UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ETERNAL WORD TELEVISION NETWORK, INC., *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*.	2:12-CV-501-SLB **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Plaintiff Eternal Word Television Network ("EWTN") hereby opposes defendants' motion to dismiss. As explained below, defendants' standing and ripeness arguments depend on a speculative proposed rulemaking that, by its own terms, could not affect EWTN's challenge to defendants' contraception, sterilization, and abortion-drug mandate.

INTRODUCTION

This case concerns a Catholic television network that wants to practice the faith it preaches and a government mandate that will fine it for doing so. The mandate in question is composed of two parts. Part one is a statute—found in the Patient Protection and Affordable Care Act—that requires most employers to provide free insurance coverage for "preventive care." Part two is a regulation that defines "preventive care" to include contraceptives and sterilization. Both parts of the mandate—the statute and the implementing regulation—are definitive, final and enforceable on a specific date.

EWTN cannot comply with the mandate without violating its faith. In advance of the mandate's enforcement, EWTN will have to drop insurance for its 340 employees and prepare to pay annual fines of over $600,000. Its only way out would be to publicly abandon the faith that it was founded to promote. EWTN's final deadline for making that choice is twenty-five months from the date of this pleading—July 1, 2014—when the mandate will be enforceable against it.

EWTN therefore filed this lawsuit, claiming the mandate violates its religious liberties. Its straightforward legal claims can be resolved with no factual development. Yet defendants say the suit should be dismissed because EWTN has no standing and its claims are not ripe. Why? Defendants have given advance notice of a proposed new rulemaking which, they say, will solve EWTN's problems before the mandate goes into effect.

This argument is puzzling. By its own terms, the rulemaking proposed in the advance notice will not change anything about the mandate that now inflicts constitutional injury on EWTN. Instead, the advance notice merely brainstorms future strategies of transferring the financial and administrative burdens of providing contraceptive coverage from an employer to a plan administrator. But tweaking the details of a coverage scheme will do nothing to lift the mandate's burden on religious conscience, and particularly not for an employer like EWTN which *self*-insures its employees. Whatever might emerge from the future rulemaking—and that is anybody's guess—the mandate will *still* make EWTN provide "preventive care" coverage, and it will *still* define "preventive care" to include contraceptives and sterilization. The Court should deny the motion to dismiss and allow the parties to proceed expeditiously to the merits of that challenge.

STATEMENT OF FACTS

The Plaintiff, Eternal Word Television Network

Eternal Word Television Network was founded in 1981 by Mother Angelica, a Catholic nun of the Poor Clares of Perpetual Adoration order, on the grounds of Our Lady of Angels Monastery in Irondale, Alabama. Doc. 13, Amended Complaint ("Compl"). ¶ 2. EWTN exists to share the teachings of the Catholic Church: "Eternal Word Television Network is dedicated to the advancement of truth as defined by the Magisterium of the Roman Catholic Church. The mission of the Eternal Word Television Network is to serve the orthodox belief and teaching of the Church as proclaimed by the Supreme Pontiff and his predecessors." Compl. ¶ 23.

From its humble beginnings, EWTN has grown into the world's largest Catholic television network, broadcasting in English and Spanish to more than 217 million homes in 144 countries and territories, as well as sharing its message through its popular website and other communications media. Compl. ¶ 21. Today, it has more than 300 employees. Compl. ¶ 27.

EWTN holds and shares Catholic teachings on the sanctity of human life and the purpose of human sexuality. It believes that all life is precious and must be protected from the moment of conception. Compl. ¶ 24. Therefore, EWTN believes and teaches that anything which could end human life after the moment of conception is a grave sin. *Id.* So, too, EWTN holds and shares the teachings of the Catholic Church with regard to human sexuality. Compl. ¶ 25. In particular, EWTN believes and teaches that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an

end or as a means"—including contraception and sterilization—is a grave sin. Compl. ¶ 25.

As part of its commitment to its Catholic faith, EWTN provides its roughly 340 employees with health care coverage superior to that generally available in the Alabama market. Compl. ¶ 28. As part of its commitment to its Catholic faith, that insurance coverage excludes coverage for artificial contraception, sterilization, and abortion. Compl. ¶ 30; Warsaw Decl. ¶ 4.

EWTN provides employee insurance through a self-funded plan. EWTN employs Blue Cross/Blue Shield of Alabama to administer that plan. Warsaw Decl. ¶ 3.

The Mandate

In March 2010, Congress passed the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act").[1] Among other things, the Act requires that "[a] group health plan . . . shall . . . provide coverage for" women's "preventive care and screenings" without cost sharing. 42 U.S.C § 300gg–13(a)(4). "Preventive care and screenings" are defined in guidelines issued by a division of Defendant Department of Health and Human Services (HHS). *Id.* In August 2011, HHS issued an "amended interim final rule" defining preventive care to include "[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Health Resources and Services Administration, *Women's Preventive Services: Required*

[1] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 23, 2010); Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (Mar. 30, 2010).

Health Plan Coverage Guidelines (Aug. 1, 2011), http://www.hrsa.gov/womensguidelines/ (last visited May 18, 2012). FDA-approved contraceptive methods include birth-control pills; prescription IUDs; Plan B (the "morning-after pill"); and ulipristal ("ella" or the "week-after pill"). *See* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited June 1, 2012). These requirements would go into effect one year after their issuance, on August 1, 2012. 42 U.S.C. § 300gg-13(b)(1), (2); 76 Fed. Reg. at 46624.

The rule added an exemption for those "religious employer[s]" who meet all of the following criteria:

(1). The inculcation of religious values is the purpose of the organization.

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

(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 6033(a)(3)(A)(i) or (iii)[2] of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(B)(1)-(4). EWTN cannot meet all four of these prongs. Compl. ¶¶ 78-83.

The mandate and the exemption provoked public outcry, including some 200,000 comments. MTD at 9; *see also* Compl. ¶ 71. This lawsuit and several others followed. On February 10, 2012, following a press conference on the subject by President Obama, HHS issued a bulletin describing a "Temporary Enforcement

[2] These IRC sections "refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." 76 Fed. Reg. at 46623.

Safe Harbor." Under that Safe Harbor, defendants would wait an additional year before enforcing the mandate against certain non-exempt, religious organizations.[3] That same day, defendants adopted the religious employer exemption "as a final rule without change." 77 Fed. Reg. 8725, 8730.

About a month later, defendants announced an "Advance Notice of Proposed Rulemaking" (ANPRM). 77 Fed. Reg. 16501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147). The ANPRM does not propose to rescind the mandate or broaden the existing religious employer exemption. Rather, it solicits comments on how to craft another mandate. That theorized mandate would force a non-exempt religious organization's insurer to provide the mandated contraceptive services separately to employees with "no premium charge." *See* ANPRM at 16503. For employers with self-insured plans, the additional mandate would require them to grant certain authority to a plan administrator, who would be required to provide the additional coverage. *See* ANPRM at 16506. The ANPRM notes the difficulty inherent in creating such a mandate for self-insured insurance plans, where the funds flow directly from the employer. *See id.* at 16506-07. The ANPRM states that the original mandate will remain in effect. *Id*. at 16502. The proposals outlined in the ANPRM would still coerce EWTN to violate its religious beliefs. Compl. ¶ 115.

EWTN's insurance plan year for its 340 employees begins on July 1 of each year. Warsaw Decl. ¶ 5. The mandate takes effect for the first plan year after August 1,

[3] HHS Bulletin at 3, 6, available at http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited June 1, 2012).

2012. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. at 46623. EWTN's religious beliefs forbid it from complying with the mandate. Compl. ¶ 5, 30-31, 94-96, 99-113. Consequently, EWTN will violate the mandate thirteen months from now, on July 1, 2013. One year later, on July 1, 2014, the government will begin enforcing the mandate, and EWTN will begin paying annual fines of about $2,000 per employee. *See* HHS Bulletin at 3 (effective date); 26 U.S.C. § 4980H(a), (c)(1) (penalty). It will face fines of $620,000 in the first year alone,[4] and will have to drop employee health insurance. Compl. ¶ 97, 112. EWTN has already begun planning for this approaching reality. Compl. ¶ 114.

STANDARD OF REVIEW

In evaluating a motion to dismiss, the Court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Henderson* v. *Washington Nat'l. Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006) (internal quotation omitted). EWTN must allege facts "sufficient to support jurisdiction." *Pittman* v. *Cole*, 267 F.3d 1269, 1282 (11th Cir. 2001). Standing and ripeness are relaxed in First Amendment cases. *See, e.g., Digital Properties Inc.* v. *City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997) ("[T]he injury requirement is most loosely applied when a plaintiff asserts a violation of First Amendment rights based on the enforcement of a law, regulation or policy."); *see also Bloedorn* v. *Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011). Courts weighing ripeness "are appropriately guided by the presumption of reviewability, especially when the

[4] *See* Compl. ¶ 27 (340 employees). Fines are assessed on every employee over 30. *See* 26 U.S.C. § 4980H(c)(2)(D)(i) ((340 - 30) x $2000 = $620,000).

affected person is confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties." *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

ARGUMENT

I. EWTN HAS STANDING TO CHALLENGE THE MANDATE.

To demonstrate standing, EWTN must allege (1) it suffers an actual or imminent injury (2) fairly traceable to defendants' actions and (3) likely to be "redressed by a favorable decision." *Sierra Club* v. *Johnson*, 436 F.3d 1269, 1276 (11th Cir. 2006). Defendants argue only that EWTN has not alleged an actual or imminent injury. Mot. to Dismiss (MTD) at 14-20. They are mistaken.

A. EWTN alleges both actual and imminent injuries.

EWTN's complaint details how the mandate coerces it to violate its faith under threat of severe penalties. Specifically, EWTN alleges that (1) it now offers coverage to its 340 employees that excludes the mandated contraceptive services; (2) it will be subject to the mandate and is not exempt; (3) it cannot provide the mandated coverage without violating its faith; and (4) it will therefore face, on a date certain, heavy fines and the inability to offer employee insurance. Compl. ¶¶ 5, 28-31, 78-83, 94-96, 99-113, 116-17. Further, EWTN also alleges that it has already devoted considerable resources to determine how to respond to the mandate, and must continue doing so in anticipation of violating the mandate in one year. Compl. ¶ 114. These allegations easily establish actual and imminent injuries. *See, e.g.*, *ACLU of Fla.* v. *Miami Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1194 (11th Cir. 2009)

(imminent injury "requires only that the anticipated injury occur with[in] some fixed period of time in the future").

B. EWTN's plan is not eligible for grandfather status.

Defendants claim EWTN fails to allege injury because its complaint does not rule out that its plan may be "grandfathered." MTD at 15-17. Under the Affordable Care Act, group health plans in effect on March 23, 2010 may be grandfathered and therefore exempt from the mandate. *See* 42 U.S.C. § 18011. To remain grandfathered, however, a plan must provide annual notices and must avoid certain changes to coverage, annual limits, and cost-sharing. *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 EWTN's complaint does not establish that its plan is ineligible for grandfather status. MTD at 15-17.

Defendants are mistaken. EWTN alleges that it is not grandfathered. Compl. ¶ 116. No more specificity is required since "[a]t the pleading stage . . . '[the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *31 Foster Children* v. *Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).[5]

If any doubt remained, it is eradicated by the attached declaration and exhibit, which establishes that EWTN has not included any required grandfather notices in

[5] Injury is independently alleged by Compl. ¶ 117, which states that EWTN will soon have to make plan changes that will forfeit grandfather status.

its plan materials. Warsaw Decl. ¶¶ 7-8; Warsaw Decl., Ex. A.[6] Defendants admit that the lack of such notices makes a plan ineligible for grandfather status. MTD at 17 n.7. Grandfather status is simply not an issue.

C. The Safe Harbor does not make EWTN's injury non-imminent.

Defendants also try to defeat standing on the ground that defendants will enforce the Mandate against EWTN until July 1, 2014. *See* MTD at 17-18. They say this makes EWTN's asserted injury "too remote temporally" and thus lacking "imminence." *Id*. at 18. Not so. 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); *see also Miami Dade Cnty. Sch. Bd.*, 557 F.3d at 1194 ("[i]mmediacy requires only that the anticipated injury occur with[in] some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months.") (citing *NAACP* v. *Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008)).

The Safe Harbor merely delays enforcement by one year. It is settled that, "[w]here the inevitability of the operation of a statute against certain individuals is patent, 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). The Supreme Court has found delays of three and six years insufficient to

[6] The district court may consider extra-pleading material when reviewing a motion to dismiss for lack of jurisdiction. *Mulhall* v. *UNITE HERE Local 355*, 618 F.3d 1279, 1286 n.8 (11th Cir. 2010)

defeat standing. *See Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 536-37 (6th Cir. 2011) (citing *New York* v. *United States*, 505 U.S. 144 (1992); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925)). The D.C. Circuit was not fazed by a *thirteen-year* gap. *Vill. of Bensenville* v. *FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004). The mandate will take effect no later than July 1, 2014—a comparatively short twenty-five months from today—and thus is imminent.[7]

In a nearly identical legal setting in this Circuit, defendants recently conceded that a *forty* month gap does not defeat standing. In their defense of the Affordable Care Act's "individual mandate"—which also does not take effect until 2014—defendants argued that the individual plaintiffs' alleged injuries were not imminent. *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 conceded individual standing. *See Fla. ex rel. Att'y Gen.* v. *HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011); *see also Seven-Sky* v. *Holder*, 661 F.3d 1, 4 (D.C. Cir. 2011) (addressing constitutionality of same mandate).

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[7] Defendants' cited authorities are inapposite. *See* MTD at 18-19. 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 (2003). In *Whitmore* v. *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). In *Koziara* v. *City of Casselberry*, an exotic dancer did not have standing to contest the future revocation of her employer's license when she did not allege that a future revocation was imminent. 392 F.3d 1302 (11th Cir. 2004). In *Alabama-Tombigbee Rivers Coal.* v. *Norton*, 338 F.3d 1244 (11th Cir. 2003), the plaintiffs' injury was imminent because they were "now modifying their facilities, altering their operations, or expending resources to oppose such modifications."

Moreover, the "Safe Harbor," however long it may last, is insufficient to destroy standing. Non-binding promises not to enforce do not deprive plaintiffs of standing. *See, e.g., Va. Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 388 (4th Cir. 2001) (holding that "policy of nonenforcement," "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); *see also U.S. Dept. of Labor* v. *N.C. Growers Ass'n*, 377 F.3d 345, 353 (4th Cir. 2004) ("The DOL's interpretative bulletins, however, were adopted without notice and comment rulemaking and without a formal adjudication, and accordingly, lack the force of law."). In effect, the government is claiming that a non-binding "bulletin" without the force of law trumps a final administrative rule. The argument is implausible as a matter of fact and insufficient as a matter of law.

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

Defendants also attempt to rely on the future rulemaking promised in the ANPRM to defeat standing. The ANPRM reports that, during the safe-harbor period, defendants have an "intention to propose" a new mandate that will force insurers to provide free contraceptive coverage to employees of certain non-exempt religious organizations. 77 Fed. Reg. at 8728-29; *see* MTD at 18-20. The ANPRM "suggest[s] multiple options" for how this might be accomplished and invites comment. ANPRM at 16503. In light of that, defendants say there is "no basis to conclude" that EWTN will ever be subject to the mandate and insist that "any

suggestion to the contrary is entirely speculative at this point." MTD at 19-20. This self-serving argument fails.

Defendants' argument is really about mootness. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68 n.22 (1997) (standing addresses "personal interest that must exist at the commencement" of a suit, whereas mootness requires that interest continue "throughout [the suit's] existence"). A case is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Los Angeles Cnty.* v. *Davis*, 440 U.S. 625, 631 (1979). Under the "stringent" mootness standards, it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000). This "heavy burden" lies with the party claiming mootness. *Id; see also, e.g., Sheely* v. *MRI Radiology Network, PA*, 505 F.3d 1173, 1184 (11th Cir. 2007) (noting *Laidlaw*'s "formidable . . . burden" on "party asserting mootness").

Mootness is simply out of the question at this point, because there has been no change to the mandate or the exemption. *See, e.g.*, Wright & Miller, 13C Fed. Prac. & Proc. Juris. § 3533.7 (3d ed.) ("It hardly need be added that mootness does not occur when there has been no change in the challenged activity."). Defendants must do far more than offer prospects for future corrective action to moot ongoing litigation. *See, e.g., Harrell* v. *The Fla. Bar*, 608 F.3d 1241, 1265 (11th Cir. 2010) (case mooted if "interim relief or events have *completely and irrevocably eradicated* the effects of the alleged violation") (quoting *Davis*, 440 U.S. at 631) (emphasis

added). But "an 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.* v. *EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). Similarly, "agencies 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 n.1 (D.C. Cir. 2008) (citations omitted).

Here, defendants concede they have presented only "questions and ideas" to shape future discussions about an hypothesized insurer mandate. MTD at 11; 77 Fed. Reg. at 16503. They have not amended the original mandate; they have confirmed it. *Id.* at 16502. Thus, statements of future good intentions are irrelevant. *See Sackett* v. *EPA*, 132 S. Ct. 1367, 1372 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' … does not suffice to make an otherwise final agency action nonfinal."); Wright & Miller § 3533.7 ("Nor does mootness follow announcement of an intention to change or adoption of a plan to work toward lawful behavior.").

E. The speculative proposed future mandate would not alleviate EWTN's injuries.

Finally, Defendants cannot defeat standing because the proposed new rule sketched out in the ANPRM is inadequate on its own terms. Defendants want to have it both ways—they wish to moot the case based upon the contents of a speculative future rulemaking, but they insist that the Court cannot consider the

content of the speculative future rule. *See* MTD at 18-20 (arguing the ANPRM deprives EWTN of standing); MTD at 23 & n.8 (stating the Court cannot prejudge the contents of ANPRM). Their desire that the Court ignore the content of the ANPRM is understandable, since those accommodations are plainly inadequate. As EWTN explained in its Amended Complaint, the accommodations forecast in the ANPRM—even if they were promulgated as written—would not remedy the religious conflict. *See* Compl. ¶ 115. This is true for two reasons.

First, it is fanciful to suppose that coverage for the objectionable services can be provided without financial contributions from EWTN. Nothing guarantees that covering contraception (let alone more expensive sterilization procedures, and related counseling and education) will reduce costs, or that savings would be passed on to EWTN. The ANPRM acknowledges the difficulty inherent in providing contraceptive services "for free" in an employer-funded plan. *See* 77 Fed. Reg. at 16503, 16507. Indeed, the ANPRM assumes these services have costs and discusses how those costs can be recovered by insurers, including through "rebates, service fees, disease management program fees, or other sources," even though these programs would otherwise ultimately benefit the religious institution. 77 Fed. Reg. at 16507 ("These funds may inure to the third-party administrator *rather than* the plan or its sponsor . . . .") (emphasis added). Even more troubling, the ANPRM offers no explanation as to how administrators might pay for the more expensive counseling and sterilization procedures. *See generally, id*.

These inadequacies were recently confirmed in comments on the ANPRM from the Self-Insurance Institute of America, an industry group which opposes the proposals in the ANPRM because those supposed solutions range from impracticable to illegal. The SIIA comments on the ANPRM, recently submitted to HHS, are attached. *See* Windham Decl., Ex. A. Those comments explain in detail why the compromises discussed in the ANPRM are unworkable and would likely run afoul of both federal and state insurance law. *See id.* Thus, even if the accommodations outlined in the ANPRM come to pass—and knowing that would require a crystal ball—there is no guarantee that they will relieve EWTN of the burden of paying for medical services contrary to its faith.

Second, regardless of the cost issue, the proposed rule sketched out in the ANPRM would *still* require EWTN to facilitate the provision of contraception, sterilization and abortion-causing drugs. In other words, nothing promised by the ANPRM would alter the fact that EWTN would still be required to empower and authorize its plan administrator to provide the objectionable drugs and services. *See id.* at 16506 (outlining proposed amendment to apply to self-insured plans); *see also* Compl. ¶ 115 (proposed new mandate would still "coerce[e] it to participate in the provision of items and services that violate EWTN's religious beliefs"). For instance, even though its plan administrator would ostensibly be the one "covering" these services, EWTN would nonetheless be required to comply with several conditions that, in and of themselves, would violate EWTN's rights. First, EWTN would be required to notify its plan administrator that it would not contribute funding for

contraceptives nor "act as the designated plan administrator or claims administrator with respect to claims for contraceptive services." *Id.* at 16506. Second, EWTN would be forced to grant its administrator "authority and control over the funds available to pay the benefit, authority to act as a claims administrator and plan administrator, and access to information necessary to communicate with the plan's participants and beneficiaries." 77 Fed. Reg. at 16506. These cosmetic changes to the mandate would not change the status quo, since EWTN *already* relies on its administrator to administer its plan and facilitate health care for employees. EWTN determines and funds the plan, but the medical care and administration are handled directly between the administrator and employees' medical providers. Thus, even under the hypothesized new rule, EWTN would be forced to serve as a gatekeeper, making objectionable drugs and services available to employees through a plan it sponsors and underwrites. For purposes of the violation of EWTN's religious liberty, there would be no meaningful change from the current final rule.

Defendants' standing argument ultimately amounts to a prediction that the unforeseeable results of a speculative proposed rulemaking might, sometime in the future, remove EWTN's injury. Prophecies like this, however, cannot change the fact that EWTN faces the real prospect of harm from a concrete regulatory mandate on July 1, 2014—crippling fines for which it must plan well in advance. This is more than enough to show imminent harm. *See, e.g., Johnson* v. *Bd. of Regents*, 263 F.3d 1262, 1265 (11th Cir. 2001) ("[T]o have standing to obtain forward-looking

injunctive relief, a plaintiff must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future."); *see also, e.g., Mulhall*, 618 F.3d at 1288 (explaining that "under our law, probabilistic harm is enough injury in fact to confer standing in the undemanding Article III sense"); *Thomas More Law Ctr.*, 651 F.3d at 536-37 (noting that "[i]mminence is a function of probability" and finding imminent injury over two years in the future where "[t]he only developments that could prevent this injury from occurring are not probable and indeed themselves highly speculative").

II. EWTN'S CLAIMS ARE RIPE.

Defendants also claim EWTN's claims are unripe. Specifically, they say that the future rulemaking projected by the ANPRM raises a "significant chance" that amendments to the mandate will either moot or alter the litigation. MTD at 23. Defendants are mistaken.

The ripeness doctrine addresses the timing of a lawsuit and prevents courts from umpiring "potential or abstract disputes." *Digital Properties, Inc.*, 121 F.3d at 589; *see also Wilderness Soc'y* v. *Alcock*, 83 F.3d 386, 390 (11th Cir. 1996) (unlike standing, ripeness asks "whether this is the correct *time* . . . to bring the action") (emphasis in original). "To determine whether a claim is ripe, [courts] assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review." *Harrell*, 608 F.3d at 1258 (citing *Coal. for the Abolition of Marijuana Prohibition* v. *City of Atlanta*, 219 F.3d 1301, 1315 (11th Cir. 2000)). If a dispute is fit, then "[lack of] 'hardship' cannot tip the balance against

judicial review," and, indeed, need not even be considered. *Harrell*, 608 F.3d at 1259 (citing *Consol. Rail Corp.* v. *United States*, 896 F.2d 574, 577 (D.C. Cir. 1990)) (brackets in original). Finally, ripeness analysis applies "most permissively in the First Amendment context." *Harrell*, 608 F.3d at 1258 (citing *Beaulieu* v. *City of Alabaster*, 454 F.3d 1219, 1227–28 (11th Cir. 2006)).

A. EWTN's claims are fit for review.

EWTN's claims are presumptively ripe because they involve facial challenges to the mandate's constitutionality that require no factual development. *See, e.g., Harris* v. *Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) ("In the context of a facial challenge, a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record."); *Pittman*, 267 F.3d at 1278 (ripeness favors disputes involving "pure question[s] of law"). For instance, EWTN's Free Exercise and Establishment Clause claims present purely legal challenges to the various exemption schemes found on the face of the regulations.[8] Its APA and RFRA claims likewise turn on questions of law. *See, e.g.*, *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985) (APA review presents "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

[8] *See, e.g.*, Compl. ¶ 46, 52-53 (alleging implementing regulations non-neutral under Free Exercise Clause because they expressly exempt a favored class of religious objectors in 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B)); Compl. ¶¶ 47, 56, 134 (alleging same regulations not generally applicable under Free Exercise Clause because they expressly create a system of individualized exemptions); Compl. ¶¶ 156-60 (alleging same regulations violate Establishment Clause by expressly preferring one religious denomination over another).

[plaintiff] of his free exercise right [under RFRA] is a question of law."). Defendants themselves agree. *See* MTD at 25 (noting that plaintiff's complaint "raises largely legal claims").

Moreover, EWTN challenges a regulation that is definite and concrete, and that emerged at the conclusion of a lengthy administrative process. *See, e.g., Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149-51 (1967) (assessing ripeness by reference to finality of agency action); *Atlanta Gas Light Co.* v. *FERC*, 140 F.3d 1392, 1404 (11th Cir. 1998) (assessing ripeness by asking, *inter alia*, whether "challenged agency action constitutes 'final agency action'"). Defendants included contraception and sterilization within the Affordable Care Act's mandated "preventive services" after lengthy deliberation that included an "extensive science-based review" by the Institute of Medicine. MTD at 7. And they finalized the religious employer exemption after "carefully considering"—over an additional six months—"more than 200,000 comments." *Id.* at 9. Consequently, the challenged regulation is "quite clearly definitive" because it was "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties." *Abbott Labs.*, 387 U.S. at 151. It is not "informal," nor is it "only the ruling of a subordinate official," nor is it "tentative." *Id.* (citations omitted). To the contrary, the mandate "mark[ed] the 'consummation' of the agency's decisionmaking process." *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1181 (11th Cir. 2011) (quoting *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997)). These indicia of

finality mark EWTN's claims as ripe—especially since they involve First Amendment rights.

Nonetheless, defendants insist that the ANPRM's proposed rulemaking renders EWTN's lawsuit unripe by raising a "significant chance" that future amendments to the mandate will either moot or alter EWTN's claims before the mandate's effective date. MTD at 23. Defendants' argument is perplexing and misguided.

First, defendants misunderstand the nature of EWTN's claims. EWTN challenges the Act's preventive services mandate because—and only because—defendants have defined "preventive services" to include contraception and sterilization.[9] The ANPRM promises *no* change to that status quo—that is, it promises neither to alter the preventive services mandate itself, nor to subtract contraception from the ambit of "preventive services." Nor does it propose to expand the previously finalized religious employer exemption to relieve EWTN of any responsibility under the mandate. Instead, the ANPRM merely proposes rulemaking to consider how to route free contraception coverage to EWTN's employees, subject to EWTN's compliance and cooperation.[10]

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[9] *See* 42 U.S.C. § 300gg-13 (a)(4) (requiring group health plans to "provide coverage" without cost-sharing for "preventive care … as provided for in [HRSA] guidelines"); HRSA Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited June 1, 2012) (defining "women's preventive services" to include "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling").

[10] *See* 77 Fed. Reg. at 16503 (announcing defendants' "plans for a rulemaking to require issuers to offer group health insurance coverage without contraceptive coverage to such an organization … and *simultaneously to provide contraceptive coverage directly to the participants and beneficiaries covered under the organization's plan with no cost sharing*") (emphasis added).

Consequently, defendants are wrong that the parameters of the rulemaking sketched out by the ANPRM could do anything to undermine the ripeness of EWTN's claims. "[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*, 516 F.3d at 1031 n.1 (and collecting authorities). Here, defendants' proposed future rulemaking will, by its own terms, address matters that cannot impact EWTN's constitutional claims.

Defendants cite no case to support their novel argument that a speculative and irrelevant future rulemaking derails a challenge to a final and concrete regulation. The cases defendants cite, *see* MTD at 23-26, stand for the ordinary proposition that challenges to open-ended, non-binding, or rescinded laws and regulations are unripe.[11] In such cases, additional rulemaking undermined ripeness—not because

[11] *See, e.g., Texas* v. *United States*, 523 U.S. 296, 300-01 (1998) (declaratory judgment that school district law would never trigger Voting Rights Act preclearance was unripe because, absent application, impossible to determine how the law implicated elections); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998) (suit against forestry plan unripe because plan "d[id] not command anyone to do anything," "create[d] no legal rights or obligations," and required further agency action to flesh out application to specific land); *Alcock*, 83 F.3d at 390-91 (challenge to forestry plan unripe because plan did not injure plaintiff but foresaw more decisionmaking before any dispute could materialize); *Tex. Indep. Producers and Royalty Ass'n* v. *EPA*, 413 F.3d 479, 483-84 (5th Cir. 2005) (challenge to EPA permitting rule unripe where, *inter alia*, rule's scope impossible to determine on its face; EPA had officially deferred rule and initiated rulemaking to clarify rule); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dept. of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) (suit against state unripe where the state had yet to "pass the necessary legislation, promulgate the appropriate regulations, and build and staff testing facilities," and there was no guarantee it would ever do so); *Lake Pilots Ass'n, Inc.* v. *U.S. Coast Guard*, 257 F. Supp. 2d 148, 161 (D.D.C. 2003) (challenge unripe because agency had admitted its error respecting challenged rule, had reinstated prior rule, and undertaken new

it automatically renders challenges to definite rules unripe—but because, there, new rulemaking was necessary to flesh out open-ended rules that courts could not apply in their present form. Those cases might have affected EWTN had it sued *before* "preventive care" was defined to include FDA-approved contraceptives and sterilization methods. But nothing like that situation is presented here. To the contrary, EWTN has brought facial legal challenges to a concrete and carefully-defined regulatory scheme whose application to religious objectors like EWTN is as clear as it is unconstitutional.

Like their standing argument, *supra*, defendants' ripeness argument really concerns mootness. Indeed, in arguing why the challenged regulations "have not 'taken on fixed and final shape,'" MTD at 25, defendants promise that—following the proposed rulemaking—EWTN's challenge "*likely will be moot*." *Id.* (emphasis added). But defendants misunderstand which regulations EWTN challenges. EWTN challenges the mandate and exemption—regulations that were finalized after an extensive process on August 1, 2011 and February 10, 2012, respectively. EWTN is not challenging whatever might come out of the proposed rulemaking. Such a challenge would be incoherent because, as defendants point out, the ANPRM "does not preordain what amendments to the preventive services coverage regulations defendants will ultimately promulgate." MTD at 25. More importantly, any such

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rulemaking); *Alabama* v. *United States*, 630 F. Supp. 2d 1320, 1329 (S.D. Ala. 2008) (challenge unripe because it was dependent not merely upon the text of the regulation, but upon speculation about whether the DOI would act impartially in a pending administrative proceeding).

future amendments would not, *by the very terms of the ANPRM*, change EWTN's current challenge.

B. EWTN faces imminent hardship absent immediate review.

Because EWTN's claims are fit, its challenge is ripe. *See, e.g., Harrell*, 608 F.3d at 1259 (where claim was fit, "we need not consider whether [plaintiff] would suffer any hardship"). But if the Court were to consider hardship, it would find that the hardships EWTN faces from delay weigh decisively in favor of judicial review.

First, since the ANPRM will not alter *EWTN's* claims, *see supra*, EWTN will still be compelled to drop employee insurance and pay heavy fines. And, even under the Safe Harbor, EWTN must plan *now* to address that negative consequence (which will be consummated in only twenty-five months). Inability to offer insurance will severely impact EWTN's ability to retain and recruit employees. These and other potential implications demand immediate review. Compl. ¶¶ 97-98, 112; *see also Retail Indus. Leaders Ass'n* v. *Fielder*, 475 F.3d 180, 188 (4th Cir. 2007) (finding ripeness where plaintiff had to alter "accounting procedures and healthcare spending *now*" to plan for new law).

Moreover, the Safe Harbor protects EWTN only from enforcement by *defendants*, not third parties. The Affordable Care Act empowers private parties to enforce the mandate, through its incorporation into Part 7 of ERISA. 29 U.S.C. § 1185d (a)(1). Under that part, a plan participant or beneficiary may bring a civil action to recover plan benefits or enforce or clarify plan rights. 29 U.S.C. § 1132(a)(1)(B). Thus even without enforcement by defendants, EWTN would still be subject to actions by plan

participants or beneficiaries. *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (retaining jurisdiction in part because "even without a Commission enforcement," plaintiffs would be "subject to [private] litigation challenging the legality of their actions").

Both of these "direct and immediate" consequences of the mandate warrant immediate review. *See Abbott Labs.*, 387 U.S. at 152-53.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss.

Respectfully submitted,

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Dated: June 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and that the following parties were served via that system:

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