IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, *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-03489-WSD

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs challenge regulations that defendants are not enforcing against them, never will enforce against them in their current form, and that are presently being amended to accommodate the precise religious liberty concerns that form the basis of plaintiffs' Complaint. Yet plaintiffs continue to urge this Court to engage in a fiction and pretend that the current, soon to be changed regulations have some current or future impact on them. They do not. Instead of issuing a purely advisory opinion, the Court should dismiss this case.[1]

[1] Plaintiffs suggest the Court could instead hold the case in abeyance, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss Pls.' Am. & Recast Compl. ("Opp'n") at 35 n.12, Jan. 13, 2013, ECF No. 37, but as other courts have explained, outright dismissal of an unripe case is "the customary practice," and plaintiffs have offered no reason for this Court to deviate from that customary practice here and hold onto a case in which jurisdiction is lacking awaiting another potential challenge to a new rule, as to which jurisdiction may or may not exist. *See, e.g.*, *Colo. Christian Univ. v. Sebelius* ["*CCU*"], No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *8 (D. Colo. Jan. 7, 2013); *Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200, at *14 n.10 (W.D. Pa. Jan. 22, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, Civil Action No. 12-0815 (ABJ), 2013 WL 285599, at *4 (D.D.C. Jan. 25, 2013).

ARGUMENT

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

Plaintiffs' standing allegations rest on (1) alleged imminent injuries from the supposedly upcoming enforcement of the regulations in their current form, and (2) alleged current injuries from the uncertainty created by the regulations in their current form. *See* Opp'n at 16-24. But both stem from plaintiffs' baseless speculation that the regulations will apply to plaintiffs in their current form come August 2013. So too does the court's decision in *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012), on which plaintiffs rely. *See* Opp'n at 12, 23. In that case, although the court stated that it would "assume that the Departments issued the ANPRM in good faith and not as litigation posturing," *Archdiocese of New York*, 2012 WL 6042864, at *15, the court's ruling was instead based entirely on the erroneous view that there nonetheless is a "substantial possibility" that the current version of the regulations will in fact be enforced against plaintiffs,[2] *id.*; *see also id.* at *16,

[2] For this reason, and many others, defendants have sought reconsideration or, alternatively, certification for immediate appeal under 28 U.S.C. § 1292(b) in
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*18, *21. This premise, however, ignores the uncontroverted reality that defendants have repeatedly, consistently, and publicly stated – including in the rule itself – that they will *never* enforce the regulations in their current form against entities like plaintiffs, and that defendants have already begun the process of amending the regulations for the very purpose of addressing the religious objections to covering contraception by religious organizations like plaintiffs.[3] Indeed, on February 1, 2013, defendants issued a notice of proposed rulemaking (NPRM) that would amend the contraceptive coverage requirement as it applies to plaintiffs, as well as other religious employers and other non-profit religious organizations with religious objections to contraceptive coverage. *See* 78 Fed.

Archdiocese of New York. Defs.' Mot. to Reconsider, *Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC) (E.D.N.Y. Jan. 11, 2013), ECF No. 41.

[3] *See, e.g.*, 77 Fed. Reg. 16,501, 16,503-06 (Mar. 21, 2012); 77 Fed. Reg. 16,453, 16,457 (Mar. 21, 2012); 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012); Defs.' Mem. in Supp. of Mot. to Dismiss at 3, *Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC) (E.D.N.Y. Aug. 6, 2012), ECF No. 16-1 ("[D]efendants' initiation of a rulemaking that *commits* to amending the preventive services coverage regulations well before January 2014 to accommodate the religious objections of organizations like plaintiffs further demonstrates the absence of any imminent harm to them." (emphasis added)); Defs.' Reply in Supp. of Mot. to Dismiss at 1, 6, 7, *Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC) (E.D.N.Y. Sept. 24, 2012), ECF No. 30; *see also* Defs.' Mem. in Supp. of Mot. to Dismiss the Am. Compl. ("Mem. in Supp.") at 2-5, 7 n.5, 14-15, 21-23, 27-28, 34-35, Jan. 14, 2013, ECF No. 27-1.

Reg. 8456 (Feb. 6, 2013); U.S. Dep't of Health & Human Servs., Administration Issues Notice of Proposed Rulemaking on Recommended Preventive Services Policy, http://www.hhs.gov/news/press/2013pres/02/20130201a.html (Feb. 1, 2013). After considering comments received, the next step in the regulatory amendment process will be the promulgation of final rules, which defendants expect to issue by August 2013. 78 Fed. Reg. at 8458-59. The proposed rules were released two months ahead of schedule, and defendants are well on track to finalizing the new rules before the end of the temporary enforcement safe harbor. *See* 78 Fed. Reg. at 8459. Plaintiffs' baseless conjecture that defendants will not do what they say they will do – and are currently doing – simply does not constitute an imminent injury for standing purposes, as nearly every other court to rule on the issue has held.[4] Nor does planning for such an imagined but not

[4] *See Conlon v. Sebelius*, Case No. 12-cv-3932, slip op. at 8-10 (N.D. Ill. Feb. 8, 2013) (Ex. 1); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-CV-00924-JAR, 2013 WL 328926, at *6-7 (E.D. Mo. Jan. 29, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at *3-4 (N.D. Ind. Dec. 31, 2012); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977, at *8-9, *11-12 (W.D. Pa. Nov. 27, 2012), *appeal noticed* (3d Cir. Jan. 23, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796, at *3-4 (M.D. Tenn. Nov. 21, 2012), *appeal docketed*, No. 12-6590 (6th Cir. Dec. 19, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, Nos. 13-1092, 13-1093 (6th Cir. Jan. 24, 2013). *But see* Order,

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possible scenario – even if plaintiffs have actually incurred some cost to do so – provide standing.[5]

Plaintiffs' argument that an injury can be imminent even if it would not occur for a number of years, Opp'n at 17-18, misses the point. The issue here is not just that the regulations plaintiffs challenge will not be enforced against

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Roman Catholic Diocese of Fort Worth v. Sebelius, No. 4:12-cv-00314-Y (N.D. Tex. Jan. 31, 2013), ECF No. 43. As this brief and defendants' opening brief show, *Diocese of Fort Worth* was wrongly decided and is unpersuasive. Its standing analysis ignored the enforcement safe harbor and the fact that, as defendants repeatedly made clear, the regulations will never be enforced against the plaintiff in their current form. Slip op. at 7. And though the D.C. Circuit held in *Wheaton College v. Sebelius*, No. 12-5273, 2012 WL 6652505, at *1 (D.C. Cir. Dec. 18, 2012), that the plaintiffs there had standing, that analysis was inapplicable in *Diocese of Fort Worth* and is inapplicable here. The *Wheaton* court held that, because standing is "assessed at the time of filing" and because the plaintiffs had filed suit *before* defendants established and clarified the enforcement safe harbor, those plaintiffs had standing. 2012 WL 6652505, at *1. In *Diocese of Fort Worth* and here, though, plaintiffs filed suit *after* defendants established and clarified the enforcement safe harbor. Assessing their standing at the time of filing thus leads to the opposite conclusion.

[5] Plaintiffs suggest the Court's standing analysis should be lenient because plaintiffs raise First Amendment claims. Opp'n at 3, 16. But this principle only applies, if at all, where there is a "specific and direct" "threat" of enforcement. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 492 (6th Cir. 1995); *see Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011); *Skaggs v. Carle*, 110 F.3d 831, 836-37 (D.C. Cir. 1997). There is no such credible threat here because plaintiffs' plans are grandfathered and/or in the enforcement safe harbor. *Compare Bloedorn*, 631 F.3d at 1229 (finding "every indication" of enforcement). And it is hard to fathom how plaintiffs can incur costs planning for a not-yet-promulgated regulation, particularly one meant to accommodate concerns like theirs.

plaintiffs right away, but that they 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 when 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) (emphasis added). Not so here. Because amendments to the regulations – designed to accommodate plaintiffs' objections – are underway, plaintiffs' injuries are not "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation omitted).

Plaintiffs are not helped by the cases they cite in support of their imminent injury argument. Opp'n at 17-21. 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, *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 963-64 (7th Cir. 2006); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (finding injury where *only* "action by [the court]" could prevent the challenged fee collection). In fact, *none* of the imminent injury cases cited by

plaintiffs arose in a context like this case – where the law is not being enforced by the government against plaintiffs and is certain to change.[6]

Plaintiffs also have not established standing by alleging *current* harm from the alleged uncertainty regarding whether the regulations will be amended.[7] *See*

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[6] *See, e.g.*, *Allen v. Sch. Bd. for Santa Rosa Cnty.*, 782 F. Supp. 2d 1304 (N.D. Fla. 2011) (no suggestion that school board's consent decree, which was already in force, would change); *Fla. Cannabis Action Network, Inc. v. City of Jacksonville*, 130 F. Supp. 2d 1358, 1362 (M.D. Fla. 2001) (same). Similarly, the cases plaintiffs cite for the proposition that there is standing "even if the government has suggested that it will not enforce a particular law" because the government could change its mind, Opp'n at 19-20, are inapposite. *See Eckles v. City of Corydon*, 341 F.3d 762, 767-68 (8th Cir. 2003) (city stated it would not enforce a notice to abate "while the suit is pending"); *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); *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, courts have found promises not to enforce by the government that are similar to the enforcement safe harbor in place here sufficient to defeat jurisdiction. *See, e.g.*, *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); *Presbytery of N.J. v. Florio*, 40 F.3d 1454, 1470-71 (3d Cir. 1994).

[7] Plaintiffs suggest that defendants only "assert that Plaintiffs fail to allege an adequate injury," Opp'n at 16, but this is incomplete. Defendants' opening brief also argues that any present planning injuries, even if cognizable, are not traceable to the challenged regulations. Mem. in Supp. at 24 n.15. Planning for implementation of the current, soon to be changed, regulations is futile, and plaintiffs' professed need to "budget now for the possibility" that some future rules

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Opp'n at 22-24. 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 18-19, 22-24, involves the present effects of a law that is undergoing amendment and not being enforced by the government against the plaintiffs during the amendment process. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 431 n.16 (1998) (law operated to presently revive plaintiff's liability and there was no suggestion law would change); *see Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001) ("[Plaintiffs] do[] not contend that [they] lost a benefit. Thus, *Clinton* is inapposite to the case at bar.").[8] Similarly, plaintiffs seize on the Seventh Circuit's statement that a "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);

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may expose them to fines, Opp'n at 10, or to feel "uncertain," *id.* at 20, reflects concerns about the content of future rules. No relief this Court could offer regarding the current, challenged regulations would ameliorate the alleged injury. *Notre Dame*, 2012 WL 6756332, at *4; *see CCU*, 2013 WL 93188, at *8 n.10.

[8] *See also 520 S. Mich. Ave.*, 433 F.3d 961 (holding that plaintiff had standing in the *absence* of a promise not to enforce the law at issue); *Ala.-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244 (11th Cir. 2003) (no suggestion that challenged regulations, which already applied to plaintiff, would change); *Thomas More*, 651 F.3d at 538 ("[T]here is no reason to think the law will change."); *Idaho Power Co. v. FERC*, 312 F.3d 454 (D.C. Cir. 2002) (no indication that agency orders, which presently required petitioner to act, would change).

Opp'n at 3, 11, but that case simply recognized a current harm stemming from an anti-competitive compact 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. Moreover, whereas the policies causing the harm in that case were not certain to change, the regulations in this case are undergoing change right now.

For these reasons and those contained in defendants' opening brief, plaintiffs lack standing to challenge the regulations.[9]

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 under the test articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).[10] Like the court in

[9] The Atlanta Plaintiffs' claim that they are "restricted" from altering their plan, Opp'n at 22-23, is wholly predicated on speculative (and highly unlikely) future harm, and is thus insufficient to confer standing, for the reasons discussed in defendants' opening brief. Mem. in Supp. at 20 n.11.

[10] Plaintiffs suggest this case should be subject to a relaxed ripeness standard because of the possibility of chilling effects on First Amendment rights. Opp'n at 27. But the cases on which plaintiffs rely address only the chilling effects on expressive conduct, not those on the exercise of religion, and unlike here, there was no indication in those cases that the laws were subject to change or would not

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Archdiocese of New York, 2012 WL 6042864, at *21, plaintiffs maintain that the challenged regulations are fit for judicial review because they are "final" and published in the Code of Federal Regulations, Opp'n at 15-17. But that conclusion, once again, simply flies in the face of the government's public commitment to amend the regulations before the expiration of the safe harbor and thus "ignores the reality of the regulatory landscape." *CCU*, 2013 WL 93188, at *7.[11] The emphasis placed by both plaintiffs and the *Archdiocese of New York* court on the mere fact that the regulations were issued as final rules thus "elevates

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be enforced against the plaintiffs. *See Sullivan v. City of Augusta*, 511 F.3d 16, 22-24, 31 (1st Cir. 2007); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1497-99 (10th Cir. 1995); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 377-78 (D.C. Cir. 1980); *see also McGlone v. Bell*, 681 F.3d 718, 730 (6th Cir. 2012) (noting that "subjective chill alone is insufficient" without some "specific action" to support the fear of punishment). Here, plaintiffs' exercise of religion cannot possibly be chilled given that defendants have made clear that they will never enforce the challenged regulations against plaintiffs in their current form.

[11] The decision in *Diocese of Fort Worth* likewise fails to acknowledge that the challenged regulations will change before they could ever be enforced by defendants against the plaintiff there. Slip op. at 9-11. Moreover, the decision purports to distinguish the D.C. Circuit's conclusion in *Wheaton* that challenges to these regulations like this one are unripe on the basis that defendants committed in *Wheaton* to never enforce the regulations in their current form against only the plaintiffs there. *Id.* at 11 n.6. But defendants' statement in *Wheaton* applied, by its terms, to all "similarly situated" entities. *Wheaton*, 2012 WL 6652505, at *1. In any event, defendants made the same commitment in *Diocese of Fort Worth* and have done so here.

form over substance," *CCU*, 2013 WL 93188, at *7, and as plaintiffs concede, this ripeness inquiry is meant to be "functional, not [] formal," Opp'n at 25 (quoting *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999)). Indeed, plaintiffs ignore defendants' repeated and unequivocal statements that (1) they will *never* enforce the regulations in their current form against entities like plaintiffs; (2) they have "committed to further amend" the regulations, before the rolling expiration of the safe harbor begins, to address the concerns raised by religious employers like plaintiffs and other non-profit religious organizations with religious objections to providing contraceptive coverage; and (3) they have "initiated a rulemaking process to do so." *CCU*, 2013 WL 93188, at *5, *8; *see Wheaton*, 2012 WL 6652505, at *2; *Conlon*, Ex. 1, at 11; *Archdiocese of St. Louis*, 2013 WL 328926, at *5; *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240, at *5 (C.D. Ill. Jan. 4, 2013); *Zubik*, 2012 WL 5932977, at *8-9.

Because that rulemaking process, in progress right now, will "alter the very regulations" at issue in this case, *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989) (quotation omitted), and has "not yet resulted in an order requiring compliance by the [plaintiffs]," *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 161 (7th Cir. 1976), plaintiffs' challenge is not fit for review at this time. The

argument to the contrary is inconsistent with the Supreme Court's instruction that the finality requirement should be applied "in a flexible and pragmatic way." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (quotation omitted). Indeed, "[i]nterpreted in a pragmatic way," the ongoing process makes defendants' position "tentative, as opposed to final," and because the forthcoming amendments will eliminate the need for judicial review entirely or at least narrow and refine the controversy, the current regulations are not fit for review. *CCU*, 2013 WL 93188, at *5; *see Wheaton*, 2012 WL 6652505, at *2; *Conlon*, Ex. 1, at 10-12; *Archdiocese of St. Louis*, 2013 WL 328926, at *5; *Archbishop of Wash.*, 2013 WL 285599, at *3; *Persico*, 2013 WL 228200, at *12-15, *18-19; *Catholic Diocese of Peoria*, 2013 WL 74240, at *5; *Notre Dame*, 2012 WL 6756332, at *3; *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12CV158-HSO-RHW, 2012 WL 6831407, at *7 (S.D. Miss. Dec. 20, 2012); *Zubik*, 2012 WL 5932977, at *8; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *5.[12]

[12] Plaintiffs' attempts to distinguish *Texas Independent Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479 (5th Cir. 2005), and *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), *see* Opp'n at 30-32, rest largely on the inaccurate refrain that the regulations challenged here are "final." *See Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 40 (D.D.C. 2012) (rejecting attempt to distinguish *American Petroleum* because, as in that case, the ANPRM is the

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Thus, this case does not involve "'the mere contingency that [an agency] might revise the regulations at some future time,'" as plaintiffs claim. Opp'n at 3, 16 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965)). There is nothing *contingent* about the amendment of the challenged regulations. *See Tex. Indep. Prod.*, 413 F.3d at 483 (dismissing challenge as unripe where agency announced its intent to consider issues raised by plaintiff in new rulemaking). And any suggestion that plaintiffs will be unsatisfied with whatever amendments result from the pending rulemaking, *see* Am. Compl. ¶¶ 88-89, 96-98, Dec. 31, 2012, ECF No. 21, is not grounds for this Court to issue an advisory opinion about the current regulations. *See CCU*, 2013 WL 93188, at *6; *Zubik*, 2012 WL 5932977, at *9; *Belmont Abbey*, 878 F. Supp. 2d at 40.

The fact that plaintiffs' challenges may be "legal" – and therefore may be addressed without post-enactment factual development – is irrelevant to the

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product of "significant research and deliberation" and there is "external accountability for the agency's self-imposed deadline" created by publication of the safe harbor end dates). Plaintiffs' attempt to distinguish *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 390-91 (11th Cir. 1996), is even more puzzling than it is inapt. Plaintiffs point out that that case was unripe because the challenged rule allowed for agency enforcement discretion. Opp'n at 31-32. But here, the challenged rules will *never* be enforced by defendants against plaintiffs. Instead, there will be a different rule in place. If *Wilderness Society* was unripe, then *a fortiori*, this case is, too.

ripeness issue here. *See CCU*, 2013 WL 93188, at *7. 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). By seeking review of the soon to be changed regulations now, plaintiffs ask the Court to issue a purely advisory opinion.

Moreover, the hardship of which plaintiffs complain – that the preventive services coverage regulations require advanced planning and impact their current decision-making, *see* Opp'n at 33-35 – is not sufficient.[13] Indeed, just as with plaintiffs' standing argument, all of their alleged hardships stem from the mistaken assumption that defendants will enforce the regulations in their present form against plaintiffs. This "hardship" is thus rooted in a desire to plan for

[13] Plaintiffs cite *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), for the point that changes to an employee health plan require advance planning, *see* Opp'n at 23, but they ignore that the employer in that case, unlike plaintiffs here, did not have the benefit of the safe harbor and therefore had to comply with the contraceptive coverage requirement by November 1, 2012. *Newland*, 881 F. Supp. 2d at 1294. Moreover, there was no indication that the requirement would change as to the *Newland* plaintiffs. Unlike plaintiffs here, then, the *Newland* plaintiffs were planning for a certainty, not an improbability.

contingencies that will never arise. *See Conlon*, Ex. 1, at 11-12; *Archdiocese of St. Louis*, 2013 WL 328926, at *5-6; *Persico*, 2013 WL 228200, at *15-17; *CCU*, 2013 WL 93188, at *8; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *5. Any planning plaintiffs undertake (and any costs plaintiffs choose to incur) is not caused by defendants' actions. Plaintiffs provide no reason for a different result here because the cases on which they rely, Opp'n at 34, do not suggest that planning for hypothetical future contingencies is a sufficient hardship to make this case ripe for review.[14] Indeed, in *none* of the cases plaintiffs cite with respect to hardship was there any indication that the challenged law was being amended.[15] And the "future contingencies" plaintiffs may choose to plan for cannot be

[14] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation Dev. Comm'n*, 461 U.S. 190, 198 (1983) (challenged law *currently* imposed moratorium on construction of nuclear plants); *New York v. United States*, 505 U.S. 144, 175 (1992) (challenged law was already in place and applied to plaintiffs with no suggestion it would change); *Pa. Dep't of Pub. Welfare v. HHS*, 101 F.3d 939 (3d Cir. 1996) (same).

[15] *See, e.g.*, *CSI Aviation Servs., Inc. v. DOT*, 637 F.3d 408, 412 (D.C. Cir. 2011) (challenged agency statement "gave no indication that it was subject to further agency consideration or possible modification"); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (per curiam) (agency decision was already being enforced, with no suggestion agency would change it); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cnty.*, 325 F.3d 879, 882-83 (7th Cir. 2003) (law was in place and was already impacting contracts between plaintiffs and defendant).

challenged because the future regulations are unknown, being the subject of an ongoing rulemaking.

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 3-5, 28-30. While standing doctrine seeks to ensure "the parties have a concrete stake" in the matter, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000), and while the ripeness doctrine seeks to protect agencies from premature adjudication of abstract administrative policies, *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003), mootness doctrine addresses whether to "abandon [a] case at an advanced stage" after it has been litigated "for years," where doing so "may prove more wasteful than frugal." *Laidlaw*, 528 U.S. at 191-92. Because this case has not been litigated "for years" and is not at "an advanced stage," *id.*, the interests served by the mootness analysis are not

implicated here.[16] *See, e.g.*, *Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162, at *4 n.6 (D.D.C. Aug. 24, 2012).

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 their challenge to the religious employer exemption and their Administrative Procedure Act claims. *See* Opp'n at 13-16. Because plaintiffs cannot know what form the final regulations will take, *see Wheaton*, 2012 WL 3637162, at *8 & n.11, it is pure speculation to suggest that the amended regulations will not address these concerns as well. With respect to the religious employer exemption, defendants have long 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.[17] Moreover, the NPRM proposes

[16] Plaintiffs' reliance on *CSI Aviation Servs.*, 637 F.3d at 412-14, is misleading. The court did not recast the defendant's ripeness argument as a mootness argument; it instead rejected an alternative mootness argument after determining that the plaintiffs' claims were ripe. And with respect to ripeness, that case does not support plaintiffs because, unlike here, the agency had taken a "definitive" legal position. *Id.* at 412; *see Notre Dame*, 2012 WL 6756332, at *3.

[17] *See* HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 12, 2013).

eliminating three of the four criteria for that exemption in an effort to address concerns like plaintiffs'. 78 Fed. Reg. at 8461. Further, while plaintiffs contend the regulations are contrary to other federal laws, *see* Opp'n at 15, that contention – in addition to lacking merit – assumes that the regulations will remain in their current form. As defendants have repeatedly stated and as the NPRM further shows, however, they will not, so any ruling would be irrelevant once the ongoing rulemaking process is complete. The court should therefore dismiss all of plaintiffs' claims for lack of standing and ripeness. *See, e.g.*, *Zubik*, 2012 WL 5932977, at *12-13 (dismissing nearly identical challenge to religious employer exemption and APA claim); *Persico*, 2013 WL 228200, at *16-18, *20-21 (same).

CONCLUSION

The Court should grant defendants' motion to dismiss.

Respectfully submitted this 14th day of February, 2013,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

SALLY QUILLIAN YATES
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Michael C. Pollack
MICHAEL C. POLLACK (NY Bar)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW, Room 6143
Washington, DC 20530
Tel: (202) 305-8550
Fax: (202) 616-8470
Email: michael.c.pollack@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michael C. Pollack
MICHAEL C. POLLACK

CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in Local Rule 5.1C for documents prepared by computer.

/s/ Michael C. Pollack
MICHAEL C. POLLACK