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THE ALLIANCE OF CATHOLIC HEALTH CARE,
a California non-profit healthcare association
7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 STATE OF CALIFORNIA, et al.,

12 Plaintiffs,

13 v.

14 UNITED STATES OF AMERICA, et al.,

15 Defendants,

16 and

17 THE ALLIANCE OF CATHOLIC HEALTH
CARE,

18 Defendant-Intervenors,

19 CHRISTIAN MEDICAL ASSOCIATION, et al.,

20 Defendant-Intervenors.
21

Civil Action No.: C-05-00328 JSW

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
CROSS-MOTION FOR SUMMARY
JUDGMENT BY ALLIANCE OF
CATHOLIC HEALTH CARE AND IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

Date: January 12, 2007
Time: 9:00 a.m.
Courtroom: No. 2, 17th Floor
Judge: Hon. Jeffrey S. White

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ARGUMENT

Based on the State’s opposition brief it is readily apparent that this is a case in search of a controversy. The State makes no effort to refute – and effectively concedes – the following key points in this case:

- The right of conscience which is protected by the Weldon Amendment does not deny women emergency medical care, including emergency medical care requiring the termination of a woman’s pregnancy.
- The State can identify no incident in which a woman was denied emergency medical care in violation of Health & Safety Code section 1317 on the grounds that the course of treatment may have involved termination of a woman’s pregnancy.
- Any actual conflict between California law and the Weldon Amendment is too speculative and hypothetical to support an actual injury, thus requiring reliance on an abstract “injury to sovereignty” that can be described in only a conclusory manner.

The State makes no effort to demonstrate that the Weldon Amendment is incapable of constitutional application under any particular set of circumstances, and instead rests its entire case on the simplistic notion that the Weldon Amendment must fail for want of the shibboleth of an express “emergency exception.” In so doing, the State has failed to muster sufficient facts to demonstrate a live controversy meeting Article III or prudential standing requirements, much less submit evidence sufficient to demonstrate that it, and not the Defendants and Defendant-Intervenors are entitled to summary judgment.

I. THE STATE’S UNSUPPORTED HYPOTHESIS AND CONJECTURE ARE INSUFFICIENT TO DEMONSTRATE STANDING OR AN ENTITLEMENT TO RELIEF.

To prevail on the issue of whether it is entitled to summary judgment—or even has standing to seek relief—the State must do more than articulate a hypothetical or conjectural conflict between its enforcement of California law and the Weldon Amendment. The fact that the State is asserting an injury to its sovereign interests does not expand the federal court’s jurisdiction to permit an advisory opinion regarding hypothetical circumstances. Neither *Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D. C. Cir. 1989), which concerned the

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1 Department of Transportation’s preemption of an Alaskan law, or *Oregon v. Ashcroft*, 192
2 F.Supp.2d 1077 (D. Or. 2002), in which the federal government issued a directive expressly
3 precluding enforcement of Oregon’s assisted suicide law, relieve the State of its obligation to
4 demonstrate an injury that is not conjectural or hypothetical, satisfying Article III of the
5 Constitution as articulated by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). General
6 allegations may have been sufficient at the pleading stage, but now the State’s burden is to “‘set
7 forth’ by affidavit or other evidence ‘specific facts’” demonstrating its entitlement to relief. *Id.*
8 at 561. Yet, to date, hypothesis and conjecture is all that the State has offered.

9 The November 14, 2006, decision in *National Family Planning and Reproductive Health*
10 *Association, Inc., v. Gonzalez*, No. 05-5406, 2006 U.S. App. LEXIS 28122 (D.C. Cir., Nov. 14,
11 2006) (“*NFPRHA*”), concerns similarly speculative claims against the Weldon Amendment and
12 is particularly compelling in regard to whether the State even has standing, much less is entitled
13 to relief.¹ Like the instant claims by the State, the *NFPRHA* plaintiffs alleged that the Weldon
14 Amendment is vague, and violates the limits on Congress’ power under the spending clause. *Id.*
15 at *2. The *NFPRHA* plaintiffs also alleged that the Weldon Amendment conflicted with legal
16 mandates under Title X of the Public Health Service Act, 42 U.S.C. § 300, *id.* at *3, that they
17 were uncertain about the meaning of “discrimination” under the Weldon Amendment, *id.* at *7,
18 and faced a potential loss of funding because of these potentially conflicting mandates, *id.* at *5.
19 These claims were disregarded because there were no conflicts between Title X and prior similar
20 protections for conscience rights, *id.* at *8, and the meaning of the term “discrimination” was
21 fairly well settled. *See id.* at *9-10. The Weldon Amendment may have expanded the scope of
22 conscience protections, but against this backdrop the court proceeded to find that the “plaintiff
23 has failed to show the imminence of any serious dilemma.” *Id.* at *10. Indeed, like here, there
24 were “structural reasons to doubt that the [alleged conflict] will ever come up.” *Id.* at *11. That
25 is, there was no evidence that any persons who would engage in conduct giving rise to the

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27 ¹ For the convenience of the Court a copy of the November 14, 2006 opinion of the D.C. Circuit
28 Court of Appeals in *NFPRHA* is attached hereto as Exhibit A.

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1 alleged conflict between Title X and the Weldon Amendment actually existed. *Id.* The Court of
2 Appeals for the D.C. Circuit further noted that “Litigants are . . . not entitled to an adjudication
3 of every question they perceive after reading through the text of legislation.” *Id.* (citing
4 *American Library Association v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992).

5 Similar to the conjectural claims by the plaintiffs in *NFPRHA*, the factual predicate for
6 the State’s enforcement of Section 1317 in a manner conflicting with the Weldon Amendment
7 does not exist and cannot arise. The problems with the State’s speculation are two-fold. First, it
8 suggests that women in need of emergency medical services would be wheeled to the curb to
9 fend for themselves simply because the necessary course of treatment for their emergency
10 medical condition may include the termination of her pregnancy. This is simply unfounded and
11 the State has offered *no evidence* that physicians who would refuse to treat or refer a woman in
12 need of emergency medical services actually exist. Second, and most devastating to the State’s
13 claims, is the State’s admission that it has *never* in the nearly two decade history of Section 1317
14 taken administrative, civil, or criminal action based upon an alleged failure to provide emergency
15 services involving an abortion. *See* Docket No. 84, Declaration of Elbert Lin, ¶ 2 & Ex. A
16 (Plaintiffs’ Response to Interrogatory No. 2). The factual predicate to any conflict the State
17 believes may arise under the Weldon Amendment *has never occurred*, and the State cannot show
18 that it will—or is even likely—to occur in the future.

19 This truly is a case in search of a controversy. Whether viewed in light of Article III
20 standing requirements, prudential standing requirements, or the requirements for relief on
21 summary judgment, the State’s conjecture is insufficient to support its request for relief, and the
22 facts instead compel the granting of relief to the Defendants and Defendant-Intervenors.

23 **II. THE DEFENDANTS HAVE DEMONSTRATED THE MANIFEST LACK OF**
24 **CONFLICT BETWEEN THE PROTECTION OF CONSCIENCE RIGHTS AND**
25 **STATE LAWS AND ARE ENTITLED TO SUMMARY JUDGMENT.**

26 Undoubtedly the lack of any actual controversy based on facts is why the State has rested
27 its entire case on the Weldon Amendment’s lack of an express “emergency exception” as is
28 included in California’s own conscience protections.

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1 California has at all times made clear that its conflict with the United States is
2 based solely on the Weldon Amendment’s . . . lack of an “emergency exception.”

3 Opposition at 6:3-4. The very glaring and obvious hole in the State’s claim is the assumption
4 that the Weldon Amendment’s protections for the exercise of conscience rights are in need of an
5 express “emergency exception” rather than any such exception being wholly unnecessary.

6 In its opening memorandum the Alliance explained that no exception is necessary as the
7 exercise of conscience rights does not result in women being denied emergency medical services.
8 See Docket No. 107, Memorandum at 5-7. Although the State has heretofore refused to do so,
9 the Alliance articulated what constitutes “emergency services” and what may be considered an
10 “emergency medical condition” under Section 1317, and explained how the exercise of
11 conscience rights is perfectly consistent with the obligations imposed by Section 1317. *Id.* The
12 other Defendant-Intervenors, Christian Medical Association, et al., provide a similar analysis,
13 and rebut the suggestion that an abortion is the only appropriate treatment for particular medical
14 conditions. See Docket No. 112, Medical Groups Memorandum in Support of Motion for
15 Summary Judgment and in Opposition to Plaintiffs Motion for Summary Judgment at 19-23.

16 The State simply disregards this evidence as irrelevant “because other health care
17 professionals may violate [Section 1317],” Opposition at 7:19-21, but rather than undermining
18 the Defendant-Intervenors’ arguments, this further represents the State’s failure to meet its
19 burden and show that any such professionals actually exist. See *NFPRHA* 2006 U.S. App. Lexis
20 28122, *11. See also, *Lujan*, 504 U.S. at 561 (plaintiff must submit “specific facts”). The
21 Defendant-Intervenors’ evidence, in particular, lays bare the speculative nature of the States’
22 claims. The members of the Alliance, for example, include Catholic Healthcare West which
23 represents approximately 7,500 physicians in California, and is the State’s largest and the
24 nation’s eighth largest not-for-profit hospital system. Docket No. 109, Dangberg Declaration at
25 ¶ 2. The other Defendant-Intervenors consisting of the Christian Medical Association and other
26 groups represent approximately another 18,000 health care providers nationwide with many of
27 those members practicing in California. See Docket No. 18, Declaration of Wayne VonSeggan
28 at ¶¶ 4-6; Docket No. 19, Declaration of David Stevens at ¶¶ 3-5; Docket No. 20, Declaration of

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1 Joe DeCook at ¶¶ 4-7. Collectively, the Alliance and the Christian Medical Association
2 Intervenorers represent the overwhelming majority of health care providers exercising rights of
3 conscience in the State of California.

4 This specifically invites the question: Who are these “other health care professionals”
5 who “may” violate Section 1317? The State provides no argument, let alone specific evidence to
6 answer this question. The State expressly concedes that it does not dispute that these Intervenorers
7 would not assert a desire or right to deny women needed emergency medical services.
8 Opposition at 7:17-19. But conjecture that some unknown physician, under some unknown
9 circumstances, at some unknown future time, may violate Section 1317, and the State’s unknown
10 response would constitute discrimination in violation of the Weldon Amendment is not evidence
11 demonstrating the existence of a conflict. *See NFPRHA* 2006 U.S. App. Lexis 28122, *11.

12 **CONCLUSION**

13 The record before this Court precludes a grant of summary judgment in favor of the State,
14 and instead compels the grant of summary judgment in favor of the Defendant United States of
15 America, Defendant-Intervenor Alliance of Catholic Health Care, and Defendant-Intervenorers
16 Christian Medical Association, et al. As the State admitted on page 11 of its opening
17 memorandum, its burden is to “establish that no set of circumstances exists under which the act
18 would be valid.” The State has not met this burden, and indeed it cannot. The record
19 demonstrates that the protections for the exercise of conscience rights do not conflict with the
20 provision of emergency medical care for women, and the lack of any previous denials of
21 emergency care makes evident that the State does not face any serious dilemma regarding the
22 enforcement of State law. More importantly, the State has not proven that the Weldon
23 Amendment is incapable of constitutional application requiring the invalidation of this act of

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Congress in its entirety. Defendant-Intervenor Alliance of Catholic Health Care respectfully requests that this Court deny the State’s motion, and grant those of the United States and the Defendant-Intervenors.

Respectfully submitted,

DATED: November 20, 2006

SWEENEY & GREENE LLP

By: _____/S/
James F. Sweeney
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EXHIBIT A

LEXSEE 2006 U.S. APP. LEXIS 28122

**NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH
ASSOCIATION, INC., APPELLANT v. ALBERTO GONZALES, ATTORNEY
GENERAL OF THE UNITED STATES, ET AL., APPELLEES**

No. 05-5406

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

2006 U.S. App. LEXIS 28122

September 8, 2006, Argued

November 14, 2006, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Columbia. (No. 04cv02148). *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 391 F. Supp. 2d 200, 2005 U.S. Dist. LEXIS 21386 (D.D.C., 2005)

COUNSEL: James L. Feldesman argued the cause for appellant. With him on the briefs were Kathy S. Ghiladi and Robert A. Graham.

August E. Flentje, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, and Robert M. Loeb, Attorney.

Stephen H. Aden argued the cause for appellees Christian Medical Association and American Association of Pro-Life Obstetricians and Gynecologists. With him on the brief was Benjamin W. Bull.

Jay Alan Sekulow, Colby M. May and James M. Henderson, Sr. were on the brief for amici curiae for U.S. Representative Henry J. Hyde, et al. in support of appellees.

JUDGES: Before: GINSBURG, Chief Judge, and SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

OPINION BY: WILLIAMS

OPINION:

WILLIAMS, *Senior Circuit Judge:* At the end of 2004 Congress adopted a provision commonly known as the Weldon Amendment (named after Representative David Weldon), prohibiting recipients of federal grant [*2] funds from discriminating against individuals or entities that refuse to provide or refer for abortions. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d), 118 Stat. 2809, 3163. It reenacted the same provision the next December. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, § 508(d), 119 Stat. 2833, 2879-80. Five days after the initial enactment, the National Family Planning and Reproductive Health Association filed suit in district court. Its substantive claims--at least the ones making it to the appeal--are that the amendment's alleged vagueness violates the *First Amendment*, for which it cites *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), and the limits of Congress's spending power, for which it cites *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981) (holding that a statute exercising Congress's spending power imposes legally binding conditions on a recipient state only if it expresses the binding character unambiguously). The district court found standing but on the merits denied the requested [*3] injunction and granted summary judgment for the government. We find no standing.

* * *

Under Title X of the Public Health Service Act, 42 U.S.C. § 300, the Secretary of Health and Human Services "is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects" Most Title X funds flow initially to state and local governmental agencies and non-profit organizations. These grantees function as intermediaries that in turn distribute the funds to subgrantees who actually administer the programs. The plaintiff association is an organization comprised largely of Title X grantees and subgrantees, including state and local agencies, nonprofit organizations, clinics, and individuals employed by such entities.

The association's vagueness theory rests in large part on an alleged conflict between the Weldon Amendment and a Health and Human Services ("HHS") regulation governing Title X funds. The regulation, most recently amended in 2000, requires all recipients of Title X funds to "offer pregnant women the opportunity to be provided information and [*4] counseling regarding . . . pregnancy termination." 65 Fed. Reg. 41,270, 41,279/1 (July 3, 2000). Neither party disputes that the regulation was an appropriate exercise of the Secretary's rulemaking authority (though the government notes, and plaintiff doesn't contest, that in the event of conflict the regulation must yield to a valid statute). The Weldon Amendment, on the other hand, protects institutional and individual providers that wish *not* to provide or refer for abortions:

(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

Consolidated [*5] Appropriations Act, 2005, § 508(d).

The complaint asserts that the association's members do not know how to abide by the 2000 HHS regulation as well as the Weldon Amendment and are therefore in jeopardy of losing federal grants. Arguing that its members face pervasive uncertainty as to their obligations under the two provisions, it seeks declaratory relief and a preliminary injunction against enforcement of the amendment.

* * *

Constitutional standing requires that a plaintiff show "injury in fact," which the Supreme Court has defined as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and internal quotations omitted). An actual withdrawal of funding from the association's members would clearly qualify, but the association doesn't suggest that any such withdrawal has occurred.

The association does say, however, that its members face an imminent threat of injury, including loss of funding, because of the alleged conflict between the regulation and the amendment. They claim to be [*6] in a Catch-22: If they obey the amendment, they'll violate the regulation, and vice versa. Either way, they say, they are bound to violate one of the conditions of their funding. Although of course a valid statute always prevails over a conflicting regulation, the alleged vagueness of the statute leaves the association uncertain whether the amendment or the regulation will govern a variety of situations. Compare *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153-54, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), where the plaintiff firms faced the hardship of choosing (without authoritative guidance) between compliance with a possibly unlawful regulation at considerable expense, and non-compliance, at the risk of being subjected to after-the-fact enforcement that would entail fines and reputational losses. But even if the same standard applied to challenges to a statute as to a regulation, cf. *Seegars v. Ashcroft*, 364 U.S. App. D.C. 512, 396 F.3d 1248, 1254 (D.C. Cir. 2005) (noting a possible distinction), the association falls far short of showing the necessary likelihood of any injury.

We start by noting a background point--the

association's complete failure to show that HHS's enforcement mechanism [*7] is one that would really burden a grantee that guessed wrong. There is no suggestion in its papers that good-faith conduct violating a grant condition would trigger an immediate funding cut-off, much less the sort of retroactive penalty that was involved in *Abbott Labs*.

Turning to the interaction of the substantive provisions themselves, we must look separately at the Weldon Amendment's conditions on Title X grantees with respect to *individuals* who refuse to refer for or provide abortions, and *organizations* so refusing. We start with grantees' obligations to individuals.

The association asserts that if an individual caregiver objects to providing abortion counseling to a pregnant woman but wants to retain a pregnancy counseling job, reassigning that caregiver to another job might amount to "discrimination" banned by the amendment. But Congress enacted a provision in 1974 similarly protecting exercises of individual rights of conscience, saying that no individual could be compelled to perform a service, in conjunction with an HHS program, that "would be contrary to his religious beliefs or moral convictions." National Research Act, Pub. L. No. 93-348, § 214, 88 Stat. 342, 353 [*8] (codified at 42 U.S.C. § 300a-7(d)).

Despite the apparently similar potential for conflict between the pre-Weldon conscience provisions and the current Title X regulation (dating from 2000), they have enjoyed a quite peaceful co-existence. Plaintiff doesn't point to a single instance in which the government has treated the reassignment of a caregiver who refuses to provide abortion counseling as "discrimination" against that caregiver, or in which it has questioned a member's funding because of the way the member navigated between the regulations and the conscience provisions. The association's anomalous equation of reassignment with discrimination is particularly suspect because Congress, since 1996, has forbidden "discrimination" against an individual who "refuses . . . to perform . . . abortions, or to provide referrals for . . . abortions." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 515, 110 Stat. 1321, 1321-245 (codified at 42 U.S.C. § 238n(a)(1), (c)(2)). But the 1996 provision hasn't given rise to the parade of horrors that plaintiff hypothesizes--not even to a single horrible. [*9]

To support its notion that the Weldon Amendment's

protection of individual caregivers may impose different requirements on Title X grantees than do the earlier conscience provisions, plaintiff points to the absence of any reference to "conscience" in the amendment. This is a red herring. Let us assume that under the amendment individual caregivers may lawfully refuse to participate in abortion provision or referral, without any adverse employment consequences, on broader grounds than formerly-conscience *and*, to state it as broadly as possible, "any other grounds." We cannot see how a broadening of the grounds for resisting abortion activity would suddenly transform an accommodating agency's reassignment into an act of discrimination. Plaintiff offers us no help on this.

Plaintiff has thus failed to identify any reason why the concept of discrimination forbidden by the earlier conscience provisions and the amendment at all hinges on the scope of those various provisions. Furthermore, plaintiff does not point to any desired change in its members' conduct that would create some new risk for their funding. Accordingly, the association has shown no material change since 2000 in terms [*10] of members' obligations to respect individual views on abortion, and the risk that its members will face the claimed dilemma appears to be nil. See *American Library Ass'n v. Barr*, 294 U.S. App. D.C. 57, 956 F.2d 1178, 1188 (D.C. Cir. 1992).

As to members' duties to "health care entit[ies]" that are not individuals, the association alleges that the HHS regulation requires that recipients distribute funds only to subgrantees that agree to provide abortion counseling, whereas the Weldon Amendment, for the first time (with narrow exceptions), forbids discrimination against potential subgrantees (i.e., not individuals) that refuse to refer for abortions. Because the Weldon Amendment appears to extend pre-existing conscience rights to hitherto uncovered entities, we do not have the benefit, in this context, of a six-year track record. Nonetheless, we think that here too plaintiff has failed to show the imminence of any serious dilemma.

First, the association has about 4000 members, yet in the period between enactment and the district court's September 28, 2005 denial of a preliminary injunction plaintiff offered no suggestion that any member encountered the slightest [*11] hint from HHS that its practices might imperil its funding under Weldon. Moreover, there are structural reasons to doubt that the

issue will ever come up. In 2000 HHS Secretary Shalala declined to create a specific exception from the pending regulation's mandatory referral requirement for organizations resisting provision of abortion counseling or referrals; she explained that she was "unaware of *any* current grantees that object to the requirement for nondirective options counseling, so this suggestion appears to be based on more of a hypothetical than an actual concern." *65 Fed. Reg. at 41,273/3* (emphasis added). Nowhere in its papers has plaintiff claimed that such grantees in fact existed. "Litigants are . . . not entitled to an adjudication of every question they perceive after reading through the text of legislation." *American Library Ass'n, 956 F.2d at 1197*.

The supposed dilemma is particularly chimerical here because the association's asserted injury appears to be largely of its own making. We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing. Such harm does not amount to an "injury" cognizable [*12] under Article III. *National Treasury Employees Union v. United States, 322 U.S. App. D.C. 135, 101 F.3d 1423, 1429 (D.C. Cir. 1996)*; *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 307 U.S. App. D.C. 401, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994)*. Furthermore, even if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct. *Brotherhood of Locomotive Engineers and Trainmen v. Surface Transportation Board, 457 F.3d 24, 28 (D.C. Cir. 2006)*; *Petro-Chem Processing, Inc. v. EPA, 275 U.S. App. D.C. 232, 866 F.2d 433, 438 (D.C. Cir. 1989)*.

Here the association has within its grasp an easy means for alleviating the alleged uncertainty. It could inquire of HHS exactly how the agency proposes to resolve any of the conflicts that it claims to spot between the amendment and the regulations. Under the Administrative Procedure Act, the association has the right to petition HHS to adopt a rule clarifying the responsibilities of Title X grantees. *5 U.S.C. § 553(e)*. It has never done so. Plaintiff's briefs constantly lament that [*13] the government has failed to answer its hypotheticals, see, e.g., Plaintiff's Br. at 13--17, but the association refers only to questions posed to the government's litigation counsel. Failure to seek clarification from the agency is especially troubling here because HHS is entitled to deference in interpreting its own regulation and (under many circumstances) the statutes that it administers. *National Mining Ass'n v. Babbitt, 335 U.S. App. D.C. 305, 172 F.3d 906, 911 (D.C. Cir. 1999)*; *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. As the association has *chosen* to remain in the lurch, it cannot demonstrate an injury sufficient to confer standing.

* * *

As plaintiff lacks standing to challenge the Weldon Amendment, the judgment below is vacated and the case remanded to the district court to dismiss for lack of jurisdiction.

So ordered.