IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LOUISIANA COLLEGE, Plaintiff v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No. 1:12-cv-463 JUDGE: Dee D. Drell MAGISTRATE: James D. Kirk

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Louisiana College (or, "the College") hereby responds in opposition to Defendants' Motion to Dismiss the First Amended Complaint.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

REGULATIONS

INTRODUCTION

The government issued "a final rule without change," 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012), forcing the Baptist college in this case to violate its foundational Christian beliefs about the sanctity of human life. The government essentially presents two reasons why Louisiana College lacks standing and ripeness. Both reasons fail.

First, the government contends that its non-enforcement "safe harbor" gives the College until January 2014, not 2013, to comply with the Mandate. But on its face the safe harbor does not apply to Louisiana College. The government admits that in order to qualify, an organization *must* certify in writing that "contraceptive coverage has not been provided at any point" after February 10, 2012. Gov. Brief at 7. It is undisputed in this case that the College does provide, and does not object to providing, nearly all contraceptives in its health coverage. It only omits "contraceptive" items that are also abortifacient. The government's only response to this fact is to point to a completely separate regulatory document wherein the Defendants declared that the "safe harbor" applies when entities object to "some or" all contraceptive items. But this contradicts the explicit, unambiguous language of the safe harbor Guidance and certification form. If the College signs this certification, it would not only be futile because it is false, but the College would also be committing a felony. *See* 18 U.S.C. § 1001. Moreover, even if the "safe harbor" applied, a one-year delay of government enforcement is not grounds for delaying judicial review. The "safe harbor" does not block the Mandate's creation of private lawsuit liability. This is a new, federally-imposed liability that provides standing to challenge the Mandate.

Second, the government argues that this case is not ripe because it has supposedly begun a rulemaking process to change the Mandate. But the government's Advance Notice of Proposed Rulemaking (ANPRM) issued in March is not itself a "proposed rule" to change the Mandate. It theorizes that somehow the Mandate will be shifted to the insurance companies of enti-

ties like the College. But the ANPRM does not make that proposal or explain how it will work. Louisiana College affirms that even if its insurer provided the abortifacient coverage, this would still violate the College's religious beliefs by forcing it to provide employees an objectionable plan. The ANPRM therefore is not a concrete proposed rule that "if made final, would significantly amend" the Mandate. *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739–40 (D.C. Cir. 1990) ("*API* I"). Under the government's position, no case can challenge the constitutionality of a statute or regulation if it may be changed in the future. That can be said of any law. If the government is still trying to figure out what the Mandate should require, it should withdraw it. Government shouldn't be able to require compliance with a Mandate that it says is unfinished. The ANPRM is both too uncertain to undermine ripeness, and it explicitly intends to continue to burden the College's beliefs via its insurer.

BACKGROUND

Louisiana College is a Christian liberal arts institution committed to provide educational programs with a "dedication to academic excellence for the glory of God." Am. Compl. ¶ 20. The College believes and teaches the sanctity of all human life from conception to natural death. *Id.* ¶ 23. It would violate the College's religious beliefs to provide insurance coverage for abortion-inducing drugs or related services. *Id.* ¶¶ 31–32.

Under the Patient Protection and Affordable Care Act of 2010 ("ACA"), the government has issued a Mandate that requires the College—in violation of its religious convictions—to offer abortion-inducing drugs in its insurance plans. One provision of the ACA requires group health plans to provide "preventive care" to women at no cost (the "Mandate"). It includes "[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and

patient education and counseling."[1] FDA-approved contraceptive methods include the abortion-inducing drugs levonorgestral (*i.e.*, Plan B or the "morning-after pill") and ulipristal (*i.e.*, ella or the "week-after pill"), as well as IUDs.[2]

On August 1, 2011, the government issued an interim final rule restating the Mandate and exempting only "religious employers" that 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 tax code].

76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)–(4). Louisiana College cannot satisfy these requirements. Am. Compl. ¶¶ 31–32, 64, 69–71.

After significant public outcry, in a January 20, 2012 press release Secretary Sebelius noted "the important concerns some have raised about religious liberty," but offered no change to the Mandate or its exemption.[3] Instead, she announced that non-exempt religious institutions would be given one year "to adapt to this new rule." *Id.* On February 10, 2012, President Obama and some Defendants held a press conference announcing the intent to continue mandating the required items through the insurance issuers who work with entities such as Louisiana College. HHS released a bulletin offering guidance about a "Temporary Enforcement Safe Harbor" for certain organizations, providing that Defendants will not enforce the Mandate for one

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[1] Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Aug. 8, 2012).

[2] *See* FDA, *Birth Control Guide* (Oct. 19, 2011), *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm#emerg (last visited Aug. 8, 2012) (describing various FDA-approved contraceptives).

[3] *See* Statement of HHS Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Aug. 8, 2012).

year against non-exempt, religiously-opposed, non-profit entities—as long as they certify that they have not provided any contraceptive coverage since February 10, 2012. Guidance at 3.[4] But at the same time, the government also issued "final regulations" adopting the Mandate and its narrow religious employer exemption "as a final rule without change." 77 Fed. Reg. at 8729. Under the final rule, the Mandate takes effect the first plan year after August 1, 2012. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. at 46623. Louisiana College's first plan year subject to the rule begins in January 2013. Am. Compl. ¶ 34. Thus, even assuming a stay of government enforcement under the safe harbor, the Mandate is effective against Louisiana College beginning January 2013, and explicitly empowers employees to sue to enforce it. *See* 26 U.S.C. § 1132(a).

On Friday, March 16, 2012, the government announced a private briefing announcing an Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16501 (Mar. 21, 2012). The ANPRM states that Defendants "intend to propose a requirement that health insurance issuers providing coverage for insured group health plans sponsored by such religious organizations assume the responsibility for the provision of contraceptive coverage without cost sharing to participants and beneficiaries." 77 Fed. Reg. at 16503. This intent is not a suggestion "among other options, as the government contends, Gov Br. at 8; it is *the* "inten[t]" of the ANPRM. 77 Fed. Reg. at 16503. Yet while the ANPRM's intent is clear, it proposes no actual rule to accomplish that intent, and it offers no coherent mechanism by which such a goal would be practical, functional, or even legal. The ANPRM itself cannot be finalized because it is not a proposed rule. Regarding *how* a future proposed rule would accomplish the ANPRM's stated intent, it merely presents "questions and ideas to help shape . . . discussions" and "an early opportunity for

[4] *See* Dep't of Health & Hum. Servs., Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Aug. 8, 2012) [hereafter, Guidance].

any interested stakeholder to provide advice and input." *Id*. at 16503. The ANPRM reiterates that the Mandate upon the College is final. *Id*. at 16502.

LEGAL STANDARD

In evaluating a motion to dismiss under FED. R. CIV. P. 12(b)(1), Louisiana College bears the burden of showing the Court's jurisdiction, but "[t]he court takes as true all of the allegations of the complaint and the facts set out by the plaintiff." *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011) (citations omitted).

ARGUMENT

Standing and ripeness are related concerns, arising from Article III of the Constitution and from prudential considerations. Louisiana College 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). The government challenges only the first standing requirement of actual or imminent injury. In arguing a lack of ripeness, courts evaluate "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). The Court considers whether "the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir. 2007) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003)).

In an ultimately unsuccessful effort to undercut the College's standing, the government makes essentially two arguments. First, it contends that Louisiana College's injury is not "imminent" or ripe because the safe harbor delays enforcement until January 2014. Second, it contends that enforcement is not imminent or ripe because a new rule might alleviate the burden on

Louisiana College. Both of these arguments fail.

I. The one-year "safe harbor" does not undermine imminence or ripeness.

A. Louisiana College is ineligible for the "safe harbor."

The government claims Louisiana College's injury is "too remote temporally" because, under the safe harbor, "the earliest [Louisiana College] could be subject to any enforcement" is January 2014. Gov. Br. at 14. But Louisiana College is ineligible for the safe harbor. To qualify, it must certify that, "from February 10, 2012 onward, contraceptive coverage has not been provided." Guidance at 3, 6. Louisiana College does not object to, and its employee plans cover, non-abortion-inducing contraception. Am. Compl. ¶¶ 33, 99. Thus, Louisiana College cannot make the necessary certification.

The government argues that despite the unequivocal language in the Guidance, Defendants indicated in another document (the ANPRM) that the safe harbor is available to entities who did provide some contraceptive coverage since February 10. Gov. Br. at 11–12 (citing 77 Fed. Reg. at 16504). Thus, according to the government, the Guidance does not mean what it plainly says, that Louisiana College does not qualify for the safe harbor because it is false that "from February 10, 2012 onward, contraceptive coverage has not been provided." Or, the government is arguing that the College should be content to certify this untruth as it is written.

This argument illustrates the government's sloppy approach to policy-making in disregard of religious freedom. The government wrote its "safe harbor" so hastily for its February 10, 2012 press conference that it did not think about the fact that different Americans have different religious beliefs about different forms of "contraception," objecting to some but not others, and that religious freedom protects all such objections. The government contends that the safe harbor "must be read in this context." But "this context" contradicts the actual words of the safe harbor, which the government has not changed.

For the government's position to be correct, Louisiana College and its officials would be required to commit a felony. The government is forcing the College to either abandon protection of its beliefs, or affirm what the falsehood that "from February 10, 2012 onward, contraceptive coverage has not been provided," and make that certification "available for examination" by government officials assuring compliance. Guidance at 4. But under 18 U.S.C. § 1001, such a certification would be a federal offense subject to fines and five years in prison because it is a "false, fictitious or fraudulent statement" that is "knowingly and willfully" made "within the jurisdiction of the executive . . . branch of the Government of the United States." No competent attorney could advise a client in the College's situation that it should feel free to lie on its certification form or violate the Mandate (which the government admits still applies). The entire basis for the government's standing argument is its requirement that the College commit a felony. This proposal is itself an injury providing Louisiana College standing to sue.

The government's view—that the facially false certification is not actually false—demonstrates the meaninglessness of the safe harbor Guidance as a reliable protection in the first place. If every time Defendants open their mouths the plain meaning of the Guidance changes, then the Guidance is even less protective than ordinary agency policy. Such infinite pliability cannot be entitled to a "good faith" presumption. The government's constantly shifting position illustrates that it wishes to coerce the College to comply with the Mandate, while publically posturing that it is being religiously tolerant. The Guidance means what it says—Louisiana College does not qualify—or else it changes with the wind and is unreliable for standing purposes.

B. A one-year delay does not undermine imminence.

Even if Louisiana College did qualify for the safe harbor, the safe harbor does not make the Mandate's enforcement uncertain—it merely delays enforcement for one year. Guidance at 3 (stating safe harbor will end for the first plan year on or after August 1, 2013). A one year delay

prior to a certain enforcement date does not in any way make an injury "indefinite" or "too remote" as a matter of law. "[I]t is irrelevant . . . that there will be a time delay before the disputed provisions will come into effect." *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143 (1974). Louisiana College "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*, 442 U.S. 289, 298 (1979); *see also Thomas More Law Ctr. v.* Obama, 651 F.3d 529, 536–37 (6th Cir. 2011) (citing Supreme Court cases that three- and six-year gaps did not defeat standing); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1190 (D.C. Cir. 2004) (thirteen-year gap); *Calvey v. Obama*, 792 F. Supp. 2d 1262, 1273 (W.D. Okla. 2011) (time delay before disputed provisions take effect is "irrelevant to the existence of a justiciable controversy"). This renders the delay distinct from the one in *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 482–84 (5th Cir. 2005), where the EPA "never issued a final rule" on the permit issue in question, and the future rulemaking made it "uncertain whether EPA will require permits from Petitioners" at all. Here the "safe harbor" is a precursor to *certain* enforcement.

The government conceded in the ACA's "individual mandate" cases that a multiple-year delay does not eliminate standing. The individual mandate does not take effect until 2014. At the trial level, the government argued that any injury was not imminent because it would not be felt for forty months. *Fla. ex rel. McCollum v. HHS*, 716 F. Supp. 2d 1120, 1145–46 (N.D. Fla. 2010). The argument failed, *id.* at 1146–47, and on appeal the government conceded standing. *Fla. ex rel. Att'y Gen. v. HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011) ("[T]he government does not contest the standing of the individual plaintiffs . . . to challenge the individual mandate."). The same result should transpire here. *See 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").[5]

C. Louisiana College faces imminent hardship.

Because Louisiana College's claims fully satisfy the "fitness" requirement, it is not necessary to consider the hardship factor. *See 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 Louisiana College faces from delay weigh decisively in favor of immediate judicial review.

First, as mentioned above, the safe harbor does not apply to Louisiana College. It has offered non-abortifacient contraceptive coverage to this day. The government admits the College cannot qualify for the safe harbor unless it executes the Guidance certification, which by its plain terms is not true for the College. If the College executes the form, it is committing a felony and is not eligible for the safe harbor anyway due to its lack of factual grounding. If it does not execute the form, it does not get the safe harbor. The College is therefore being forced to offer objectionable coverage in its employee health plan beginning January 1, 2013.

Second, even if the safe harbor applies, the safe-harbor guidelines only protect Louisiana College from enforcement "by the Departments"—*i.e.*, the government Defendants—but not from third-parties. Guidance at 3. The ACA also creates avenues by which private parties may seek to enforce the Mandate, regardless of the government's safe harbor. For example, the

[5] Defendants' cited authorities are inapposite. *See* Gov. Br. at 11. In *McConnell v. FEC*, 540 U.S. 93, 226 (2003), 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. In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), a death row inmate was denied standing to challenge the validity of a death sentence imposed on another inmate.

ACA's provisions were incorporated by reference into Part 7 of ERISA. 29 U.S.C. § 1185d(a)(1). Under Part 7, 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 the government, Louisiana College would still be subject to enforcement by its plan participants and beneficiaries. *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (retaining jurisdiction in part because "even without a Commission enforcement," the plaintiffs would be "subject to [private] litigation challenging the legality of their actions").

By imposing private lawsuit liability starting January 2013 in the context of the College's First Amendment and RFRA protected rights—including free exercise of religion—the government is intentionally subjecting the College to an injury that provides it standing to sue. The fact that Louisiana College has not yet faced lawsuits under the liability the Mandate imposes does not make the liability speculative. No lawsuits have arisen yet because the Mandate becomes effective in January, but the government does not dispute that starting January 1, the Mandate imposes liability even if the safe harbor applies. There is no missing fact, such as injury or causation, that would still need to arise on that date: once the Mandate requires the College to provide coverage and it fails to do so, liability exists. 29 U.S.C. § 1132. Indeed, other Christian colleges have faced similar legal actions already. See Decl. of E. Kniffin, Doc. # 30-1 (filed July 23, 2012), *Belmont Abbey Coll. v. Sebelius*, No. 11-cv-1989 (D.D.C.).

When the government imposes even private liability for exercising First Amendment rights such as free exercise of religion, that adverse effect alone establishes injury and standing. *See Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956–57 (1984) (the risk

that parties may face adverse consequences for engaging in First Amendment protected activities is itself an injury providing standing), *Bland v. Fessler*, 88 F.3d 729, 736 (9th Cir. 1996) (threat of private lawsuits provided standing to protect First Amendment rights); *R.I. Med. Soc'y v. Whitehous*e, 66 F. Supp. 2d 288, 303 (D.R.I. 1999) ("the Act's private right of action makes the threat of prosecution more credible and more imminent"); *ACLU of Tenn. v. Tennessee*, 496 F. Supp. 218, 221 (M.D. Tenn. 1980) ("the major peril posed by [the law] is its provision for civil actions by private parties"); *Ostergen v. McDonnell*, 2008 WL 3895593, at *5 (E.D. Va. 2008) (a plaintiff "is not required to face the threat of civil penalties to" engage in speech activities because "[s]tanding requirements have been historically relaxed in First Amendment cases").

The Mandate itself, by making the College choose between its religious beliefs and legal liability, imposes an injury prior to any actual private or government enforcement. The very reason courts permit pre-enforcement relief is to protect plaintiffs from being forced to choose between exercising their constitutional rights and facing liability. Indeed, permitting parties to sue before enforcement is particularly important where, as here, the danger to protected liberties is one of self-censorship. *See, e.g.*, *Virginia v. Am. Bookseller Ass'n*, 484 U.S. 383 (1988) (finding justiciability where "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("Our reluctance to require parties to subject themselves to enforcement proceedings to challenge agency positions is of course at its peak where, as here, First Amendment rights are implicated and arguably chilled by a 'credible threat of prosecution.'") (quoting *Chamber of Commerce*, 69 F.3d at 603 (finding standing based on threat of private party lawsuits)).

The government could eliminate this injury immediately by completely exempting the College from the mandate or revoking it on an interim final basis with respect to the College

while deliberations continue. Instead, the government has intentionally left the Mandate in place to impose private liability, offering the half-protection of a promise of no *governmental* enforcement.[6] The government's choice to proceed in this manner places the College in precisely the predicament described in the Complaint: starting in about five months, the College must comply with the current version of the Mandate (which would violate its religion) or it must violate that rule (and face sanctions through private litigation). The government's act of forcing this Scylla and Charybdis on the College constitutes a redressable injury now, and is therefore sufficient for purposes of standing and ripeness.[7]

Third, even under the theorized new mandate—assuming it is ever proposed and finalized—Louisiana College would be compelled to facilitate coverage of objectionable items through its insurance issuer, or face significant government penalties. *See* Am. Compl. ¶ 80. As discussed above, a one-year delay of violating the College's religious beliefs against facilitating an objectionable plan does not undermine the certainty of the burden and the College's ability to legally challenge it now.

At most, even with the ANPRM and safe-harbor, the government contends that the College's January 1, 2014 plan must cover abortifacient items through its insurer. The ANPRM is

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[6] Indeed, Defendants have taken the position that rules in this area can be implemented immediately, as "interim final rules" without waiting for notice and comment. *See* 76 Fed. Reg. 46621. Accordingly, if Defendants truly do wish to eliminate the burden on Plaintiff's religion during the next year while Defendants deliberate over the ANPRM, they could immediately do so. Their regulatory pace to date—implementing the burden on Plaintiff urgently and without notice and comment, *see id*., but then insisting on a lengthy slow-paced deliberation while Plaintiff remains exposed to private litigation—leaves the College in need of judicial protection in the near term, even if Defendants do eventually change their rules.

[7] *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (forcing someone to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion" to follow the law imposes "the same kind of burden upon the free exercise of religion" as would a direct fine for worship); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(2) (providing a claim when religious exercise "is substantially burdened by government"); *id.* § 2000bb(b)(1) (expressly adopting compelling interest test from *Sherbert.*).

unequivocal that it "intends" to propose a rule requiring "health insurance issuers" (the College's own insurance company) provide the coverage of abortifacient drugs. 77 Fed. Reg. at 16503. This proposal is not one among a universe of options—it is *the* intent of the ANPRM. This is why the ANPRM expressly refers to entities like the College as "non-exempt"—they are not exempt from the Mandate, but simply might be permitted to satisfy it in a different way, through their insurers. The ANPRM therefore raises not a question of *whether* Louisiana College will be forced to provide this coverage, but how it will be allowed to satisfy that legal obligation. The College, however, has a religious objection to facilitating access to these drugs and devices, even if the College's insurer is declared to be the one providing the coverage. Am. Compl. ¶ 80. Such an arrangement still *morally* involves the College in objectionable coverage, and the government cannot declare otherwise as a theological matter. The College's injury does not turn on the "how" question to be decided later in proposed rulemaking; it turns on the "whether" question that the government already answered in the ANPRM itself: the College will be forced to provide a plan that causes its employees to have objectionable coverage through its insurer. This is a legally certain burden on the College's beliefs regardless of how the arrangement will be structured. It is ripe because the government insists it will happen.

Fourth, this Mandate's burdens harm the College well before January, because a health plan does not come into existence overnight. The College must put it together many weeks in advance, with the objectionable coverage, or face the Mandate's penalties. Indeed, as noted above, the ACA and its regulations recognize the need for advance knowledge of finality—one year at least—until the any preventive services coverage is mandated. 75 Fed. Reg. 41726. The government contradicts this statutory prescription by claiming that this case is unripe for review now, a mere five months before January 2013 and less than a year before August 2013. The

government's proposed course—a one-year enforcement safe harbor during which they promise to think up better rules than they have implemented to date—strips the College of the one year lead time to which it is entitled under federal law, and would force it to litigate quickly, as soon as the new rule issues and the safe harbor expires, to protect its rights. Placing religious objectors like the College in this position, in which they are deprived of the lead time to which *every other employer* is entitled by statute, injures the College, and does so now

The government's Mandate and its future plans also impose severe impacts on the College's ability to retain and recruit both employees and students, and potentially on its continued operation. These and other potential implications demand immediate resources. Am. Compl. ¶¶ 67–68, 85–86, 114; *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*" in planning to comply). These consequences are "direct and immediate" and place Louisiana College in the pressing dilemma of how to comply with its own religious convictions without jeopardizing its educational mission. *See Abbott Labs.*, 387 U.S. at 152–53. These real and significant hardships further warrant immediate review of the Mandate.

D. Louisiana College's claims raise questions of law, not fact.

The ripeness doctrine favors disputes that are "purely legal" over disputes requiring further factual development. *Texas*, 497 F.3d at 498–99. Louisiana College's challenge to the Mandate raises questions of law independent of any context-specific facts. Its Free Exercise claims under RFRA and the First Amendment allege that the Mandate, in its final form pursuant to the justifications the government used to pass it, burdens religious exercise, is not justified by a compelling interest, is not the least restrictive means of pursuing that interest. *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) (whether regulation violates "free exercise right [under RFRA] is a question of law"). The Free Exercise Clause claim further alleges that the Man-

date is not neutral or generally applicable *on its face*, because it exempts a favored class of religious objectors and excludes a disfavored class, 45 C.F.R. § 147.130(a)(iv)(A)–(B), and 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 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, Louisiana College's Establishment Clause claim raises the 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). APA claims likewise turn on questions of law. *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985) (review under APA is "purely legal"). Its due process claim points to vagueness and unfettered discretion on the face of the Mandate. Thus, the College's claims are "purely legal" and *presumptively* ready for adjudication. *McCollum*, 716 F. Supp. 2d at 1149 ("In the context of a facial challenge, . . . 'a purely legal claim is presumptively ripe for judicial review.").

II. The government's non-binding promise of an additional mandate does not make the current Mandate's impending harm speculative.

The government contends that a not-yet-proposed rule announced in its March ANPRM undermines Louisiana College's standing and ripeness because it promises new rules that would remove the Mandate's burden. Gov. Br. at 14. The government's self-serving argument fails.

A. The Mandate is final and therefore ripe.

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." *Abbott 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. In these circumstances, the government cannot reasonably dispute that the new "Final Rule" is truly final for purposes of ripeness. *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.").

There has been no change to the Mandate and its narrow "religious employer" exemption. Rather, in February, Defendants confirmed they were "adopted as a final rule without change." 77 Fed. Reg. at 8730. Thus, the College's challenge is ripe. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115–18 (10th Cir. 2010) (indicating that challenged law must actually be amended, repealed, or expired to satisfy mootness); 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.")

Moreover, "a mere informal promise or assurance" by the government to take corrective action later cannot destroy jurisdiction. *See Rio Grande Silvery Minnow*, 601 F.3d at 1118 (citation omitted). Indeed, "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." *API* I, 906 F.2d at 739–40. 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 (D.C. Cir. 2008) (citations omitted).[8]

Here, the ANPRM presents no actual proposed rule, but only "questions and ideas" to "shape" future discussions about the idea of forcing insurers to provide contraceptive coverage. 77 Fed. Reg. at 16503. They have not sought to amend the original Mandate, but expressly confirmed its binding force. *Id.* at 16502. *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, 13C FED. PRAC. & PROC. JURIS. § 3533.7 ("Nor does mootness follow announcement of an intention to change or adoption of a plan to work toward lawful behavior.").

Finally, even if the Notice introduced a final new rule, the protections it proposes would not resolve the religious conflict. Louisiana College would still be forced to cover objectionable drugs and services. Although its insurer ostensibly would administer them, Louisiana College would still have to provide "access to information necessary to communicate with the plan's participants." 77 Fed. Reg. at 16505. This would constitute zero change from the status quo. Louisiana College already does not directly provide health-care services to its employees. Services are provided by a third party. Louisiana College selects and pays for the plan, but the 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 rule, Louisiana College would be forced to make objectionable drugs and services available to employees through a plan it sponsors and pays for, just as under the current final rule.[9]

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[8] *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 501 (D.C. Cir. 1994), is irrelevant because it involved a researcher who no longer engaged in the regulated activity.

[9] The ANPRM's assumption that employers under the theorized rule will not have to pay is baseless. Abortion-inducing "contraceptives" have indisputable up-front costs. Indeed, the ANPRM assumes there will be costs and discusses ways they can be recovered by insurers, in-

B. The ANPRM is neither a proposed rule nor would it help the College.

The ANPRM does not serve to undermine ripeness of the College's challenge to the final Mandate because it is not a proposed rule, and by its own terms it would not fix the situation. This is illustrated by contrasting two cases the government relies on, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API* II"), and *Tex. Indep. Producers*, 413 F.3d 479. Both cases show that the final Mandate here is ripe for review.[10]

In *API* II, 683 F.3d at 384, the EPA had proposed an actual rule that "if made final, [it] would significantly amend EPA's 2008 decision." The ANPRM here is a mere expression of intent to create a proposed rule to impose the Mandate on insurance issuers, without specifying how it could do so. Additionally, the EPA in *API* II did not have the discretion to delay or alter completion of its rule; such tactics were "not within the discretion of or controlled by the agency as would usually be the case," because the EPA was legally obliged to finalize that change due to a court settlement. *Id.* at 389. Here, this is the "usual" case where the government has no obligation to fulfill its non-binding promise of a change. Worse, the government has not even proposed a rule to be finalized, and need never do so (especially if the president wins reelection). With no proposed rule and no legal obligation to create one, it is impossible to say as in *API* II that the existing, final Mandate's injury might be alleviated.

Furthermore, the actual proposed rule in *API* II would have entirely resolved the challenge. Those challengers objected that their waste products were deemed hazardous even while other waste products were excluded from hazardous status if they were transferred for recycling. *API* II, 683 F.3d at 384–86. The new, actually-proposed EPA rule "would wholly eliminate the

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cluding by taking rebates from employers themselves. 77 Fed. Reg. at 16507.

[10] The court incorrectly reached the opposite conclusion in *Belmont Abbey Coll. v. Sebelius*, 2012 WL 2914417, at *11–13 (D.D.C. July 18, 2012). Its reliance on *API* II is misplaced for the reasons explained here.

very transfer-based exclusion of which API's members wish to take advantage." *Id.* at 387–88. Here, however, the ANPRM's speculative proposed rule insists that it would impose the mandate on insurers, which the College explicitly declares is still a violation of its religious beliefs. Am. Compl. ¶ 80. Therefore, in this case both the existing final Mandate and the speculative not-yet-proposed rule would violate the College's beliefs.

The government argues that its ANPRM *might* lead to a proposed rule that does something besides imposing an insurer mandate. But this not only contradicts the explicit intent of the ANPRM, 77 Fed. Reg. at 16503, it is wholly speculative and exists in no proposed rule that "if made final, [it] would significantly amend [agency's previous] decision." *API* II, 683 F.3d at 384. The idea that the Obama administration might reverse its final rule with respect to the College is baseless. "If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *Id.* at 388 (quoting *API* I, 906 F.2d at 739–40). The ANPRM is exactly the kind of "indefinite" delay that *API* I & II both insisted were not tolerable.

For similar reasons, the government misplaces its reliance on *Texas Independent Producers*. In that case the Court deferred review of permit requirements for storm water discharges that failed to exempt the oil and gas industry, *Tex. Indep. Producers*, 413 F.3d at 480–82, based on three reasons that are not applicable here. First, the EPA in that case "ha[d] never issued a final rule with respect to the oil and gas exemption." *Id*. at 482. Instead it had repeatedly deferred finalization of the rule pending further review. The government here has done the opposite to the College and other entities: finalized its rule against the College "without change." The government steadfastly refuses to do what the EPA did in *Texas Independent Producers*, namely, to refrain from finalizing its Mandate in the first place until after additional review. The

government here is shooting first and asking questions later.

Second, the Court in *Texas Independent Producers* determined that there was insufficient hardship on the plaintiffs in delaying review because the EPA never put its permit requirement effect, and because plaintiffs admitted they did not need advance notice. *Id.* at 483. Here, as explained above, the Mandate is in effect and the College does not qualify for the safe-harbor because it already covers some contraception. And even if the safe harbor applied, the College would face a burden during the safe harbor because the substantive Mandate would still require coverage, directly enabling lawsuits against the College by plan participants. Third, the Court declared that the non-finalized permit requirement might never be applied to the plaintiffs, and that the existing non-final rule lacked such specificity it was not clear how it would apply. *Id.* at 483–84. The opposite is true here: it is the final Mandate, not the speculative ANPRM, that is clear about how it applies to violate the College's beliefs. And even if the ANPRM fulfills its intent entirely, there is no "uncertainty" whether the College will have to violate its beliefs. The ANPRM is unequivocal that the College will have to provide contraceptive coverage at least through its insurer, in violation of the College's religious views.

The College's religious freedom claims in this case will persist regardless of any hypothetical rule change. There is no proposed rule, and even if the speculated change occurs it will violate the College's beliefs rather than ameliorate the violation of those beliefs. Therefore the claims the College presents today are fully ripe for adjudication.

C. The promise of future rulemaking has no impact on fitness.

The government's theorized new rule would not alleviate the conflict with Louisiana College's religious convictions. The College would still be required to provide an insurance plan that directly gives employees access to products and services it deems morally wrong. This proposal would be equally offensive to the College's religious convictions. Am. Compl. ¶ 80.

The mere possibility that an agency will change its rule, without any specific proposed rule that would definitely remove the burden on Louisiana College, does not alter ripeness because "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." *API* I, 906 F.2d at 739–40.

In this respect the government wishes to have its cake of finality and eat it too. The ACA prohibits the government from imposing its Mandate on anyone until at least one year after it is finalized. 75 Fed. Reg. at 41726. And the government now claims that the ANPRM means its rule lacks finality on Louisiana College. But it insists the existing rule was indeed finalized on August 1, 2011, to let it impose the Mandate on all plans starting after August 1, 2012. Having done this to burden the College as soon as possible, the government turns around and claims in this litigation that its rule will not really be final until August 2013, and then will apply to plans less than one year later. This duplicity precludes a ruling that standing is lacking for prudential reasons. If the ANPRM *really* removes the Mandate's finality, the government is violating the ACA by applying it to any plan before a year *after* August 2013. But if, as the government insists, its Mandate *really* finalized in August 2011, it cannot claim under the ANPRM that the Mandate against the College is not yet ripe.

Notably, the announced but-not-proposed new rule would not cure the constitutional defects in the Mandate itself. The Mandate would still violate the Free Exercise Clause by granting some formal churches (*i.e.*, "religious employer[s]") a complete exemption, while granting others—like Louisiana College—only a partial "accommodation," and providing exclusions undermining general applicability. The Mandate would also still violate the Establishment Clause by wrongly preferring some religious activities over others, and creating excessive government en-

tanglement in religion by requiring the government to distinguish between the two.

In sum, the government refuses to grant the College even a temporary exemption, and instead insists—even under the speculative ANPRM mandate on issuers—that the College directly facilitate access to abortion-inducing drugs one way or another. In this context, the mere promise of future rulemaking has no impact on the Mandate's finality.

CONCLUSION

For all the foregoing reasons, Louisiana College respectfully requests that the Court deny Defendants' motion to dismiss.

Date: August 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Bradley P. Humphreys and Michelle R. Bennett, Counsel for Defendants.

s/ Matthew S. Bowman
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