until revoked. All laws might be changed, and promises to change or improve laws are particularly common in election years. Promises cannot deprive this court of jurisdiction.

Here, Defendants are not even promising to revoke the unconstitutional Mandate. To the contrary, at the same time they began making the promises offered here, Defendants took affirmative action to adopt the Mandate "as a final rule ***without change***." 77 Fed. Reg. at 8729 (emphasis added).

Instead, all Defendants really offer is a public brainstorming session about *additional* mandates Defendants might impose on third parties, which *Defendants* assert should satisfy Belmont Abbey's religious objections. But in truth these possible future changes would not alleviate the conflict with Belmont Abbey's religious convictions. Belmont Abbey would still be required to provide an insurance plan that gives employees access to products and services it deems morally wrong. And although Defendants also claim there will be "no charge for the contraceptive coverage," 77 Fed. Reg. 8728, there is no guar-

antee the cost will not be passed along to the employer in the form of premiums or some other way.[18]

But more importantly, even if Belmont Abbey could be guaranteed that it would not be *paying* for products and services that violate its religious beliefs, under Defendants' theorized rule it would still be *directly facilitating access*, an act equally offensive to its religious convictions. Am. Compl. ¶¶ 2, 30, 79-81, 89.

Moreover, the proposed rulemaking would not cure the constitutional defects in the Mandate and its "religious employer" exemption. It would still violate the Free Exercise clause by granting some formal churches (*i.e.*, "religious employer[s]") a complete exemption, while granting other religious organizations—like Belmont Abbey—only a partial work-around, and ignoring entirely the religious liberty of individuals and for-profit institutions.[19]

Similarly, the Mandate would still be subject to the Free Exercise claim that it was enacted with discriminatory intent. And its lack of general applicability and allowance for individual exemptions would remain as fatal flaws.

With respect to Belmont Abbey's Establishment Clause claims, the Mandate would still wrongly prefer some religious activity (inwardly focused inculcation of values by formal churches) over other religious activity (everything else) and would create exces-

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[18] Defendants claim that "[a]ctuaries and experts have found that coverage of contraceptives is cost neutral when taking into account all costs and benefits in the health plan." 77 Fed. Reg. at 8728. But the up-front costs of providing coverage are unavoidable. And it is entirely speculative to conclude that the costs of this Mandate will be neutralized over time or that the future savings will be passed along to the religious employer. Moreover, Defendants fail to address the significantly greater costs associated with sterilizations and the mandated education and counseling programs.

[19] It is notable that not even all formal churches qualify for the "religious employer" exemption. For example, churches that hire or serve primarily persons of other faiths are ineligible. 45 C.F.R. § 147.130(a)(iv)(B).

sive government entanglement in religion by requiring government officials to distinguish between the two. *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (noting that under the Establishment Clause "infringement occurs the moment the government action [here, the statutory preference] takes place—without any corresponding individual conduct"). Astonishingly, the Advance Notice of Proposed Rulemaking openly admits that the Mandate and its "religious employer" exemption seek to define what it means to be "religious," claiming that this selection of which organizations deserve First Amendment protection is not "intended to set a precedent for any other purpose." ANPRM at 16502.

Under RFRA, the Mandate would still substantially burden Belmont Abbey's Free Exercise, because even the theorized new issuer mandate would not exempt Belmont Abbey from directly facilitating its employees' and students' access to products and services that violate its religious beliefs. And, finally, the Mandate would still be subject to the APA claims that it was enacted in an arbitrary and capricious manner, in violation of preexisting federal laws.

In sum, because Defendants refuse to exempt religious objectors entirely, and instead insist—even under the theorized new issuer mandate—that religious objectors must directly facilitate access to contraceptives and abortion-inducing drugs, the promise of future rulemaking has no impact on the Mandate's finality.

Yet the Court need not go even this far, because the ANPRM offers not any actual change to the law, but only "presents questions and ideas to help shape these discussions as well as an early opportunity for any interested stakeholder to provide advice and input into the policy development relating to the accommodation to be made with respect to

non-exempted, non-profit religious organizations with religious objections to contraceptive coverage." ANPRM at 16503. And as noted above, the mere promise of *discussions* about future rulemaking is insufficient to thwart review of an existing regulation that is final and binding now. *Am. Petroleum Inst.*, 906 F.2d at 739-40; *32 Cnty. Sovereignty Comm.*, 292 F.3d at 798-99; *Am. Bird Conservancy, Inc.*, 516 F.3d at 1031; *Flake*, 611 F. Supp. at 75; *see also Consol. Rail Corp.*, 896 F.2d at 577 (calling an admission that a regulation was "'final'. . .'at least at this time'" a "lame attempt at a reservation" that would not delay judicial review).[20]

B. Belmont Abbey faces imminent hardship if the Mandate is not reviewed now.

Because Belmont Abbey's claims fully satisfy the "fitness" requirement, it is not necessary to consider the hardship factor. *Askins* v. *Dist. of Columbia*, 877 F.2d 94, 97-98 (D.C. Cir. 1989) ("[W]hen a case is clearly 'fit' to be heard, the 'hardship' factor is irrelevant in applying the ripeness doctrine."). But even if fitness were in question, the hardships Belmont Abbey faces from delay weigh decisively in favor of immediate judicial review.

[20] Again, the authorities cited by Defendants are inapposite. None support Defendants' contention that the mere promise of future rulemaking can thwart judicial review of an existing, binding rule. *See Texas* v. *United States*, 523 U.S. 296, 300 (1998) (denying review where risk of injury was "contingent on a number of factors" and plaintiff had "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 (1952) (dismissing claims where plaintiff did "not request an adjudication that it [had] a right to do, or to have, anything in particular" and did not seek "a judgment that the [state was] without power to enter any specific order or take any concrete regulatory step," but merely sought a declaration that its conduct constituted interstate commerce, for no apparent purpose); *Toca Producers* v. *FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (dismissing claims on ripeness grounds where both parties agreed their dispute was the subject of an ongoing agency proceeding); *Tenn. Gas Pipeline Co.* v. *FERC*, 736 F.2d 747, 750 (D.C. Cir. 1984) (finding no ripeness where a "series of events" or "ifs" had to occur certain way before plaintiff would suffer any injury).

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First, even under Defendants' theorized new issuer mandate—and assuming such a new mandate emerges from the ANPRM brainstorming sessions as a final rule—Belmont Abbey would be compelled by its religious convictions to drop its insurance plan and pay the government's fines. *See* Am. Compl. ¶¶ 3, 76, 92. It must begin planning to address the inevitably negative consequences of this decision now, even assuming application of the one-year grace period. The inability to offer health insurance coverage will have severe impact on its ability to retain and recruit both employees and students and potentially on its continued operation. These and other potential implications demand immediate attention and planning. *See* Am. Compl. ¶ 96; *see also Retail Indus. Leaders Ass'n* v. *Fielder*, 475 F.3d 180, 188 (4th Cir. 2007) (finding ripeness where plaintiff had to "alter its internal accounting procedures and healthcare spending *now*" in planning to comply with enactment).

Moreover, the safe-harbor guidelines protect Belmont Abbey only from enforcement "by the Departments," *i.e.*, HHS Bulletin at 3. Belmont Abbey is not protected from enforcement actions by third parties. The EEOC, for example, has long maintained that excluding contraceptives from an employer's prescription drug coverage constitutes sex-based discrimination under Title VII of the Civil Rights Law of 1964.[21] Courts have divided on this issue. *Compare In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007), *with Erickson* v. *Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). But the Mandate gives additional credence to the EEOC's position that declining to cover contraceptives violates federal law, thus encouraging suits under Title VII.

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[21] *See* EEOC, Commission Decision on Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html.

In addition, the Affordable Care Act creates additional avenues by which private parties may seek to enforce the Mandate, regardless of Defendants' safe harbor. For example, the Act's provisions were incorporated by reference into Part 7 of ERISA. 29 U.S.C. § 1185d(a)(1). Under Part 7 of ERISA, a plan participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Thus, even without enforcement by Defendants, Belmont Abbey would still be subject to enforcement by its plan participants and beneficiaries. *Chamber of Commerce*, 69 F.3d at 603 (retaining jurisdiction in part because "even without a Commission enforcement," the plaintiffs would be "subject to [private] litigation challenging the legality of their actions").

These consequences are "direct and immediate" and place Belmont Abbey in the pressing dilemma of how to comply with its own religious convictions without jeopardizing its educational mission. *See Abbot Labs.*, 387 U.S. at 152-53. These real and significant hardships further warrant immediate review of Defendants' Mandate.[22]

[22] These present hardships also distinguish this case from those cited by the Defendants at 19-20. *See Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 733 (1998) (the regulation at issue "create[d] no legal rights or obligations" and did "not subject anyone to civil or criminal liability"); *Texas Indep. Producers & Royalty Owners Ass'n* v. *U.S. E.P.A.*, 413 F.3d 479, 483-84 (5th Cir. 2005) (rule at issue did not apply unless EPA made subsequent decision to "require permits from petitioners"); *Wyo. Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 49-50 (D.C. Cir. 1999) (Forest Service had no duty to produce environmental impact statement unless and until it issues oil and gas leases and it had issued no such leases when the case was filed); *Lake Pilots Ass'n, Inc.* v. *U.S. Coast Guard*, 257 F. Supp. 2d 148, 161 (D.D.C. 2003) (Coast Guard had "admitted its error" and issued temporary final rule, withdrawing the challenged rule for the time period at issue). Here, in contrast, Defendants have affirmed the rule at issue as a final rule without change, and that final rule both burdens Belmont Abbey today and will govern its conduct in the near future unless and until it is revoked.

CONCLUSION

For all the foregoing reasons, Belmont Abbey respectfully requests the Court to deny Defendants' motion to dismiss without further delay.

[ORAL HEARING REQUESTED]

Dated: April 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 23, 2012, I electronically filed the foregoing Memorandum in Opposition to Defendants' Motion to Dismiss with the Clerk of the Court using CM/ECF, which transmitted Notices of Electronic Filing generated by CM/ECF to the following:

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