No. 12-3238

In the U.S. Court of Appeals for the Eighth Circuit

STATE OF NEBRASKA, *ET AL.*,
Plaintiffs-Appellants,

vs.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,
Defendants-Appellees.

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA, NO. 4:12-cv-03035-WKU-CRZ,
HON. WARREN K. URBOM, SENIOR DISTRICT JUDGE

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: November 13, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") files this brief with the consent of all parties. Eagle Forum is an Illinois nonprofit corporation organized in 1981. For over thirty years it has defended principles of limited government and individual liberty, including freedom of religion. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.[1]

INTRODUCTION

This litigation asks whether the Executive Branch of the federal government (the "Administration") can violate the procedural requirements for rule making and then evade judicial review merely by providing an unenforceable, temporary "safe harbor" and representing that the Administration might later reconsider its rule. *Amicus* Eagle Forum respectfully submits that the district court erred in deferring to the Administration's *post hoc* litigation position to deny the plaintiffs – various states, private citizens, and religious charities and institutions (collectively, the "Plaintiffs") – their day in court on ripeness grounds. In addition, because the

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

Plaintiffs' complaint adequately alleges an "injury in fact" at the pleading stage, the district court also erred in dismissing the Plaintiffs' complaint on the alternate grounds that the Plaintiffs lack standing.

STATEMENT OF THE CASE AND FACTS

Amicus Eagle Forum adopts the Statement of Facts in the Plaintiffs' brief. *See* Plaintiffs' Br. at 7-11. In addition, the following two facts also are relevant: (1) any Plaintiffs (if any) who qualify for the Contraceptive Mandate's grandfather clause are restricted – or "trapped" – by the Contraceptive Mandate if they want to retain their grandfathered status to avoid the Contraceptive Mandate's burdens and invasions of liberty, Compl. ¶88; *see also id.* ¶¶33, 60; and (2) the Safe Harbor is not self-executing and, instead, requires that the Plaintiffs who seek to avoid the Contraceptive Mandate's burdens and invasions of liberty via the Safe Harbor must nonetheless expend compliance costs to avail themselves of the Safe Harbor.

By moving to dismiss the complaint under FED. R. CIV. P. 12(b)(1), the Administration admits as true all of the factual allegations in the complaint:

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.

Warth v. Seldin, 422 U.S. 490, 501 (1975). At that pleading stage, moreover, a complaint's "general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear,* 520 U.S. 154, 168 (1997). Finally, to evaluate

jurisdiction under Rule 12(b)(1), courts assume the plaintiffs' merits views. *Campbell v. Minneapolis Public Housing Auth. ex rel. City of Minneapolis*, 168 F.3d 1069, 1073 (8th Cir. 1999) ("inquiry into standing is not a review of the merits of [plaintiff's] claims"); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 439 (D.C. Cir. 1986) ("we must assume the challenging party's view of the merits in determining ripeness"); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (same for standing). As explained in this *amicus* brief, the district court did not engage in these requires analyses.

Under the circumstances, this Court must evaluate jurisdiction for this litigation under the assumption that the Administration violated the notice-and-comment requirements of the Administrative Procedure Act ("APA") when it promulgated the interim final rule, *Dep't of the Treasury et al., Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 75 Fed. Reg. 41,726 (2010) (hereinafter, the "Contraceptive Mandate"). *See* 5 U.S.C. §553. As explained in this *amicus* brief, the two administrative developments that followed the Contraceptive Mandate do not change the analysis.[2] In summary, the

[2] The two documents are (1) "*Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without*

(Footnote cont'd on next page)

"Safe Harbor" purports to shield employers, group health plans, and insurers from federal-agency enforcement for violations of the Contraceptive Mandate until the first plan year after August 2013, provided that they meet certain self-certification requirements and provide notice to insureds. The ANPRM "announced plans to expeditiously develop and propose changes to the [Contraceptive Mandate]," without identifying or proposing any changes. 77 Fed. Reg. at 16501. The ANPRM also sought public input on that endeavor. *Id.*

SUMMARY OF ARGUMENT

The Contraceptive Mandate's publication as an "interim final rule," without the notice-and-comment rulemaking, violated not only the APA (Section I.B) but also the Constitution (Section I.A). Moreover, because they are either nullities for failing to comply with the same APA rulemaking requirements or are simply unenforceable policy statements, the Safe Harbor and the ANPRM cannot alter the analysis for judicial review of the substantive merits (Sections I.C, I.D).

(Footnote cont'd from previous page.)

Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code" (Feb. 10, 2012) (hereinafter, the "Safe Harbor") issued by the Center for Consumer Information and Insurance Oversight in the Centers for Medicare & Medicaid Services, and (2) an advanced notice of proposed rulemaking ("ANPRM") from the Department of the Treasury *et al.*, captioned *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501 (2012).

On standing, the Plaintiffs have standing not only because the Contraceptive Mandate is sufficiently imminent and the complaint sufficiently informative for Article III (Sections II.A.1-II.A.2), but also because even the Safe Harbor purports to require actions – namely, certification and notice – that impose compliance burdens and out-of-pocket costs (Section II.A.2). Further, the procedural injuries that the Plaintiffs suffer not only provide procedural standing but also lower the required showing on immediacy (II.A.3).

On ripeness, the Plaintiffs' claims are ripe because (a) the Plaintiffs' procedural claims are ripe notwithstanding the alleged lack of ripeness for the merits issues (Section II.B.1), (b) neither the courts nor the Administration have a cognizable institutional interest in avoiding review of this purely legal matter under the fitness-for-review prong of prudential ripeness (Section II.B.2.a), and (c) the hardship prong of prudential ripeness both is lessened for purely legal matters otherwise fit for review and, in any event, is easily met by the Plaintiffs' current burdens and unrecoverable compliance costs (Section II.B.2.b).

Finally, although the Safe Harbor and ANPRM are best analyzed as a defendant's attempt to moot these proceedings via voluntary cessation, the Administration neither moots all of the Plaintiffs' injuries (*i.e.*, some injuries result from the Safe Harbor and others survive the Safe Harbor and ANPRM) nor demonstrates that its purely voluntary, non-binding Safe Harbor and ANPRM

necessarily moot the Plaintiffs' injuries (Section II.C).

ARGUMENT

I. THE CONTRACEPTIVE MANDATE VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA AND THE CONSTITUTION

The "history of liberty has largely been the history of observance of procedural safeguards." *Jones v. State of Arkansas*, 929 F.2d 375, 381 (8th Cir. 1991) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Before addressing the jurisdictional bases on which the district court dismissed the Plaintiffs' actions, *amicus* Eagle Forum first reviews the procedural merits. Although this merits-first approach is atypical, parties who suffer procedural injury have an easier task of demonstrating jurisdiction under Article III. *See* Section II.A.3 *infra.* As such, this Court at least should consider the powerful procedural arguments that the Plaintiffs bring, if only to aid this Court in assuring itself that the Plaintiffs suffer procedural injuries.

A. The Contraceptive Mandate Violated the Constitution's Law-Making Requirements

Although the most heavily contested procedural issues arise under the APA – and the Administration's failure to comply with the APA – this Court should not forget the underlying constitutional issues: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). In this action, the Administration purports to rely on the exception to

congressional lawmaking that Congress itself has enacted. *See* 5 U.S.C. §553(b) (congressionally proscribed rulemaking procedures). In doing so, an agency cannot "replace the statutory scheme with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969); *accord U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989). Failure to follow APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). Thus, if the Administration failed to comply with the APA, the Administration's attempt to make law violates not only the APA but also the Constitution.

B. The Contraceptive Mandate Violated the APA's Rulemaking Requirements

Unless certain exceptions apply, agencies must undertake notice-and-comment rulemaking in order to issue "legislative rules" under the APA. The parties do not question that the Contraceptive Mandate is a legislative rule. As such, the only potential exception to the APA's rulemaking requirements is where the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C.

§553(b)(B). Although the Administration made weak findings to support bypassing a rulemaking, the Administration also promulgated its Contraceptive Mandate as an "interim final rule." In the absence of a viable exception to notice-and-comment rulemaking, the concept of interim final rules (*i.e.*, rules that take effect until the agency gets around to promulgating lawful rules) is foreign to the APA.

The Plaintiffs allege that the Administration's findings on the good-cause issue are inadequate, and the Plaintiffs are entitled to judicial review of that issue. *See, e.g., Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425, 447 (D.C. Cir. 1982); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1320-21 (8th Cir. 1981). Moreover, "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dept. of Environmental Protection v. U.S. Environmental Protection Agency*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same); *U.S. Steel Corp. v. E.P.A.*, 649 F.2d 572, 575-76 (8th Cir. 1981); *Goldschmidt*, 645 F.2d at 1320-21. For the jurisdictional purposes at issue in the district court's dismissal, that reviewability of the Administration's actions establishes that the Plaintiffs raise a valid – indeed, *compelling* – procedural claim against the Contraceptive Mandate.

C. The ANPRM Does Not Alter the Contraceptive Mandate

Just as the APA recognizes a Final Rule, but not an ***Interim*** Final Rule, *see* Section I.B, *supra*, the APA also recognizes a Notice of Proposed Rulemaking ("NPRM"), but not an ***Advanced*** Notice of Proposed Rulemaking.

At the outset, it is simply wrong to assume that the ANPRM says that the Administration definitely will amend the Contraceptive Mandate in any way meaningful to this litigation. In its ANPRM, the Administration "has embarked upon the least responsive course short of inaction." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983); *In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C. Cir 1988) (same). An ANPRM merely takes under advisement the question of ***whether*** potentially to undertake in the future to change a rule; an ANPRM neither makes the decision to consider changing the rule nor commences the process of changing the rule. *In re Bluewater Network*, 234 F.3d 1305, 1313 (D.C. Cir. 2000) ("an agency's pronouncement of its intent … to engage in future rulemaking generally does not constitute final agency action reviewable by this court"). An "ANPRM [is] a preparatory step, antecedent to a potential future rulemaking, not itself a decision to reconsider the [Contraceptive Mandate] rule." *P & V Enterprises v. U.S. Army Corps of Engineers*. 516 F.3d 1021, 1026 (D.C. Cir. 2008). Far from taking serious action here, the ANPRM merely kicks the can down the road.

By contrast, when an agency issues an *actual* NPRM, the affected public can sue to ensure the completion of the process within a reasonable time, *Sierra Club v. Thomas*, 828 F.2d 783, 794-97 (D.C. Cir. 1987), which puts the agency on track to avoid unreasonable delay, consistent with agencies' APA duty to avoid such delay. 5 U.S.C. §§553(b), 706(1); *see also Monroe Communications*, 840 F.2d at 946. But even a full-fledged NPRM would command no deference. *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Comm'r, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000). The district court gave the ANPRM altogether too much credence.

Significantly, an NPRM can moot ***unreasonable-delay*** claims under certain circumstances, without mooting merits claims:

> An agency's notice of proposed rulemaking necessarily moots a petitioner's claim of unreasonable delay if that claim is based upon (1) a period of delay occurring prior to the agency's issuance of a notice of proposed rulemaking, and (2) a matter that the agency proposes to regulate in that rulemaking.

In re Int'l Union, United Mine Workers of America, 231 F.3d 51,54 (D.C. Cir. 2000). Similarly, if sufficiently confined by a fixed deadline such as a court-sanctioned settlement, an NPRM that would sufficiently alter a reviewing court's legal analysis with the agency's proposed "complete reversal of course" could

render judicial review prudentially unripe. *American Petroleum Institute v. E.P.A.*, 683 F.3d 382, 388-89 (D.C. Cir. 2012). Without an NPRM, however, these mootness and ripeness issues simply do not arise. *See* Sections II.B, II.C *infra.* On balance, then, the district court's conclusion that the ANPRM can terminate the Plaintiffs' right to judicial review is unsupportable.

D. The Safe Harbor Does Not Alter the Contraceptive Mandate

For purposes of justiciability, the parties dispute the extent to which the "Safe Harbor" undermines the Plaintiffs' standing and the ripeness of this action. *See* Sections II.A, II.B, *infra.* In this section, *amicus* Eagle Forum questions whether the "Safe Harbor" provides any "safety" ***at all.***

Because safe harbors bind the promulgating agency, the APA requires notice-and-comment rulemaking to promulgate a safe harbor. *See General Elec. Co. v. E.P.A.*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (*quoting* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992)). Similarly, under *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), four criteria trigger the requirement for notice-and-comment rulemaking: (1) whether the rules provide adequate legislative authority, absent the rule, for the same result; (2) whether the agency promulgated the rule into the C.F.R.; (3) whether the agency invoked its general

legislative authority; and (4) whether the rule effectively amends prior legislative rules. By effectively amending the Contraceptive Mandate, the "Safe Harbor" itself required a rulemaking.[3]

On the other hand, the Administration may argue (or a Court may find) that the "Safe Harbor" is merely an enforcement policy, and therefore exempt from APA notice-and-comment requirements as a "general statement of policy." 5 U.S.C. §553(b)(A). Significantly, such enforcement statements are not entitled to deference when an agency relies on them to resolve a ***future*** substantive question because, logically, the future action (not the initial statement) is the final agency action. *Pacific Gas & Elec. Co. v. F.P.C.*, 506 F.2d 33, 38-39 (D.C. Cir. 1974); *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 811-12 (8th Cir. 1981). Moreover, unlike interpretive rules, agencies can change policy statements at will, without rulemaking. *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Prof'l Hunters Ass'n, Inc., v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Syncor*, 127 F.3d at 94-95. Under this view, the "Safe Harbor" would not bind future public or private litigants.

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[3] The fact that the Administration was "not required by law to promulgate any rules limiting its discretion" does not undermine the fact that the Administration "was nonetheless bound by [APA] when it decided to do so." *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918 (D.C. Cir. 1982).

Of course, if the Safe Harbor is merely a non-binding policy, it cannot carry the load that the district court and the Administration place on it:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

F.C.I.C. v. Merrill, 332 U.S. 380, 384 (1947). If the Administration – whether by design or by accident – has created a non-binding policy, that non-binding policy cannot make the Plaintiffs' ripe action somehow unripe.

Either the "Safe Harbor" is an administrative nullity for failure to comply with the APA's notice-and-comment rulemaking or the "Safe Harbor" is merely a non-binding enforcement policy that – while it required no APA process – the Administration can change (or ignore) at will. In either case, the "Safe Harbor" cannot affect the justiciability of a challenge to the Contraceptive Mandate.

II. THE PLAINTIFFS HAVE STANDING AND BRING A RIPE CHALLENGE TO THE CONTRACEPTIVE MANDATE

The three inter-related doctrines of standing, ripeness, and mootness all arise in Article III's requirement that federal courts confine themselves to cases and controversies. *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). These doctrines "relate in part, and in different though overlapping ways, to an idea … about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S.

737, 750 (1984) (*quoting Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). By the same token, however, the principles of justiciability cannot be misused to avoid a justiciable question today because deferring review might be convenient. As Chief Justice Marshall put it, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Here, the district court's dismissal on jurisdictional grounds improperly rejected the Plaintiffs' justiciable controversy with the Administration over the Plaintiffs' right to avoid violating the tenets of their religious faith to comply with a procedurally defective and substantively unlawful final rule.

A. The Plaintiffs Have Standing

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The plaintiff's injury must involve "a legally protected interest" and its "invasion [must be] concrete and particularized" and "affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560-61 & n.1. For standing, an "injury-in-fact" includes both injury and threatened injury, *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), which "need not be to economic or … comparably tangible" interests. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1547-48 (D.C. Cir. 1989); *Mausolf*, 85 F.3d at 1301. Under

the prudential "zone of interest" test, the plaintiff's injury must be "***arguably*** within the zone of interests to be protected … by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998) (Court's emphasis and alteration, *quoting Ass'n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) ("*N.C.U.A.*"). Standing must satisfy both the constitutional and prudential tests.

Although an abstract or generalized interest (*e.g.*, ensuring proper government operation and general compliance with the law) cannot ***establish*** standing, the mere fact that many people share an injury cannot ***defeat*** standing. *FEC v. Akins*, 524 U.S. 11, 23 (1998). Moreover, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Thus, the Plaintiffs can challenge the Administration's action for any unlawfulness, once the Plaintiffs establish their standing to challenge that action. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing). The Plaintiffs' injuries from the Contraceptive Mandate's religious, economic, and administrative burdens plainly provide a "case" or "controversy" over the Administration's adopting the Mandate without the procedural requirements for making law or regulations.

1. The Complaint Adequately Alleges Injury from the Contraceptive Mandate

The district court's standing analysis essentially faults the Plaintiffs for not providing sufficient allegations in their complaint to indicate whether they even are subject to the Contraceptive Mandate, based on their "grandfathered" status. *See* 75 Fed. Reg. at 41,729 (collecting grandfathering provisions). As indicated in the Statement of the Case, by moving to dismiss the complaint for lack of standing under Rule 12(b)(1), the Administration accepts as true all of the factual allegations in the complaint, *Warth*, 422 U.S. at 501, as well as "those specific facts that are necessary to support the claim." *Spear*, 520 U.S. at 168. Under this standard, the district court's overly technical analysis would warrant reversal even if the district court were not also simply wrong.

The grandfathered Plaintiffs allege that their eligibility for grandfathering cannot last, and at the motion to dismiss phase this Court certainly can assume that that is true. (Indeed, anyone with a private group medical plan knows that those plans change significantly at every renewal period.) As explained below, the institutional Plaintiffs will be injured whether they restrict their otherwise-permissible actions to retain their grandfathered status or, alternatively, they lose their grandfathered status and therefore suffer injury in the form of costs and other administrative burdens.

First, to the extent that the Plaintiffs' insurance plans currently are

grandfathered, the Contraceptive Mandate requires that those plans remain unchanged in order to avoid the injuries that the Contraceptive Mandate would inflict. By ***unlawfully*** placing any grandfathered Plaintiffs in that bind,[4] the Contraceptive Mandate regulates and burdens the terms on which those Plaintiffs may interact with third parties, which represents a distinct type of first-party (not third-party) injury that ***directly*** impairs the freedom to interact with others. Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407, 422-23 (1942); *FAIC Securities, Inc. v. U.S.*, 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan, *supra*) (Scalia, J.); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.*, 843 F.2d 517, 524 (D.C. Cir. 1988) (R.B. Ginsburg, J.). Here, "the legal right … asserted – the right not to be injured by unauthorized agency action – [is] their own," *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.13 (D.C. Cir. 1987), and the Plaintiffs have standing to assert that right directly.

[4] Again, as indicated in the Statement of the Case, the jurisdictional analysis assumes the Plaintiffs' merits views in evaluating standing.

Second, as explained in Section II.A.2, *infra*, there is no question that the Contraceptive Mandate will injure those Plaintiffs to which it applies. To the extent that he sought to avoid those inevitable injuries with the theory that the grandfather clause protects those Plaintiffs, the district judge neglected to consider the injuries that the grandfather clause itself inflects.

In *Spear*, ranch operators and irrigation districts challenged an agency action reduced the water available – for all uses – from a river. The Supreme Court rejected the federal government's argument that the plaintiffs had failed to establish redressability, based on the uncertainty of whether those plaintiffs (as opposed to other water users) would get more water if the plaintiffs prevailed. *Spear*, 520 U.S. at 168. In holding that the plaintiffs' claims were redressable, at least at the pleading stage, the Supreme Court elaborated on the types of supplementing facts that a court can presume in support of standing:

> [W]hile a plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment and must ultimately support any contested facts with evidence adduced at trial, [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim. Given petitioners' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured-for example, the Bureau's distribution of the reduction pro rata among

> its customers. The complaint alleges the requisite injury in fact.

Spear, 520 U.S. at 168 (interior quotations and citations omitted, second and third alterations in original). Using the same flexible analysis at the pleading stage here, "it is easy to presume" that the Plaintiffs will be injured by either the "grandfather" trap or the Contraceptive Mandate's invasions of liberty.

2. The Plaintiffs Have Standing Based on Financial Costs and Administrative Burdens Imposed by the Contraceptive Mandate

The Contraceptive Mandate plainly imposes financial and administrative burdens on the Plaintiffs, not only in the future but also now. If nothing else, under the Administration's view of the case, the Plaintiffs must devote time to completing the certification and providing notice in order to avail themselves of the "Safe Harbor." Even those burdens cost money, and the imposition of such burdens plainly qualifies as an injury. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979). Unlawful administrative burdens "[c]learly… me[e]t the constitutional requirements, and… [the Plaintiffs] therefore ha[ve] standing to assert [their] own rights," the "[f]oremost" of which is the "right to be free of arbitrary or irrational [agency] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Moreover, it is plain that requiring insurers to provide contraceptives for free will raise the cost of the underlying

insurance package. *United Transp. Union v. I.C.C.*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989) ("courts routinely credit" "basic economic logic" for standing).[5] By whatever amount the Plaintiffs must devote to the Contraceptive Mandate now or whatever amount extra they will pay for insurance later, the Plaintiffs plainly have standing to challenge the Mandate.

Even if the economic or administrative burden is trivial, the burden provides a sufficient basis for standing:

> The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax. While these cases were not dealing specifically with [§10] of the APA, we see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.'

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973) (citations omitted). Summing up, the Court indicated that the

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[5] Even if the increased cost were insufficiently obvious for the merits phase, it would nonetheless suffice for the analysis under Rule 12(b)(1) for standing. *Warth*, 422 U.S. at 501; *Spear*, 520 U.S. at 168.

"basic idea … is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Id.* (interior quotations omitted); *National Wildlife Federation v. Agricultural Stabilization and Conservation Serv.*, 901 F.2d 673, 676-77 (8th Cir. 1990) (same).[6]

3. The Plaintiffs Have Procedural Standing, Which Reduces the Immediacy Required for Standing on the Merits

The Plaintiffs challenge the Administration's failures to observe procedural safeguards, for which "those adversely affected … generally have standing to complain." *Akins*, 524 U.S. at 25 (citing cases); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1039 (8th Cir. 2002) ("[i]njury to a procedural interest may satisfy the constitutional requirements of standing"). Significantly, the Plaintiffs need not show that a rulemaking will provide the desired result: "If a party claiming the deprivation of a right to notice-and-comment rulemaking . . . had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002). Instead, while rescission and remand may produce the same result, until that happens, the initial injury remains "fairly traceable" to the

[6] Even if *SCRAP* is standing's high-water mark, lower courts must follow it until the Supreme Court overturns it. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

agency's initial action, and redressable by an order striking the initial agency action. *Akins*, 524 U.S. at 25.

Given the clear procedural violations here, *see* Section I, *supra*, the Plaintiffs have procedural standing, in addition to the substantive standing outlined in Sections II.A.1-II.A.2, *supra*. This procedural standing does not redundantly ***double*** the Plaintiffs' standing to challenge the Contraceptive Mandate. Instead, procedural standing ***relaxes*** the standing inquiry's redressability and immediacy requirements. *Defenders of Wildlife*, 504 U.S. at 572 n.7 (procedural-rights plaintiffs "can assert that right without meeting all the normal standards for redressability and immediacy"); *Rosebud Sioux Tribe*, 286 F.3d at 1039-40; *Wyo. Outdoor Council v. U.S.F.S.*, 165 F.3d 43, 51 (D.C. Cir. 1999) (in procedural rights cases, the "necessary showing" for the "constitutional minimal of injury-in-fact, causation, and redressability ... is reduced"). Thus, given the Plaintiffs' concrete injuries, redressability and immediacy apply to the ***present procedural violation,*** which may someday injure the concrete interest, rather than to the concrete (but less certain) future substantive injury. *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7. Here, the Administration's procedural failure to convene rulemakings under §553(b) thus makes it ***easier*** to prove the substantive injuries, which undermines the district court's contrary rulings on the immediacy required by Article III.

4. The Plaintiffs' Injuries Are Within the Relevant Zones of Interest of the Statutory and Constitutional Protections

Standing's "zone-of-interest" test is a prudential doctrine that asks whether the interests to be protected ***arguably*** fall within those protected by the relevant statute. *N.C.U.A.*, 522 U.S. at 492. The test asks whether a plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Camp*, 397 U.S. at 153. Given that the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4, "applies to all Federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. §2000bb-3(a), the Plaintiffs' injuries fall within the dead center of the applicable zone of interests.

But even if the Plaintiffs' injuries somehow were not even arguably within the ***statutory*** zone of interests, the Plaintiffs still would satisfy the zone-of-interest test here for the Administration's *ultra vires* rulemaking procedures. *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); *cf. Gracey*, 809 F.2d at 812. In essence, the zone-of-interest test either does not apply or implicates zone of interests of the overriding constitutional issues raised by a lawless agency:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires*

> governmental action that injures him violates the due process clause.

Gracey, 809 F.2d at 812 n.14; *accord Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989). By acting outside its authority, the Administration purports to make law without the constitutional process for making law, violating "the separation-of-powers principle, the aim of which is to protect … the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991). With the Administration acting outside its authority (*i.e., ultra vires*),[7] the zone of interest test would not limit standing, even if the Plaintiffs fell outside the statutory zones of interests.

B. The Plaintiffs' Claims Are Ripe

Like standing, ripeness has a constitutional and a prudential component, with the constitutional component essentially mirroring the constitutional standing component of a case or controversy. U.S. CONST. art. III, §2; *Johnson v. Missouri*, 142 F.3d 1087, 1090 n.4 (8th Cir. 1998). If plaintiffs have constitutional standing, their claims are constitutionally ripe, and vice versa.

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[7] *Ultra vires* means that the "officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). Here, the APA requires rulemakings (or a valid exception to a rulemaking) before an agency promulgates legislative rules. *See* 5 U.S.C. §553.

In the post-Mandate utterances, the Administration merely tinkers at the margins and, at best, changes only minor timing issues. For ripeness purposes, it is immaterial whether the Plaintiffs will hit this wall in 2012, 2013, or 2014. The wall is there, and ripeness provides no barrier to litigating the wall's legality: "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (*quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)); *accord Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 143 (1974). Here, there is no question that the Contraceptive Mandate will injure the Plaintiffs.

1. The Plaintiffs' Procedural Claims Are Ripe

The prudential-ripeness doctrines on which the district court relied do not apply to the Plaintiffs' challenge to the Contraceptive Mandate's procedural defects because procedural injuries are extant today and can never get more ripe. *Ohio Forestry Ass'n, Inc., v. Sierra Club*, 523 U.S. 726, 737 (1998) (plaintiff "may complain at the time … that failure … takes place, for the claim can never get riper"). Thus, whatever the Court decides about the Plaintiffs' substantive claims, the Court should allow the Plaintiffs to proceed on their procedural claims.

2. The Plaintiffs' Substantive Claims Are Ripe

Working under a presumption of reviewability, prudential ripeness seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 863 (8th Cir. 2006) (same); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56-57 (1993). This inquiry pragmatically balances two independent, but related, factors: (1) fitness for review (*i.e.*, the interests of the court and agency in postponing review), and (2) the hardship of postponing review (*i.e.*, plaintiffs' countervailing interest in securing immediate judicial review). *Abbott Labs.*, 387 U.S. at 140. Fitness for review "most often [means] that the issue is legal rather than factual," and the hardship of withholding review "is usually found if the regulation imposes costly, self-executing compliance burdens" or chills protected activity. *Minnesota Citizens Concerned for Life v. Federal Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997). Both prongs favor review now.

a. The Substantive Claims Are Fit for Review

Purely legal issues are presumptively fit for review, *Abbott Labs.*, 387 U.S. at 149; *Catholic Social Services*, 509 U.S. at 56-57, particularly where they "would not benefit from further factual development of the issues presented." *Whitman v.*

Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) (interior quotations omitted). Here, the issues in question are purely legal and depend only on the Administration's constitutional powers and statutory interpretation. Moreover, as indicated, the Plaintiffs' procedural claims are ripe now. It makes little institutional sense – from the perspective of judicial and litigant economy – to litigate only some of the issues raised here.

Although the district court relied on the uncertainty that it perceived in the ANPRM and the Safe Harbor to suggest that the Administration's actions are insufficiently final for judicial review, the Contraceptive Mandate is – or at least purports to be – a final rule. As such, the Contraceptive Mandate is not "contingent in part on future possibilities" in the way that suggests an unripe controversy. *Nebraska Public Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000). If its policies were not sufficiently firm, the Administration should not have promulgated a final rule. But the Administration promulgated a final rule, and nothing remains "contingent" for the rule to take effect as promulgated. The possibility that the Administration may change its mind (and its rule) later has no bearing on whether challenges to the current rule are ripe now.

As such, this case does not present the unique circumstances of the D.C. Circuit's recent *American Petroleum Institute* decision – relied on by the district court – where the administrative schedule was tightly controlled and the proposed

future resolution would overturn the entire rule that was currently under judicial review. *Compare American Petroleum Institute*, 683 F.3d at 388-89 (finding continued review unripe) *with American Petroleum Institute v. U.S. E.P.A.*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("[i]f the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely"). Thus, no facts remain to develop, and neither the Administration nor the courts have an interest in delaying review.

b. The Hardship Prong Does Not Deny Review

With respect to the hardship prong, this Circuit recognizes a sliding scale where an issue's fitness for review lowers the showing required for hardship. *MidAmerican Energy*, 234 F.3d at 1038-39. Here, the Contraceptive Mandate unnecessarily confines the Plaintiffs to their current insurance plans (if grandfathered) or exposes them to unrecoverable costs and administrative burdens (if not grandfathered). In either case, the merits are ripe for judicial review under the hardship prong, regardless of whether the Plaintiffs' strong showing under the fitness-for-review prong lowers the bar for the Plaintiffs' hardship showing.

C. The Plaintiffs' Claims Are Not Moot

Shorn of their inapposite arguments for a lack of ripeness, the arguments for dismissal based on the Safe Harbor and ANPRM are readily recognizable as an argument that those non-final, non-binding actions moot the Plaintiffs' claims.

While claims of mootness share doctrinal similarities with standing and ripeness, claims of mootness based on a defendant's voluntary cessation of the challenged conduct impose ***on the Administration*** the "formidable burden of showing that it is absolutely clear [its] allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 189-90 (2000). As the district court implicitly recognized by not even addressing mootness, the Administration cannot prevail here. First, the ANPRM and Safe Harbor do not even moot all of the injuries that the Plaintiffs suffer, including most obviously the paperwork burden of complying with the Safe Harbor itself. Second, allowing an ANPRM to moot a merits challenge would run directly counter to administrative-law precedents that ***conditionally*** allow an actual NPRM to moot unreasonable-delay claims. See *United Mine Workers*, 231 F.3d at 54 (quoted in Section I.C, *supra*). This Court should recognize the Administration's challenge to justiciability for what it is – an argument for mootness – and reject it accordingly.

CONCLUSION

For the foregoing reasons and those argued by the Plaintiffs, this Court should reverse the district court.

Dated: November 13, 2012

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I hereby certify that on November 13, 2012, I electronically submitted the foregoing *amicus curiae* brief to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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