IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOST REVEREND DONALD W. TRAUTMAN, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 1:12-cv-00123 **MOTION TO DISMISS**

REPLY IN SUPPORT OF OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs challenge regulations that defendants are not enforcing against them and that defendants are amending in order to accommodate the precise religious liberty concerns that form the basis of plaintiffs' Complaint. Yet plaintiffs ask this Court to ignore the fact that the regulations will change before defendants could ever enforce them against plaintiffs, thereby inviting the Court to waste time and effort to issue a purely advisory opinion. Because plaintiffs have not met the basic jurisdictional prerequisites of standing and ripeness, the Court should decline plaintiffs' invitation and dismiss this case.

It is plaintiffs' burden to demonstrate injury stemming from the regulatory actions they seek to challenge. But because the regulations will have changed by the earliest time defendants could enforce them against plaintiffs, any injury is wholly speculative at this time. Contrary to plaintiffs' dire predictions, the amended regulations likely will address their concerns (after all, that is the intent of the ongoing rulemaking). At the very least, the amendments will change what the Court is to review. Plaintiffs cannot transform their allegations of speculative future harm into a current concrete injury by claiming a need to prepare for that speculative future harm. Of course, if plaintiffs still believe their rights have been violated once the amended regulations are issued, they can file suit challenging them at that time and will have lost nothing in the interim. But this Court cannot now assess what—if any—injury plaintiffs might suffer as a result of a not yet promulgated rule.

It is also plaintiffs' burden to show a ripe claim—that, even though the challenged regulations will inevitably change before defendants could enforce them against plaintiffs, this Court should nonetheless intervene to review regulations that are currently being amended. But such review would impermissibly interfere with defendants' ongoing rulemaking and expend the

parties' and the Court's resources unnecessarily—requiring the parties to brief the propriety of, and the Court to issue rulings on, two sets of regulations. In fact, it would result in an advisory decision on the regulations in their current form even though they do not and will not harm plaintiffs in such form (if ever).

To date, every court to have considered defendants' jurisdictional arguments has ruled in defendants' favor. Indeed, since defendants filed their opening brief in this case, another court joined the two that have already dismissed nearly identical challenges to the preventive services coverage regulations for lack of standing and lack of ripeness. *See Wheaton Coll. v. Sebelius*, No. 12-cv-1169, 2012 WL 3637162 (D.D.C. Aug. 24, 2012). Like the court in *Belmont Abbey College v. Sebelius*, No. 11-cv-1989, 2012 WL 2914417 (D.D.C. July 18, 2012), the *Wheaton* court concluded that the plaintiff lacked standing in light of the temporary enforcement safe harbor and the forthcoming regulatory accommodations, and that the plaintiff's claims were not ripe because "the regulations [the plaintiff] challenges are being amended precisely in order to accommodate [the plaintiff's] concerns." 2012 WL 3637162, at *8; *see also Nebraska v. HHS*, No. 12-cv-3035, 2012 WL 2913402 (D. Neb. July 17, 2012).[1] Defendants respectfully ask this Court to do the same.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION BECAUSE PLAINTIFFS LACK STANDING

Defendants demonstrated in their opening brief that plaintiffs lack standing because they have not alleged an injury-in-fact resulting from the operation of the preventive services coverage regulations. Plaintiffs have not shown otherwise in their opposition. Plaintiffs concede that their employee health plans are eligible for the temporary enforcement safe harbor, *see* Aff.

[1] The plaintiffs in *Belmont Abbey*, *Wheaton*, and *Nebraska* have appealed the district courts' rulings.

of Mary Maxwell ¶ 23, ECF No. 24-2; Aff. of David J. Murphy ¶ 17, ECF No. 24-3, pursuant to which defendants will not bring any enforcement action against plaintiffs for failing to provide contraceptive coverage until at least January 1, 2014. By that time, defendants will have finalized amendments to the preventive services coverage regulations that are designed to accommodate the religious objections of religious organizations, like plaintiffs, to providing contraceptive coverage. Thus, plaintiffs have not been, and likely never will be, injured by the current regulations, and therefore lack standing. *See Wheaton*, 2012 WL 3637162; *Belmont Abbey*, 2012 WL 2914417.

Plaintiffs' standing allegations rest on two types of alleged injuries: (1) imminent injury from the supposedly upcoming enforcement of the regulations in their current form and (2) current actual injury from the "uncertainty" created by the regulations in their current form. *See* Opp'n at 12-15. But both types of alleged injuries suffer from the same fatal flaw, which is why the courts in *Belmont Abbey* and *Wheaton* rejected them as a basis for standing. Plaintiffs' allegations of injury rest entirely on plaintiffs' speculation that the regulations will apply to plaintiffs in their current form come January 2014. This, however, ignores the uncontroverted reality that defendants have begun the process of amending the regulations for the very purpose of addressing the religious objections to covering contraception by religious organizations like plaintiffs. Plaintiffs' baseless conjecture that defendants will not do what they say they will do—and are currently doing—does not constitute an imminent injury for standing purposes. Nor does planning for such an imagined scenario (the continuation of the challenged regulation in their current form)—even if plaintiffs have actually incurred some cost to plan for something that will never happen—provide standing.[2]

[2] Plaintiffs argue that that the Court's standing analysis should be "relaxed" because this is a pre-enforcement suit alleging First Amendment claims. Opp'n at 9-10. But this principle only applies, if at all, where

Plaintiffs note that "a one-year enforcement delay, even one that makes enforcement uncertain, is not 'too remote.'" Opp'n at 10. But that argument misses the point. The issue here is not just that the regulations will not be enforced against plaintiffs right away, but that these regulations almost certainly will never be enforced against plaintiffs. The Supreme Court has made clear that a time delay is only "irrelevant" to justiciability when "the inevitability of the operation of a statute against certain individuals is *patent*," *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143 (1974) (emphasis added), and it "appear[s] that the [law] certainly would operate as the complainant [] apprehend[s] it would," *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). "Because an amendment to the [regulations] that may vitiate the threatened injury is not only promised but underway, the injuries alleged by Plaintiff[s] are not 'certainly impending.'" *Belmont Abbey*, 2012 WL 2914417, at *10 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)); *see also Wheaton*, 2012 WL 3637162, at *1. Thus, the cases plaintiffs cite for their argument that "standing to challenge a current law is unaffected by promised non-enforcment," Opp'n at 10-11, are all inapposite. Indeed, the principal case upon which plaintiffs rely for this point, *Conchatta, Inc. v. Miller*, 458 F.3d 258 (3d Cir. 2006), dealt not with a law or regulation that was undergoing amendment, but instead determined that non-enforcement alone could not provide a limiting principle that would save an otherwise overbroad statute. *Id*. at 264-65 (considering plaintiff's challenge of a statute that had been in place, apparently unchanged, since

there is a "credible" threat of enforcement. *Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011); *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 821 (5th Cir. 1979). There is no such credible threat here because plaintiffs acknowledge they are eligible for the enforcement safe harbor. *Cf. Bloedorn*, 631 F.3d at 1229 (finding that there was "every indication" of enforcement). And it is hard to fathom how plaintiffs can reasonably incur costs planning for the effects of a not-yet promulgated regulation, particularly one that is intended to accommodate concerns of the very type that plaintiffs have raised.

the early 1950s).[3] That case is of no moment here, where there are no such allegations of overbreadth, and defendants are doing much more than merely delaying enforcement.

Plaintiffs are also not helped by the cases they cite in support of their imminent injury argument. *See* Opp'n at 10-11 & n.4. Those cases recognize standing in run-of-the-mill pre-enforcement suits where—unlike here—there was "no reason to think the law will change," *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 538 (6th Cir. 2011), or not be enforced, *see, e.g.*, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 963-64 (7th Cir. 2006) (emphasizing that defendants had not promised non-enforcement of law against plaintiff). In fact, *none* of the cases cited by plaintiffs in support of their claim of imminent injury arise in a context comparable to this case—that is, where the challenged law is not being enforced by the government against the plaintiffs and is virtually certain to change.[4]

[3] *See also Eckles v. City of Corydon*, 341 F.3d 762, 767-68 (8th Cir. 2003) (city promised non-enforcement only while the plaintiff's lawsuit was pending and city "clearly outlined the actions it plans to take with regard to [the plaintiff's] property as soon as the federal case ends"); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388-89 (4th Cir. 2001) (agency's non-enforcement policy was expressly limited to a defined geographic region, and plaintiff alleged a specific intent to engage in advocacy outside of that region); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (no indication that law would change, and only indication that state would not apply law to plaintiff was informal statement made in the context of litigation); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (enforcement was contingent on the vote of six Commissioners who split three-three with one Commissioner changing her mind at the last minute, and there was no evidence the challenged rule would change before the next vote). Indeed, the Third Circuit has found similar promises not to enforce by the government sufficient to defeat jurisdiction. *See Presbytery of N.J. v. Florio*, 40 F.3d 1454, 1470-71 (3d Cir. 1994) (dismissing churches' challenge to discrimination law as unripe where affidavit from State official indicated that State would not prosecute churches for violating law); *see also Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485,490 (7th Cir. 2004); *Winsness v. Yocom*, 433 F.3d 727, 732-33 (10th Cir. 2006).

[4] *See Larson v. Valente*, 456 U.S. 228, 241-42 (1982) (state had already used currently applicable law to attempt to compel plaintiff to register with the state before soliciting contributions); *N.J. Physicians, Inc. v. President of the United States*, 653 F.3d 234, 240 & n.5 (3d Cir. 2011) (concluding that plaintiff lacked standing to challenge the Patient Protection and Affordable Care Act ("ACA")); *Thomas More*, 651 F.3d at 537 (indicating that there was "no reason to think the law will change"); *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011) (concluding that some plaintiffs had standing to challenge the ACA), *overruled on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Vill. of Bensenville v.*

Plaintiffs maintain that "nothing prevents the Government from trying to abandon" the enforcement safe harbor and that defendants' commitment to amending the challenged regulations is only "speculation." Opp'n at 11-12. But the federal government is entitled to a presumption that it acts in good faith. *See, e.g.*, *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith."); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) ("[W]e assume that formally announced changes to official governmental policy are not mere litigation posturing."). As the *Belmont Abbey* court explained in rejecting a similar argument:

> [Defendants] have published their plan to amend the rule to address the exact concerns Plaintiff raises in this action and have stated clearly and repeatedly in the Federal Register that they intend to finalize the changes before the enforcement safe harbor ends. Not only that, but Defendants have already initiated the amendment process by issuing an ANPRM. The government, moreover, has done nothing to suggest that it might abandon its efforts to modify the rule—indeed, it has steadily pursued that course—and it is entitled to a presumption that it acts in good faith.

2012 WL 2914417, at *9 (internal citations omitted). Accordingly, any suggestion by plaintiffs that defendants may not abide by their commitments is not only dubious, but insufficient to establish injury in fact. *See Wheaton*, 2012 WL 3637162, at *6.

Plaintiffs also have not established standing by alleging *current* harm from the "uncertainty" regarding whether the regulations will be amended. *See* Opp'n at 13-16. Plaintiffs cannot transform their allegations of speculative (and highly unlikely) future harm (i.e., that the regulations in their current form might be enforced against plaintiffs in the future) into a current concrete injury by claiming a need to prepare for that speculative (and highly unlikely) future harm. *See Nw. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) ("The injury

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Fed. Aviation Admin., 376 F.3d 1114, 1119 (D.C. Cir. 2004) (indicating that the city's consideration of the challenged fee was final, and that, absent action by the court, the city "will begin collecting . . . the fee"); *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432-33 (6th Cir. 2004) (concluding that plaintiff did not have to exhaust the prescribed administrative remedies in order to challenge a currently applicable "flat prohibition" on plaintiff's use public squares).

requirement will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury."). The plaintiffs in *Wheaton* and *Belmont Abbey* made similar allegations, and yet both courts found standing lacking. *See Wheaton*, 2012 WL 3637162 (dismissing identical suit for lack of standing where religious college alleged in its complaint that it had already spent staff resources and money planning for the possibility of eventual compliance with the preventive services coverage regulations in their current form, that legal uncertainty harmed its employee recruitment and retention, and that the challenged regulations put plaintiff at a competitive disadvantage); *Belmont Abbey*, 2012 WL 2914417 (same).

With good reason: under plaintiffs' theory, a party claiming to be currently affected by the most uncertain, remote, or ill-defined government actions would have standing to challenge those actions, thereby sapping the imminence requirement of any meaning. *See* Defs.' Mem. in Support of Mot. to Dismiss at 14, ECF No. 18. Every organization plans for the future, even for events that are unlikely to occur. Under plaintiffs' theory, an organization would have standing to challenge a future event that has only a one percent chance of happening—after all, the organization might feel the need to prepare for such an event just in case. But a theory that permits standing to challenge a future event that has a one percent chance of occurring cannot be reconciled with the Supreme Court's admonition that the threatened injury must be "certainly impending." *Whitmore*, 495 U.S. at 158. Plaintiffs' present-injury allegations are all predicated upon the possibility that defendants will enforce the preventive services coverage regulations against plaintiffs in their current form after the safe harbor expires. *See* Opp'n at 15. For instance, plaintiffs' assertion that they are harmed because the third-party administrator of their employee health plan has requested that they sign an indemnification agreement depends entirely

on the assumption that liability will be imposed for plaintiffs' employee health plan's failure to provide the prescribed services. *See id.* (claiming that indemnity agreement would be "crushing for Plaintiffs, *if such liability were imposed*) (emphasis added). Yet, under the safe harbor, of course, defendants have indicated that they will not enforce the regulations against plaintiffs (if ever) until after the amendment process is complete. It is impossible to square any assertion that this scenario is "certainly impending" (or even at all likely) with the fact that defendants have publicly committed themselves to the development of amended regulations—and have indeed initiated the development of such regulations—aimed at addressing the concerns of the very time that plaintiff has raised before the expiration of the safe harbor.

Tellingly, plaintiffs hang their present-harm argument on cases wholly dissimilar from this one. In fact, once again, *none* of the cases plaintiffs cite, *see* Opp'n at 12-15, involves the present effects of a law that is undergoing amendment and not being enforced by the government during the amendment process, or finds standing based on a need to prepare for a highly speculative and unlikely future occurrence. Plaintiffs seize on the Seventh Circuit's statement that "the present impact of a future though uncertain harm *may* establish injury in fact," *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005) (emphasis added); Opp'n at 12, but *Lac Du Flambeau* simply recognized that a tribe was currently harmed when the capital costs of its casino ventures rose as a result of an anti-competitive compact between the state and another tribe that was in force and unchanging. 422 F.3d at 499. *Lac Du Flambeau* was not a pre-enforcement challenge and has no bearing on plaintiffs' standing to challenge the preventive services coverage regulations here.

In sum, this case involves not only a time delay before defendants will enforce the challenged regulations against plaintiffs, but also a commitment by defendants to amend the

regulations as they relate to organizations like plaintiffs, initiation of the amendment process, and opportunities for plaintiffs to participate in that process. In these circumstances, no injury to plaintiffs is "certainly impending," *Whitmore*, 495 U.S. at 158, and plaintiffs cannot transform their speculative future injuries into current concrete injury for standing purposes, *see Wheaton*, 2012 WL 3637162; *Belmont Abbey*, 2012 WL 2914417.

II. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION BECAUSE IT IS NOT RIPE

Even if the Court were to conclude that plaintiffs have standing, plaintiffs have not shown that this case is ripe for judicial review. Adjudicating the merits of plaintiffs' claims now, while defendants are actively working to accommodate the religious concerns of religious organizations like plaintiffs, would only entangle the Court in an "abstract disagreement[] over administrative policies." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). The preventive services coverage regulations reflect defendants' tentative (and virtually certain to change), rather than final, position as to organizations like plaintiffs. And although plaintiffs claim that they are currently harmed by their need to plan for the speculative impact of the challenged regulations, that type of harm is insufficient to make this case justiciable. *See Cephalon, Inc. v. Sebelius*, 796 F. Supp. 2d 212, 218 (D.D.C. 2011) ("Plaintiff cannot base an argument of undue burden from postponement of a judicial decision on its having to plan for a future event, as opposed to the actual event, if that event is too speculative in the first instance."). Under these circumstances, as explained below, plaintiffs' claims fail the three-prong ripeness test articulated in *Step-Saver Data Sys, Inc. v. Wyse Technology*, 912 F.2d 643 (3d Cir. 1990).[5]

[5] Plaintiffs rely on *Peachlum v. City of York, Pennsylvania*, 333 F.3d 429 (3d Cir. 2003), to suggest that this case should be subject to a relaxed ripeness standard because it involves fundamental rights. Opp'n at 16-17. Even assuming plaintiffs are correct, their claims would still be unripe under such a standard. In *Peachlum*, the court indicated that, in such cases, "even the remotest threat of prosecution, such as the *absence* of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were 'predominantly legal' and did not require additional factual development." 333 F.3d at 435 (emphasis added) (citing *Presbytery of N.J.*, 40 F.3d at

A. Plaintiffs Have Failed to Establish Current Adversity.

Plaintiffs maintain that there is sufficient adversity of interest because they are challenging regulations that are "current" and published in the Code of Federal Regulations. Opp'n at 18. This formalistic argument ignores defendants' "clear[] and repeated[]" statements that they intend to amend the regulations to address the concerns raised by religious organizations with religious objections to providing contraceptive coverage, like plaintiffs. *Belmont Abbey*, 2012 WL 2914417, at *9. It also ignores the ANPRM, whereby defendants "initiated the amendment process." *Id*. And it is inconsistent with the Supreme Court's instruction that ripeness should be analyzed "in a 'flexible' and 'pragmatic' way." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967)). Because defendants' position is "tentative" and "indeterminate," and because the forthcoming amendments may eliminate the need for judicial review entirely or at least narrow and refine the controversy, the regulations are not "final" in any meaningful sense. *Belmont Abbey*, 2012 WL 2914417 at *12 (citing *Ciba-Geigy*, 801 F.2d at 436); *see also Wheaton*, 2012 WL 3637162, at *8 ("Because they are in the process of being amended, the preventive services regulations are by definition a tentative agency position 'in which the agency expressly reserves the possibility that its opinion might change.'") (quoting *Birdman v. Office of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012)); *see also Continental Airlines, Inc. v. Civil Aeronautics Bd.*, 552 F.2d 107, 125 (D.C. Cir. 1975) ("The interest in postponing review is strong if the agency position whose validity is in issue is not in fact the agency's final position.

1464). Here, of course, defendants *have* provided a promise not to enforce, and further factual development is required to know how the challenged regulations will, in fact, apply to plaintiffs. In any event, that this case has First Amendment implications just as easily cuts in favor of postponing review. As explained by Judge Boasberg, "[j]udicial restraint is particularly warranted where, as here, 'the issue is one of constitutional import' and its 'uncertain nature . . . might affect a court's ability to decide intelligently.'" *Belmont Abbey*, 2012 WL 2914417, at *14 (quoting *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1107 (D.C. Cir. 2001)).

If the position is likely to be abandoned or modified before it is actually put into effect, then its review wastes the court's time and interferes with the process by which the agency is attempting to reach a final decision.").

Thus, this case does not involve a "mere contingency" that defendants might revise the regulations at some future time, as plaintiffs claim. Opp'n at 17 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965)). There is nothing *contingent* about defendants' intent to amend the challenged regulations. *See Tex. Indep. Prod.& Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483 (5th Cir. 2005) (dismissing challenge as unripe where agency announced its intent to consider issues raised by plaintiff in new rulemaking). And plaintiffs' suggestion that it will be unsatisfied with whatever amendments result from the pending rulemaking, *see* Opp'n at 19, is not grounds for this Court to issue an advisory opinion on the lawfulness of the ideas proposed in the ANPRM. *See Belmont Abbey*, 2012 WL 2914417, at *13 ("It would . . . be premature to find that the amendment will not adequately address Plaintiff's concerns."). Plaintiffs cannot maintain that nothing flowing from the ANPRM could possibly alter their challenge to the regulations when the ANPRM is a mere starting point, and plaintiffs have ample opportunity to express their concerns and help shape the forthcoming amendments.

Plaintiffs implausibly suggest that defendants will wait until the last minute before the expiration of the enforcement safe harbor to finalize their amendments to the preventive services regulations, leaving them with no time to challenge the regulations if they are ultimately unsatisfied with what comes of the amendment process. *See* Opp'n at 20. The Court should reject this argument out of hand. As an initial matter, it is misleading. The enforcement safe harbor will be in effect until the first plan year that begins *on or after* August 1, 2013, s*ee* 77 Fed. Reg. 16,501, 16,504 (Mar. 21, 2012); HHS, Guidance on the Temporary Enforcement Safe

Harbor (Aug. 15, 2012), and defendants have indicated that they intend to finalize amendments to the regulations before the beginning of this rolling expiration period, 77 Fed. Reg. 16,503; *see also* 77 Fed. Reg. 8725, 8272 (Feb. 15, 2012). Thus, because plaintiffs' plan year begins on January 1, defendants will have amended the regulations, at the latest, several months before plaintiffs will be subject to enforcement.

Moreover, defendants, through the enforcement safe harbor and the ongoing amendment process, have consistently sought to *accommodate* religious organizations' religious objections to the regulations, working quickly to begin the rulemaking process, and have committed to finalizing their amendments in advance of the expiration of the safe harbor. There is nothing to suggest that, if the amendment process does not alleviate plaintiffs' concerns altogether, plaintiffs would not have an opportunity to present a legal challenge in a timely manner once there are regulations that are ripe for review. And even if plaintiffs' worst fears were to somehow come to pass, plaintiffs could then seek preliminary injunctive relief to preserve the status quo while the Court considers the merits of plaintiffs' claims.

The hardship of which plaintiffs complain—that the preventive services coverage regulations require advanced planning and impact their current decision-making—is just too speculative to create adversity of interest. In other words, plaintiffs "cannot base an argument of undue burden from postponement of a judicial decision on their having to plan for a future event, as opposed to the actual event, if that event is too speculative in the first instance." *Cephalon*, 796 F. Supp. 2d at 218. Plaintiffs' alleged desire to plan for future contingencies does not constitute a hardship, even if, as plaintiffs claim, they feel the effects of that planning at present. *See, e.g.*, *Tenn. Gas Pipeline Co. v. FERC*, 736 F.2d 747, 751 (D.C. Cir. 1984); *Wilmac Corp. v. Bowen*, 811 F.2d 809, 813 (3d Cir. 1987); *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 162 (7th

Cir. 1976); *see also Am. Petroleum Inst.*, 683 F.3d at 389; *Cephalon*, 796 F. Supp. 2d at 218 ("If the Court were to adopt [plaintiff's] reasoning, it would effectively create a rule where any future event, however remote or speculative, could constitute a burden when a plaintiff claims that it must prepare for this future contingency."). Nor do plaintiffs' allegations of harm demonstrate the sort of "direct and immediate" effect on plaintiffs' "day-to-day business" with "serious penalties attached to noncompliance," as required by *Abbott Laboratories*, 387 U.S. at 152-53. Instead, the "hardship" that plaintiffs claim is rooted entirely in a desire to plan for contingencies that likely will never arise given defendants' ongoing efforts to amend the challenged regulations. And because plaintiffs do not know what form the regulations will take once they are amended—other than they will attempt to accommodate concerns of the very type that plaintiffs have raised—it is not clear what contingencies plaintiff could plan for.

Faced with substantially similar allegations, the courts in *Belmont Abbey*, *Wheaton*, and *Nebraska* concluded that the plaintiffs had not demonstrated sufficient harm from delayed review. *Belmont Abbey*, 2012 WL 2914417, at *14 ("Costs stemming from [a plaintiff's] desire to prepare for contingencies are not sufficient . . . to constitute a hardship for purposes of the ripeness inquiry—particularly when the agency's promises and actions suggest the situation [the plaintiff] fears may not occur."); *Wheaton*, 2012 WL 3637162, at *8 ("'The planning insecurity [plaintiff] advances' with regard to what the preventive services regulations may (or may not) require of it does not suffice to show hardship.") (quoting *Tenn. Gas Pipeline*, 736 F.2d at 751); *Nebraska*, 2012 WL 2913402, at *23 ("[T]he plaintiffs' desire to plan for future contingencies that may never arise does not constitute the sort of hardship that can establish the ripeness of their claims[.]"). Plaintiffs cannot distinguish those cases.[6]

[6] Although plaintiffs cite the court's decision in *Newland v. Sebelius*, 12-cv-1123, 2012 WL 3069154 (D. Colo. July 27, 2012), for the point that changes to an employee health plan require advance planning, *see* Opp'n at

The cases plaintiffs do cite do not suggest that planning for hypothetical future contingencies is a sufficient hardship to make the parties' interests adverse. For instance, in *Pacific Gas and Electric Company v. State Energy Resesource Conservation and Development Commission*, 461 U.S. 190 (1983), the plaintiff challenged a state law that *currently* imposed a moratorium on construction of nuclear plants until the State Energy Commission determined that there has been developed "demonstrated technology or means for the disposal of high-level nuclear waste." *Id.* at 198. Thus, unlike the challenged regulations in this case, the challenged law in *Pacific Gas* immediately affected the day-to-day operations of the plaintiffs, as they could not engage in the construction of new facilities. Nor was there an expectation that the law itself was subject to change. Indeed, in *none* of the cases plaintiffs cite with respect to harm was there any indication that the defendants intended to amend the challenged law, much less that they were actively engaged in doing so.[7]

B. Plaintiffs Cannot Establish Conclusivity Given the Amendment Process.

13, 19-20 n.8, plaintiffs ignore that the employer in that case, unlike plaintiffs here, did not have the benefit of the enforcement safe harbor. *See Newland*, 2012 WL 3069154. at *2. The plaintiff in *Newland*, therefore, had to comply with the contraceptive coverage requirement by November 1, 2012. And there was no indication that the requirement would change as to the *Newland* plaintiffs; so, unlike plaintiffs here, they were planning for a certainty, not an improbability.

[7] *See New York v. United States*, 505 U.S. 144, 175 (1992) (rejecting government's ripeness argument based exclusively on delayed effective date); *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (agency had reiterated its "definitive" legal position); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 263 (D.C. Cir. 2007) (challenge to currently effective "sunset" provision removing price mitigation measures after one year); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 186-87 (4th Cir. 2007) (challenged law required plaintiff to alter its accounting practices *immediately* because existing accounting practices did not permit plaintiff to collect information that had to be reported under the challenged law); *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006) (state's open primary law required plaintiffs to alter their political campaign decisions *immediately*, and delay would have diminished the effectiveness of those decisions); *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 101 F.3d 939, 146-47 (3d Cir. 1996) (determining that challenge to regulation that had been in effect for six years would have been ripe had plaintiff brought such a challenge); *Gary D. Peake Excavating, Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68, 71-72 (2d Cir. 1996) (holding that plaintiff should not be required to continue with a costly state licensing process before challenging a city ordinance currently prohibiting the conduct for which he sought a license); *Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir. 1995) (holding that plaintiffs' challenge to the state's seniority-based system for determining disability benefits was ripe "[g]iven the relative certainty of the statute's application"); *Town of Rye, N.Y. v. Skinner*, 907 F.2d 23, 24 (2d Cir. 1990) (finding challenge to agency decision ripe where there was "nothing else for the [agency] to do").

For substantially similar reasons, plaintiffs cannot establish conclusivity. Plaintiffs contend that this case is sufficiently conclusive because the issues in this case are primarily legal. Pls.' Opp'n at 21-22. Yet, the fact that plaintiffs' challenges may be "legal"—and therefore may be addressed without post-enactment factual development—is irrelevant to the ripeness issue here. Courts may not opine on the lawfulness of regulations that are not yet final no matter how "legal" the issues may be. *See, e.g., Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005); *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 79. F.3d 1298, 1306 (2d Cir. 1996). Until the pending rulemaking is completed, this Court has nothing to review. *See Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952) (indicating that, to be ripe for review, a case "must have taken on fixed and final shape so that a court can see what legal issues it is deciding . . . ."); *Chamber of Commerce of U.S. v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam) ("[E]ven in cases involving pure legal issues, review is inappropriate when the challenged policy is not sufficiently fleshed out to allow the court to see the concrete effects and implications of its decision . . . or when deferring consideration might eliminate the need for review altogether."); *Bethlehem Steel*, 536 F.2d at 161 ("[T]he issues here are fit for judicial review in the sense that they present concrete legal questions, but are not fit for judicial review in the sense that the actions challenged are part of a continuing agency decision-making process which has not yet resulted in an order requiring compliance by the petitioners."); *Belmont Abbey*, 2012 WL 2914417, at *14 ("[C]ourts should refrain from 'intervening into matters that may best be reviewed at another time or in another setting,' even if the issue presented is 'purely legal' and 'otherwise fit for review.'" (quoting *Full Value Advisors*, 633 F.3d at 1106). Thus, a judgment on plaintiffs' claims, before defendants have completed amending the challenged regulations "would itself be a 'contingency'" granted in the absence of

concrete facts. *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992).[8] Because the challenged regulations are not sufficiently conclusive, and will certainly take a different form before the expiration of the enforcement safe harbor, the Court should reject plaintiffs' attempt to obtain premature review of their claims.

C. Review of Plaintiffs' Claims Would Be of Little Practical Help, or Utility.

Plaintiffs are also wrong to suggest that review at this time would be of any meaningful practical help, or utility. In conducting a utility inquiry, courts "look at the hardship to the parties of withholding decision" and "whether the claim involves uncertain and contingent events." *See Tait v. City of Philadelphia*, 410 F. App'x 506, 510 (3d Cir. 2011). As discussed above, plaintiffs face no present harm, given the enforcement safe harbor, and plaintiffs' claims depend fundamentally on a contingent (and highly unlikely) future event—namely, that defendants will not amend the preventive services coverage regulations as they have committed to do. By seeking review of the challenged regulations now, before they have taken on fixed and final shape, plaintiffs ask the Court to issue an advisory opinion on the lawfulness of regulations that will never be enforced against plaintiffs.

III. STANDING AND RIPENESS, NOT MOOTNESS, ARE THE PROPER STANDARDS TO APPLY

The Court should reject plaintiffs' attempts to recast defendants' jurisdictional arguments as questions of mootness. *See* Opp'n at 12, 22-23. This case would be about mootness if plaintiffs had already established injury, the case was proceeding, and then the cause of the injury disappeared. But here, any injury is speculative and in the future, which raises quintessential standing and ripeness questions. Indeed, the plaintiffs in *Belmont Abbey* and

[8] Although plaintiffs understandably hope to distinguish *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), *see* Opp'n at 23, plaintiffs' attempt to do so is unavailing for the reasons explained by Judge Boasberg in *Belmont Abbey*, including the "significant research and deliberation" of which the ANPRM is the product and the publication of the safe harbor end dates, "creating external accountability for the agency's self-imposed deadline." *Belmont Abbey*, 2012 WL 2914417, at *13.

Wheaton raised precisely the same mootness arguments to no avail. *See, e.g.*, Pl.'s Opp'n to Defs.' Mot. to Dismiss at 17-19, *Wheaton*, Civ. Action No. 1:12-cv-01169, ECF No. 18; *Wheaton*, 2012 WL 3637162, at *4 n.6.

The standing and ripeness doctrines serve different interests than the mootness doctrine. "Standing doctrine functions to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000). And the ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808. "In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years." *Laidlaw*, 528 U.S. at 191. The mootness doctrine serves the distinct interest of avoiding "abandon[ing] [a] case at an advanced stage" where doing so "may prove more wasteful than frugal." *Id*. at 191-92. Because this case has not been litigated "for years" and is not at "an advanced stage," the interests served by the mootness doctrine simply are not implicated here.

Accordingly, the Court should reject plaintiffs' attempt to shift their burden to establish standing and ripeness by requiring defendants to show that under no set of circumstances would plaintiffs be adversely affected by the challenged regulations. Plaintiffs have it backwards. It is plaintiffs' burden—not defendants'—to demonstrate current or imminent injury stemming from the regulatory actions they seek to challenge. "[A]lthough the burden lies with the party *asserting* mootness . . . the fact that a case *becomes* moot when plaintiff loses standing . . . does not mean that it is somehow defendant's burden to show that plaintiff no longer faces imminent

injury. To the contrary, the party asserting federal jurisdiction bears the burden of establishing that it has standing at every stage of the litigation." *Wheaton*, 2012 WL 3637162, at *4 n.6.

IV. PLAINTIFFS LACK BOTH STANDING AND RIPENESS TO ASSERT EACH OF THEIR CLAIMS

Finally, plaintiffs wholly miss the mark by arguing that the enforcement safe harbor and the ongoing rulemaking do not affect a subset of their claims, i.e., their challenge to the religious employer exemption and their Administrative Procedure Act ("APA") claims. *See* Opp'n at 7-9. Because plaintiffs cannot know what form the final regulations will take, it is pure speculation to suggest that the amended regulations will not address these concerns as well. For instance, contrary to plaintiffs' assertions, Opp'n at 8, defendants have not foreclosed the possibility that the amendment process will alter the religious employer exemption as it currently exists. *See Wheaton*, 2012 WL 3637162, at *8 & n.11. And defendants have made clear that an employer can avail itself of the safe harbor without prejudicing its ability to later avail itself of the religious employer exemption. *See* Guidance at 4. Moreover, with respect to plaintiffs' APA claim, although plaintiffs contend that the preventive services coverage regulations are contrary to certain other provisions in federal law, such as the Weldon Amendment, *see* Compl. ¶¶ 359-68, ECF No. 1, that contention—in addition to lacking merit—assumes that the regulations will remain in their current form. Indeed, it is difficult to imagine how the Court could meaningfully review regulations that are still in flux, as any ruling would be irrelevant once the ongoing rulemaking process is complete. Because there is a substantial likelihood that all of plaintiffs' claims will be materially affected, if not made entirely irrelevant, by changes to the regulations, this Court should dismiss all of plaintiffs' claims for lack of standing and ripeness.

CONCLUSION

For these reasons and those set forth in defendants' opening brief, plaintiffs lack standing and their claims are not ripe for review. This Court, accordingly, should grant defendants' motion to dismiss.

Respectfully submitted this 24th day of September, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, 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/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS