IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RIGHT TO LIFE OF MICHIGAN,	)	
Plaintiff,	)	
v.	)	**Case No. 1:13-cv-1202**
KATHLEEN SEBELIUS, *et al.*	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

While the regulatory scheme at issue in this litigation is complex, this case itself is quite simple. In short, plaintiff Right to Life of Michigan ("RLM") challenges the wrong regulations. More precisely, RLM challenges a version of the regulations that no longer applies to RLM because it was superseded in July 2013 – four months before RLM filed its Complaint. Because RLM cannot possibly be injured by regulations that are no longer operative, this Court lacks jurisdiction over RLM's claims and this case should be dismissed in its entirety.

The Patient Protection and Affordable Care Act ("ACA") requires group health plans and health insurance issuers that offer non-grandfathered health coverage to their employees to provide coverage for certain preventive services without cost-sharing, including, as relevant to this case, FDA-approved contraceptive services. As explained in more detail below, the defendant agencies have promulgated regulations implementing this requirement. RLM alleges that a prior version of these regulations violates its rights under the First Amendment, the Religious Freedom Restoration Act and the Administrative Procedure Act. But RLM challenges regulations that do not apply to it. The allegations in RLM's Complaint paint an incomplete and outdated picture of the relevant regulatory scheme. Specifically, RLM fails to acknowledge that regulations adopted in July 2013 – four months before RLM filed its Complaint – create an accommodation for organizations such as RLM, under which RLM would not be required to contract, arrange, pay, or refer for contraceptive coverage.

RLM suffers no injury from the inapplicable regulations it challenges. Because RLM cannot prove that it has or will suffer any injury stemming from the defunct regulatory scheme that it describes in its Complaint, RLM lacks standing to challenge the 2012 regulations, and the Court should dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

Before the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."). Section 1001 of the ACA seeks to cure this problem by making preventive care accessible and affordable for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," which is a component of the Department of Health and Human Services (HHS). 42 U.S.C. § 300gg-13(a)(4).

Because there were no such existing HRSA guidelines relating to preventive care and screening for women, HHS requested that the Institute of Medicine (IOM) develop recommendations for it. IOM REP. at 2. After conducting an extensive science-based review, IOM recommended that preventive services for women include "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id*. at 10-12. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany them) and promote healthy birth spacing. *Id*. at 102-03.

On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, encompassing all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling" as prescribed by a healthcare provider, subject to an exemption

relating to certain religious employers, which was authorized by regulations issued that same day ("2011 amended interim final regulations"). *See* HRSA Women's Preventive Services Guidelines ("HRSA Guidelines").[1] In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage) ("2012 final regulations"). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012).

RLM challenges the 2012 final regulations in its Complaint. However, during the safe harbor period announced in the 2012 final regulations, the government committed to undertake a new rulemaking to adopt new regulations to further accommodate non-profit religious organizations' religious objections to covering contraceptive services. *Id*. at 8728. The regulations adopted on July 2, 2013, represent the culmination of that process. *See* 78 Fed. Reg. 39,870 (July 2, 2013); *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012); 78 Fed. Reg. 8456 (Feb. 6, 2013).[2]

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[1] To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to 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; and
(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.

76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). The 2013 final rules simplify and clarify the religious employer exemption by eliminating the first three criteria and clarifying the fourth. Under the 2013 final rules, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a).

[2] The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, except the amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013. *See* 78 Fed. Reg. at 39,871-72.

The 2013 final rules represent a significant accommodation by the government of the religious objections of certain non-profit religious organizations and promote two important policy goals. The regulations provide women who work for accommodated non-profit religious organizations with access to contraceptive coverage without cost sharing, thereby advancing the government's compelling interests in safeguarding public health and ensuring that women have equal access to health care. And the regulations do so in a narrowly tailored way that does not require non-profit religious organizations with religious objections to such coverage to contract, arrange, pay, or refer for that coverage.

Specifically, the 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed. Reg. at 39,875-80. An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75. Based on the allegations in the Complaint, it appears likely that RLM meets these criteria and is therefore eligible for an accommodation.

Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at

39,874. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its health insurance issuer or third party administrator. *Id*. at 39,878-79. An eligible organization's issuer or third party administrator, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id*. at 39,879-80. RLM alleges that it contracts with an outside issuer – Blue Cross Blue Shield – that provides healthcare coverage to its employees. Compl. at ¶ 43. Thus, RLM need not contract, arrange, pay or refer for contraceptive coverage under the 2013 final rules.

STANDARD OF REVIEW

Defendants move to dismiss this case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The party invoking federal jurisdiction bears the burden of establishing its existence, and the Court must determine whether it has subject matter jurisdiction before addressing the merits of a claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998). In determining its jurisdiction, the Court may consider evidence in addition to the Complaint when defendants assert a factual challenge to subject matter jurisdiction. *See Lovely v. U.S.*, 570 F.3d 778, 781-82 (6th Cir. 2009).

ARGUMENT

THIS CASE SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING TO CHALLENGE THE 2012 REGULATIONS

This Court's jurisdiction is limited by Article III of the United States Constitution to "Cases" and "Controversies." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Standing is a "core component" of the case-or-controversy requirement. *Id*. at 560. "[T]he

irreducible constitutional minimum of standing requires that a plaintiff (1) suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling." *Id*. As to the injury prong, a plaintiff must demonstrate that it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. (quotations omitted).

RLM challenges the 2012 final regulations and alleges injury resulting from the application of those regulations. However, based on the allegations in the Complaint, it appears likely that RLM is eligible for an accommodation under the 2013 final rules, and therefore need not contract, arrange, pay, or refer for contraceptive coverage. In other words, RLM challenges regulations that no longer apply to it, because they have been superseded by those adopted in July 2013 – a full four months before RLM filed its Complaint.

As a jurisdictional requirement, standing is analyzed based on the time that the complaint was filed. In the words of the Supreme Court, "[i]t has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824)). Under the currently operative regulatory scheme, which was in effect at the time the Complaint was filed, RLM appears – based on the allegations in the Complaint – to be eligible for an accommodation. Thus, RLM has challenged a version of the regulations that no longer apply to it. RLM cannot establish that it has been injured by a now supplanted version of the regulations, with which it is not obligated to comply. [3]

Notably, after the 2012 final regulations were issued, and before the government adopted the 2013 final rules, numerous non-profit religious organizations with religious objections to

[3] If and when plaintiff challenges the operative version of the regulations, defendants will defend those regulations on the merits.

contraceptive coverage challenged the 2012 final regulations on grounds similar to those alleged by RLM. Many federal courts dismissed these challenges as unripe, and some also found that the plaintiffs lacked standing because the government had committed to engage in further rule-making. *See, e.g., Priests for Life v. Sebelius,* No. 12-CV-753 (FB), ECF No. 56 (E.D.N.Y. April 2012, 2013); *Ave Maria Univ. v. Sebelius,* No. 2:12-cv-88-Ftm-99SPC, ECF No. 72 (M.D. Fla. Mar. 29, 2013); *Most Reverend Wenski v. Sebelius*, No. 12-23820-CIV-GRAHAM/GOODMAN (S.D. Fla. Mar. 5, 2013); *Franciscan Univ. v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Eternal Word Television Network, Inc. v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala. Mar. 25, 2013); *Diocese of Dallas v. Sebelius*, No. 3:12-cv-1589-B, 2013 WL 687080 (N.D. Tex. Feb. 26, 2013)*; Conlon v. Sebelius*, No. 1:12-cv-3932, 2013 WL 500835 (N.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924-JAR, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815 (ABJ), 2013 WL 285599 (D.D.C. Jan. 25, 2013); *Persico v. Sebelius*, 919 F. Supp. 2d 622 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-01276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius,* No. 3:12-cv-00253, 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), mot. to alter or amend j. denied, 2013 WL 690990 (S.D. Miss. Feb. 15, 2013); *Zubik v. Sebelius*, No. 2:12–cv–00676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d. 980 (E.D. Mich. Oct. 31, 2012); *Nebraska v. U.S. Dep't of Health & Human Servs*., No. 4:12CV3035, 2012 WL 2913402 (D. Neb. July 17, 2012). In one such challenge, for example, the court dismissed the complaint for lack of jurisdiction, finding

> "the challenged regulatory requirement isn't the cause of the injuries of which Notre Dame complains . . . It is enough to know that the present regulation is to be replaced by another, and the safe harbor is protecting Notre Dame from harm to its religious precepts until that replacement occurs."

Univ. of Notre Dame, 2012 WL 6756332, at *4. Thus, even before the 2013 final rules were adopted, courts recognized that they lacked jurisdiction to consider challenges to the 2012 regulations brought by non-profit religious organizations raising religious objections to those regulations, because new regulations would soon be promulgated that would supersede the challenged regulations.

Accordingly, RLM cannot show that it has suffered any injury in fact stemming from the version of the regulations that it challenges. Thus, RLM lacks standing to challenge the 2012 final regulations, and this Court lacks jurisdiction to review the Complaint.

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court dismiss plaintiff's Complaint for lack of subject matter jurisdiction.

Respectfully submitted this 13th day of January, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Julie S. Saltman
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