IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al., Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants-Appellees.	No. 12-3238

RESPONSE TO MOTION TO STAY APPEAL

Plaintiffs seek to enjoin on religious grounds the application of federal regulations that require certain group health plans to include contraceptive coverage. The district court dismissed on grounds of standing and ripeness, and plaintiffs appealed. They have now moved to stay their appeal pending the conclusion of rulemaking proceedings that are scheduled to result in superseding regulations by August.

We believe that the district court's judgment is clearly correct and that summary affirmance would be appropriate. We recognize, however, that an appellate court has broad discretion in scheduling the disposition of appeals, and we therefore take no position with regard to plaintiffs' motion, although we disagree with several aspects of its reasoning.

1. The Patient Protection and Affordable Care Act establishes minimum standards for certain group health plans to be implemented in regulations promulgated by the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury. The regulations, as amended on February 15, 2012, require that certain group health plans cover FDA-approved approved contraceptive methods, as prescribed by a healthcare provider. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The regulations exempt the plan of any organization that qualifies as a religious employer. In issuing the regulations, the Departments established a temporary enforcement safe harbor for plans sponsored by certain non-profit organizations that have religious objections to providing contraceptive coverage. *See id.* at 8726-28. The safe harbor is to remain in place during the pendency of a new rulemaking designed to establish alternative means of providing contraceptive coverage without cost-sharing while also accommodating non-exempt organizations' religious objections to covering contraceptive services. *See, e.g.,* 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012).

2. Plaintiffs are various employers, employees, and states. Their suit alleges that application of the contraceptive coverage requirement would infringe rights protected by the Religious Freedom Restoration Act and the First Amendment.

The district court dismissed the claims on grounds of standing as well as ripeness. The court held that plaintiffs' allegations failed to establish that the challenged rules apply to any plaintiff, and that they had therefore failed to establish

the existence of an actual case or controversy. The court noted that several plaintiffs admitted explicitly that the rules do not apply to them. Other plaintiffs asserted that they fall within the rules' ambit but made no factual allegations to support their legal conclusion.

The court additionally held that, in any event, plaintiffs' claims are not ripe. The court explained that plaintiffs' group health plans qualify for the enforcement safe harbor and that the rules challenged in this litigation will be superseded at the close of the pending rulemaking.

Plaintiffs appealed and, in their opening brief, they challenge both the standing and the ripeness holdings. Shortly after the filing of the government's brief as appellee, the Departments took the next in a series of steps to amend the challenged rules, issuing a Notice of Proposed Rulemaking. *See* 78 Fed. Reg. 8456 (published Feb. 6, 2013).

On February 8, plaintiffs moved for "a provisional stay of the proceedings in this appeal during the pendency of the Federal Government's regulatory process." Mot. 3-4. They argue that the ultimate amendment "may impact aspects of [their] appeal." Mot. 3.

3. The federal government takes no position on plaintiffs' request to stay their appeal. We note, however, that the content of the future rules do not affect the issues presented by this appeal: whether plaintiffs have standing to challenge the present rules and whether their challenges are ripe. If the plaintiffs believe that they will be

injured by the forthcoming final rules, they must file a challenge to those regulations when they issue. Their challenge to the current regulations will not ripen at the point that the current rules are superseded by new rules. Any plaintiff that determines to bring a challenge to the new regulations must also demonstrate injury sufficient to establish a case or controversy. As the district court held, plaintiffs failed to establish requisite Article III injury with regard to the rules at issue in this case.

We also note that plaintiffs are mistaken in suggesting that courts routinely hold unripe cases in abeyance pending events that might affect the ripeness analysis. Mot. 3. When a suit is unripe, the proper course, followed by the district court in this case, is to dismiss. It is also entirely clear, however, that the Court has discretion to stay a pending appeal.

Respectfully submitted,

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FEBRUARY 2013

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Adam Jed
ADAM C. JED