IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-314-Y
KATHLEEN SEBELIUS, et al.	§	

ORDER DENYING MOTION TO DISMISS

Before the Court is Defendants' Motion to Dismiss (doc. 12). Defendants are United States Secretaries Kathleen Sebelius, Hilda Solis, and Timothy Geithner, and the respective departments they head--the United States Department of Health and Human Services ("DHHS"), the United States Department of Labor ("DoL"), and the United States Department of Treasury ("DoT") (collectively, "the Departments").[1] After review of Defendants' motion, the Court concludes that plaintiff Roman Catholic Diocese ("the Diocese") has standing to bring its claims in this case and that those claims are ripe for judicial review. Therefore, the Court will deny Defendants' motion.

I. Background

In July 2010, the Departments issued interim regulations under the federal Patient Protection and Affordable Care Act ("the ACA") requiring group health plans and health-insurance issuers to cover

[1] In addition to the parties' briefing, the Court considered the amicus brief (doc. 21) filed by the American Center for Law and Justice, joined by seventy-nine (79) members of the United States House of Representatives in the One Hundred Twelfth Congress.

"preventive care and screening" for women, without imposing cost-sharing requirements (e.g., co-payments or deductibles).[2] 75 Fed. Reg. 41,726, 41,728 (July 19, 2010). In August 2011, the Health Resources and Services Administration ("HRSA"), an agency within the DHHS, promulgated guidelines clarifying that preventive services for women included "all Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 77 Fed. Reg. 8725,8725 (Feb. 15, 2012). That same month, the Departments amended the interim regulations such that HRSA was granted "additional discretion to exempt certain religious employers from the Guidelines where contraceptive services [were] concerned." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).[3]

In February 2012, the Departments adopted the amended interim regulations and issued them as a final rule ("the Mandate"). The Departments left undisturbed the criteria for determining whether

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[2] This requirement does not apply to "grandfathered" plans. *See* 42 U.S.C.A. § 18011(a)(2) (West 2012). But the Diocese's plan is not grandfathered.

[3] To qualify for the religious-employer exemption, an organization must meet four 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) (West 2013).

an organization qualifies for the religious-employer exemption. But in light of several comments the Departments had received complaining that the protection offered by the exemption was too narrow, the Departments announced that they were implementing a one-year "temporary enforcement safe harbor" for "certain non-exempted, non-profit organizations with religious objections to covering contraceptive services." 77 Fed. Reg. at 8728.

The Departments also announced that, "[d]uring the temporary enforcement safe harbor, [they] plan[ned] to develop and propose changes to these final regulations that would . . . provid[e] contraceptive coverage without cost-sharing to individuals who want it and [at the same time] accommodat[e] non-exempted, non-profit organizations' religious objections to covering contraceptive services." *Id.* In March 2012, the Departments issued an Advance Notice of Proposed Rulemaking ("ANPRM"), "present[ing] questions and ideas" concerning ways to carry out those objectives. 77 Fed. Reg. at 16,503.

These proposed accommodations notwithstanding, the Diocese contends that the Mandate, in its current form, violates the Religious Freedom Restoration Act ("RFRA"); the Administrative Procedures Act ("APA"); and the free-exercise, establishment, and free-speech clauses of the First Amendment to the United States Constitution. Defendants, on the other hand, argue that the Diocese lacks standing to challenge the mandate at this time and

that, alternatively, the Diocese's claims are not ripe for review. According to Defendants, because the safe harbor protects the Diocese from having to comply with the Mandate until at least July 1, 2014, and considering that the Departments have announced their intention to further amend the Mandate to accommodate religious objections, the Diocese does not face any imminent injury sufficient to support standing. Similarly, Defendants contend that because further changes are likely to result to the Mandate, the constitutionality of its current provisions is not ripe for review.

The Diocese insists, however, that it has standing to challenge the Mandate. First, the Diocese argues that it faces imminent injury because the Mandate is a final rule (i.e., a law) with a definite effective date. Second, the Diocese alleges that, in any event, it faces certain present costs and other harms as a result of the looming effective date of the Mandate. For example, the Diocese alleges that it must take the Mandate into account now as it conducts the "analyses, negotiations, and decisions [that] must occur each year before [it] can offer a health benefits package to its employees." (Pl.'s Compl. 34, ¶ 119 (doc. 1).) According to the Diocese, "[t]he multiple levels of uncertainty surrounding the . . . Mandate make this already lengthy process even more complex." (*Id.* at 34, ¶ 120.) Moreover, the Diocese alleges that, should it decide its "only tolerable option is to attempt to qualify as a 'religious employer' under the . . .

Mandate, it will need to undertake a major overhaul of its organizational structure, hiring practices, and the scope of its programming." (*Id.* at 34-35, ¶ 121.) And for essentially the same reasons, the Diocese contends that this case is ripe for review.[4]

II. Analysis

"Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing Fed. R. Civ. P. 12(b)(1)). "The party asserting jurisdiction carries the burden of proof." *In re Eckstein Marine Serv., L.L.C.*, 672 F.3d 310, 314 (5th Cir. 2012) (citation omitted). "In assessing jurisdiction, the district court is to accept as true the allegations and facts set forth in the complaint." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012) (citation omitted). In addition, "the district court is empowered to consider matters of fact which may be in dispute." *Id.* (citation

[4] Alternatively, the Diocese contends that Defendants' standing and ripeness arguments do not address six of the Diocese's nine claims. First, the Diocese complains that the ANPRM merely proposes accommodations to non-exempt entities and, thus, contains no suggestion of further modification to the **criteria** for determining whether an organization qualifies as a "religious employer." In view of this, the Diocese argues, Defendants' standing and ripeness arguments do not apply to the Diocese's three claims challenging the religious-employer criteria. Second, the Diocese asserts that its three claims under the APA are based on Defendants' **past** conduct in connection with the rule-making process and, thus, are beyond the scope of Defendants' standing and ripeness arguments.

omitted) (internal quotation marks).[5]

A. Standing

"Article III of the United States Constitution grants jurisdiction to the federal courts only over claims that constitute 'cases' or 'controversies.'" *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (citing U.S. Const. art. III, § 2, cl. 1). "The requirement that a claimant have standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Nat'l Federation of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011) (citation omitted) (internal quotation marks omitted).

"The irreducible constitutional minimum of standing contains three elements." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 190 (5th Cir. 2012) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).

> The first is an injury in fact which is a concrete and particularized invasion of a legally protected interest. The second is that there must be a causal connection between the injury and the conduct complained of; the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

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[5] A court "has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Choice Inc.*, 691 F.3d at 714 (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981)). Defendants here merely raise a facial challenge to the Diocese's jurisdictional allegations; thus, the Court will look to the Diocese's complaint in determining whether jurisdiction exists in this case.

Id. at 190-91 (quoting *Lujan*, 504 U.S. at 560-61) (internal quotation marks omitted).

The Diocese alleges that the "Mandate's requirements for coverage of abortion-inducing drug[s], contraception, steriliza-tion, and related speech violates the Diocese's religious beliefs and compels it to support speech with which it disagrees." (Pl.'s Resp. 11.) The Diocese further alleges that the looming effective date of the Mandate imposes present costs and other harms upon the Diocese as it prepares for the Mandate's enforcement. Because these alleged harms would be likely to be "redressed by a favorable decision" in this case, the Court is satisfied that the Diocese has standing to assert its claims. *Lujan*, 504 U.S. at 561.

Defendants' arguments concerning the potential for further amendments to the Mandate are irrelevant here because "[s]tanding is determined as of the time that suit is filed." *Energy Mgmt. Corp. v. City of Shreveport*, 397 F.3d 297, 302 n.3 (5th Cir. 2005) (citation omitted); *see also Wheaton College v. Sebelius* , Nos. 12-5273 & 12-5291, 2012 WL 6652505, at *1 (D.C. Cir. Dec. 18, 2012) (slip opinion) (holding that a plaintiff organization had standing to challenge the Mandate, notwithstanding the ANPRM or related announcements, because "standing is assessed at the time of filing"); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996) ("There is no need for [the plaintiff] to wait for actual implementation of the statute and

actual violations of his rights under the First Amendment where the statute 'makes inappropriate government involvement in religious affairs inevitable.'" (citing *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981))).

B. Ripeness

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003) (citations omitted) (internal quotation marks omitted). The doctrine is also intend "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 807-08. "[D]rawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," the doctrine of ripeness is particularly apposite "when a party is seeking pre-enforcement review of a law or regulation." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008) (citations omitted) (internal quotation marks omitted).

As a practical matter, "[t]o determine if a case is ripe for adjudication, a court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Texas v. United States*, 497 F.3d

491, 498 (5th Cir. 2007) (citations omitted). More specifically, "[a] challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal ones,' (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.'" *Id.* (quoting *Nat'l Park*, 538 U.S. at 812). One other "consideration is whether resolution of the issues will foster effective administration of the statute." *Id.* at 499 (citations omitted) (internal quotation marks omitted).

In light of these considerations, the Court concludes that the Diocese's challenges to the Mandate are ripe for judicial review. The Diocese's claims present purely legal issues, and further factual development is not necessary to resolve them. The Mandate, moreover, is a final rule with a definite effective date, and neither the ANPRM nor Defendants' related announcements change this. And because the Mandate is "on the books," there is nothing improper about subjecting it to the limitations of the United States Constitution and other applicable laws. A ruling on the lawfulness of a final rule, in other words, is not tantamount to judicial entanglement "in abstract disagreements over administrative policies." *Nat'l Park*, 538 U.S. at 807.

Indeed, a prompt ruling on the merits of the Diocese's claims should add clarity to the constitutional issues presented by the

Mandate and, in that sense, "foster effective administration of the statute." *Texas*, 497 F.3d at 498. Conversely, a decision to withhold consideration of the Mandate would likely result in hardship to the Diocese, given that the Diocese must now decide whether to (a) implement substantial changes to its group health plans to achieve compliance with the Mandate or (b) budget for the imposition of significant fines for non-compliance. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967), *abrogated on other grounds by Califano v. Sanders* , 430 U.S. 99 (1977) ("[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted.").

Defendants' assertion that the Diocese's concerns stem merely from its "own personal choice to prepare for contingencies that may never occur" is disingenuous. (Defs.' Mot. 14.) The Departments themselves once "determined that it [was] impracticable and contrary to the public interest to delay putting the provisions in the[] interim final regulations in place" because the organizations "subject to the[] provisions [would] have to be able to take the[] changes into account in establishing their premiums, and in making other changes to the designs of plan or policy benefits." 75 Fed. Reg. 41,730 (July 19, 2010). The Diocese simply does not have the luxury of inaction; the Mandate "has been formalized and its

effects [are being] felt in a concrete way." *Nat'l Park*, 538 U.S. at 807-08.

As the United States District Court for the Eastern District of New York recently observed:

> The Coverage Mandate is a final rule, and the ANPRM has not made the Coverage Mandate any less binding on plaintiffs. Therefore, this is not a case where an enforcement action is only remotely possible or plaintiffs' concerns are imaginary or speculative.
> . . . .
> Moreover, the First Amendment does not require citizens to accept assurances from the government that, if the government later determines it has made a misstep, it will take ameliorative action. There is no, "Trust us, changes are coming" clause in the Constitution. To the contrary, the Bill of Rights itself, and the First Amendment in particular, reflect a degree of skepticism towards governmental self-restraint and self-correction.

Roman Catholic Archdiocese of N.Y. v. Sebelius, No. 12 Civ. 2542(BMC), 2012 WL 6042864, at *16, *19 (E.D.N.Y. Dec. 4, 2012) (citations omitted) (internal quotation marks omitted).[6] *But see Colorado Christian Univ. v. Sebelius*, No. 1:11-CV-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 8, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-CV-01276-JES-BGC, 2013 WL 74240 (C.D. Ill.

[6] The only federal appellate court to weigh in on the matter thus far, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), determined that the case before it was not ripe for review. *See Wheaton College*, 2012 WL 6652505, at *1-*2. But in that case, "the government went further" than merely citing to the ANPRM and related announcements in the Federal Register. *Id.* at *1. The government, for example, "represented to the court that it would never enforce [the Mandate] in its current form against the appellants or those similarly situated as regards contraceptive services" and "further represented that it would publish a Notice of Proposed Rulemaking for the new rule in the first quarter of 2013 and would issue a new Final Rule before August 2013." *Id.* Therefore, the *Wheaton College* case is distinguishable from the instant one. In any event, the D.C. Circuit did not dismiss the claims as unripe but merely determined to hold them in abeyance.

Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12-CV-0523-RLM-CAN, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-CV-00158, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012); *Zubik v. Sebelius*, No. 12-CV-676, 2012 WL 5932977, at *1 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 12-CV-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Nebraska v. Dep't of Health & Human Servs.*, No. 4:12-CV-3035, 2012 WL 2913402 (D. Neb. July 17, 2012).

III. Conclusion

Based on the foregoing, the Court concludes that the Diocese has standing to bring its challenges to the Mandate and that those challenges are ripe for review. Accordingly, Defendants' motion to dismiss is DENIED.

SIGNED January 31, 2013.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE