IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-03350-CMA-BNB

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al.

Defendants.

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**DEFENDANTS' MOTION TO DISMISS & MEMORANDUM IN SUPPORT THEREOF**

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Pursuant to Federal Rule of Civil Procedure 12(b)(1), defendants hereby move to dismiss this action for lack of subject matter jurisdiction.

The Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010),[1] and implementing regulations, require all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage – except in connection with certain religious employers – to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[2] As relevant here, the preventive services that must be covered include all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity. Plaintiff, Colorado Christian University, filed suit

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[2] A grandfathered plan is one that was in existence on March 23, 2010 and that has not undergone any of a defined set of changes. 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

on December 22, 2011, seeking to have the Court invalidate and enjoin the preventive services coverage regulations, in their interim final form. Plaintiff alleges that its sincerely-held religious beliefs prohibit it from providing coverage for emergency contraceptives (such as Plan B and Ella) and related patient education and counseling.

On February 10, 2012, after plaintiff filed this action, defendants finalized an amendment to the interim final regulations, issued guidance on a one-year enforcement safe harbor, and gave notice of a future rulemaking, all designed (in whole or in part) to address religious concerns such as those raised by plaintiff. The final regulations confirm that group health plans sponsored by certain religious employers (and associated group health insurance coverage) are exempt from the contraception coverage requirement. The enforcement safe harbor encompasses a larger group of employers with religious objections to providing contraceptive coverage; it provides that defendants will not bring any enforcement action against employers that meet certain criteria (and associated plans and issuers) during the safe harbor period, which will be in effect until the first plan year that begins on or after August 1, 2013. Finally, defendants explained that, before the expiration of the safe harbor, they will propose and finalize changes to the preventive services coverage regulations to further accommodate non-profit religious organizations' religious objections to covering contraceptive services. The forthcoming modifications, among other things, would require health insurance issuers to offer group health insurance coverage without contraceptive coverage to non-profit religious organizations that object to contraceptive coverage and simultaneously to offer contraceptive coverage directly to such organizations' plan participants who desire it, at no charge.

In light of these actions, this Court lacks jurisdiction over this case. At the outset, plaintiff's suit must be dismissed because plaintiff has not alleged any imminent injury

from the operation of the regulations. Plaintiff sponsors a group health plan for its employees, and plaintiff has not alleged that the plan – which according to the Complaint does not cover emergency contraceptives – is ineligible for grandfather status. Thus, even prior to defendants' most recent actions, plaintiff has not borne its burden to prove that it is under any current obligation to offer coverage for emergency contraceptives. Moreover, even assuming that plaintiff's group health plan is ineligible for grandfather status, plaintiff has not alleged an imminent injury in light of the enforcement safe harbor – which protects plaintiff until at least July 1, 2014 – and defendants' announced intention to promulgate new regulations before that date that are intended to accommodate the religious objections of employers like plaintiff.

The Court likewise lacks jurisdiction because this case is not ripe. Plaintiff's challenge to the preventive services coverage regulations is not fit for judicial review because defendants have indicated that they will propose and finalize changes to the regulations that are intended to accommodate religious objections to providing contraceptive coverage like plaintiff's. In the meantime, the enforcement safe harbor will be in effect such that plaintiff, even if its group health plan is not eligible for grandfather status, will not suffer hardship as a result of its failure to cover emergency contraceptives.

## BACKGROUND

### I. STATUTORY BACKGROUND

Prior to the enactment of the ACA, many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due in large part to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM

REP."). Section 1001 of the ACA – which includes the preventive services coverage provision that is relevant here – seeks to cure this problem by making recommended preventive care affordable and accessible for many more Americans.

The preventive services coverage provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing.[3] 42 U.S.C. § 300gg-13. The preventive services that must be covered include, for women, such additional preventive care and screenings not separately recommended by the United States Preventive Services Task Force as provided in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA"), an agency within the Department of Health and Human Services ("HHS"). *Id*.

Research shows that cost-sharing requirements can pose barriers to preventive care and result in reduced use of preventive services, particularly for women. IOM REP. at 109. Indeed, a 2010 survey showed that less than half of women are up to date with recommended preventive care screenings and services. *Id*. By requiring coverage for recommended preventive services and eliminating cost-sharing requirements, Congress sought to increase access to and utilization of recommended preventive services. 75 Fed. Reg. 41726, 41728 (July 19, 2010). Increased use of preventive services will benefit the health of individual Americans and society at large. 75 Fed. Reg. at 41733. Individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease; healthier workers will be

[3] A group health plan includes a plan established or maintained by an employer that provides medical care to employees. 42 U.S.C. § 300gg-91(a)(1). Group health plans may be insured (i.e., medical care underwritten through an insurance contract) or self-insured (i.e., medical care funded directly by the employer). The ACA does not require employers to provide health coverage for their employees, but, beginning in 2014, certain large employers may face assessable penalties if they fail to do so. 26 U.S.C. § 4980H.

more productive with fewer sick days; and increased utilization will result in savings due to lower health care costs. *Id.*; IOM REP. at 20.

Defendants issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41726. The interim final regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1).

Because there were no existing HRSA guidelines relating to preventive care for women, HHS tasked the Institute of Medicine ("IOM")[4] with "reviewing what preventive services are necessary for women's health and well-being" and developing recommendations for comprehensive guidelines. IOM REP. at 2. IOM conducted an extensive science-based review and, on July 19, 2011, published a report of its analysis and recommendations. *Id.* at 20-26. The report recommended that HRSA guidelines include, among other things, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices. FDA, Birth Control Guide, *available at* http://www.fda.gov/ForConsumers /ByAudience/ForWomen /ucm118465.htm.

On August 1, 2011, HRSA adopted IOM's recommendations in full, subject to an exemption relating to certain religious employers authorized by an amendment to the

[4] IOM, a component of the National Academy of Sciences that is funded by Congress, secures the services of eminent members of appropriate professions to examine policy matters relating to the public health and provides expert advice to the federal government. IOM REP. at iv.

interim final regulations. *See* HRSA Guidelines, *available at* http://www.hrsa.gov/womensguidelines/. The amendment to the interim final regulations, issued on the same day, authorized HRSA to exempt group health plans sponsored by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46621 (Aug. 3, 2011). To qualify for the exemption, an employer must meet all of the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv).[5] Thus, as relevant here, the amended interim final regulations require non-grandfathered plans that do not qualify for the religious employer exemption to provide coverage for recommended contraceptive services, without cost-sharing, for plan years beginning on or after August 1, 2012.

Defendants requested comments on the amended interim final regulations and specifically on the definition of religious employer contained in those regulations. 76 Fed. Reg. at 46623. After carefully considering the more than 200,000 comments they received, defendants decided to adopt the definition of religious employer contained in the amended interim final regulations for purposes of the final regulations while also creating a one-year enforcement safe harbor for plans sponsored by certain

[5] The sections of the Internal Revenue Code referenced in the fourth criterion refer to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," that are exempt from taxation under 26 U.S.C. § 501(a). 26 U.S.C. § 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii).

organizations with religious objections to contraceptive coverage that do not qualify for the religious employer exemption. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012).

Pursuant to the safe harbor, defendants will not take any enforcement action against an employer, group health plan, or group health insurance issuer that fails to cover recommended contraceptive services without cost-sharing with respect to a non-exempted, non-grandfathered group health plan sponsored by an organization that meets all of the following criteria:

(1) The organization is organized and operates as a non-profit entity.

(2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan sponsored by the organization, consistent with any applicable state law, because of the religious beliefs of the organization.

(3) The group health plan sponsored by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that the plan will not provide contraceptive coverage for the first plan year beginning on or after August 1, 2012.

(4) The organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribed procedures.[6]

The enforcement safe harbor will be in effect until the first plan year that begins on or after August 1, 2013. Guidance at 3. By that time, defendants expect significant changes will have altered the landscape with respect to religious accommodations under the regulations by providing further relief to organizations like plaintiff from the contraceptive services coverage requirement.

Those intended changes, which were announced in the preamble to the final regulations and will be finalized before the end of the enforcement safe harbor, would

[6] HHS, Guidance on the Temporary Enforcement Safe Harbor ("Guidance"), at 3 (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf.

provide alternative means of arranging for contraceptive coverage without cost-sharing for participants in plans sponsored by non-profit religious organizations that object to contraceptive coverage for religious reasons. 77 Fed. Reg. at 8728-29. Specifically, defendants explained that they will initiate a rulemaking to require health insurance issuers to offer group health insurance coverage without contraceptive coverage to such organizations and simultaneously to offer contraceptive coverage directly to the organization's plan participants who desire it, at no charge. *Id*. Defendants further explained that they intend to establish similar policies with respect to self-insured group health plans sponsored by such organizations. *Id*.

## II. CURRENT PROCEEDINGS

Plaintiff brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage it makes available to its employees to cover emergency contraception and related patient education and counseling. Plaintiff filed suit after defendants promulgated the amendment to the interim final regulations but before defendants finalized that amendment and before defendants created the temporary enforcement safe harbor.

Plaintiff describes itself as a "Christian liberal arts university" in Lakewood, Colorado, with approximately 4,200 students and 280 full-time and 330 part-time employees. Compl. ¶¶ 12, 25, 26. According to the Complaint, plaintiff currently makes available a health plan – which does not cover emergency contraceptives – to its employees. *See id*. ¶¶ 27-28, 77-78. Plaintiff alleges that it believes emergency contraceptives prevent a fertilized egg from implanting in the wall of the uterus thereby causing what plaintiff believes is an abortion. *Id*. ¶¶ 76-84. Plaintiff further asserts that its sincerely-held religious beliefs prohibit it from providing coverage for emergency contraceptives and related education and counseling. *Id*. ¶¶ 77, 100. Plaintiff claims the

preventive services coverage regulations – in their interim final form and as they pertain to emergency contraceptives – violate the First Amendment to the U.S. Constitution, the Religious Freedom Restoration Act, and the Administrative Procedure Act.

## ARGUMENT

The party invoking federal jurisdiction bears the burden of proof. *Loving v. Boren*, 133 F.3d 771, 772 (10th Cir. 1998). Where, as here, the defendant challenges jurisdiction on the face of the complaint, the complaint must plead sufficient facts to establish that jurisdiction exists. *See id*.

### I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFF DOES NOT HAVE STANDING

To meet its burden to establish standing, a plaintiff must demonstrate that it has "suffered an injury in fact—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 (1992). Allegations of possible future injury do not suffice; rather, "[a] threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). A plaintiff that "alleges only an injury at some indefinite future time" has not shown an injury in fact, particularly where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan*, 504 U.S. at 564 n.2. In these situations, "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id*.

The preventive services coverage regulations do not apply to grandfathered plans. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. A grandfathered plan is a health plan in which at least one individual was enrolled on March 23, 2010 and that has continuously covered at least one individual since that date. *Id*. A grandfathered plan may lose its grandfather status

only if, compared to its existence on March 23, 2010, it eliminates all or substantially all benefits to diagnose or treat a particular condition, increases a percentage cost-sharing requirement, significantly increases a fixed-amount cost-sharing requirement, significantly reduces the employer's contribution, or imposes or tightens an annual limit on the dollar value of any benefit. *Id*.

Here, plaintiff alleges that it sponsors for its employees a group health plan that does not cover emergency contraceptives. Compl. ¶¶ 27-28, 77-78. There is no allegation in the Complaint that this plan was not in place on March 23, 2010. Plaintiff, moreover, does not allege that it has altered its plan since March 23, 2010 in a way that would cause it to lose grandfather status. Nor does plaintiff allege that it will alter the plan in such a way in the imminent future. And it is not to be expected that plaintiff would act to forego its grandfather status lightly, which would require its plan to comply with many other ACA requirements. Accordingly, the allegations in the Complaint simply do not show that plaintiff will be required by the preventive services coverage regulations to provide coverage for emergency contraceptives – as opposed to continuing to offer the same grandfathered plan that does not, and would not, cover such contraceptives. Plaintiff therefore has not alleged any concrete and imminent injury resulting from the operation of the challenged regulations.

Furthermore, even if plaintiff had alleged that its group health plan does not qualify for grandfather status, plaintiff still would not have alleged an injury in fact. Plaintiff does not allege that it will not satisfy the criteria for the temporary enforcement safe harbor, and there is nothing in the Complaint to suggest that plaintiff will be unable to meet those criteria. Under the safe harbor, defendants will not take any enforcement action against an organization that qualifies for the safe harbor until the first plan year that begins on or after August 1, 2013. Guidance at 3. The Complaint indicates that

plaintiff's plan year begins on July 1. Compl. ¶ 30. Thus, if plaintiff qualifies for the safe harbor – and the allegations in the Complaint suggest that it will – the earliest plaintiff could be subject to any enforcement action by defendants for failing to provide emergency contraceptive coverage is July 1, 2014. With such a long time gap before the inception of any possible injury and the challenged regulations still in flux, plaintiff cannot satisfy the imminence requirement for standing; the asserted injury is simply "too remote temporally." *McConnell v. FEC*, 540 U.S. 93, 226 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

This defect in plaintiff's suit does not implicate a mere technical issue of counting intermediate days; rather, it goes to the fundamental limitations on the role of federal courts. The "underlying purpose of the imminence requirement is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all.'" *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting *Lujan*, 504 U.S. at 564 n.2); *see also State of Utah v. Babbitt*, 137 F.3d 1193, 1212 (10th Cir. 1998). This concern is particularly appropriate here. Defendants have indicated in the preamble to the final regulations that, before the expiration of the enforcement safe harbor, they will finalize changes to the preventive services coverage regulations to accommodate the concerns of non-profit religious organizations that object to providing contraceptive coverage for religious reasons, like plaintiff. 77 Fed. Reg. at 8728-29. In light of these forthcoming modifications, there is no reason to suspect that plaintiff will be required to sponsor a group health plan that covers contraceptive services in contravention of its alleged religious beliefs once the enforcement safe harbor expires. And any suggestion to the contrary is entirely

speculative at this point.[7] At the very least, given the anticipated changes to the preventive services coverage regulations, plaintiff's claim of injury, if any, after the enforcement safe harbor expires would differ substantially from plaintiff's current claim of injury.[8] Accordingly, this case should be dismissed for lack of standing.

## II. THE COURT LACKS JURISDICTION BECAUSE THIS CASE IS NOT RIPE

The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003). It also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 807-08. A case ripe for judicial review cannot be "nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). In assessing ripeness, courts evaluate both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99, 105 (1977).

The Supreme Court discussed these two prongs in *Abbott Laboratories*, the seminal case on pre-enforcement review of agency action. *Abbott Laboratories* involved

[7] Even absent the enforcement safe harbor, plaintiff would not have been required to comply with the challenged regulations until July 1, 2013, *see* 45 C.F.R. § 147.130(b)(1); Compl. ¶ 30, and it's likely the challenged regulations would change before that date.

[8] Plaintiff does not allege that it makes available a health plan to its students, *see* Compl. ¶ 27, but, even if it did, plaintiff could not establish standing on this basis because, among other things, the preventive services coverage regulations impose requirements only on a group health plan or a health insurance issuer and, with respect to any student coverage plaintiff may offer, it is neither. *See* 42 U.S.C. § 300gg-91(a)(1), (b)(2).

a pre-enforcement challenge to regulations that required drug manufacturers to include a drug's established name every time the drug's proprietary name appeared on a label. 387 U.S. at 138. The regulations required the plaintiff drug manufacturers to change all their labels and advertisements at considerable burden and expense. *Id*. at 152. Noncompliance would have triggered significant penalties. *Id*. at 153 & n.19.

The Court determined the regulations were fit for judicial review because they were "quite clearly definitive," *id*. at 151; the regulations "were made effective immediately upon publication," *id*. at 152, and "[t]here [was] no hint that th[e] regulation[s] [were] informal . . . or tentative." *Id*. at 151. Moreover, the Court noted that "the issue tendered [was] a purely legal one" and there was no indication that "further administrative proceedings [were] contemplated." *Id*. at 149. The Court therefore was not concerned that judicial intervention would inappropriately interfere with further administrative action. With respect to the hardship prong, the Court determined that delayed review would cause sufficient hardship to the plaintiffs. The impact of the regulations, the Court noted, was "sufficiently direct and immediate" because their promulgation put the drug manufacturers in a "dilemma" – "[e]ither they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling" or they must "risk serious criminal and civil penalties for the unlawful distribution of misbranded drugs." *Id*. at 152–53.

None of the indicia of ripeness discussed in *Abbott Laboratories* is present in this case. Plaintiff seeks judicial review of the preventive services coverage regulations as applied to non-exempted, non-profit religious organizations that object to contraceptive coverage for religious reasons, like plaintiff. Defendants, however, have made clear that, well before the earliest date on which the challenged regulations could affect plaintiff, they will propose and finalize changes to the preventive services coverage

regulations intended to accommodate the concerns expressed by plaintiff and similarly-situated organizations. 77 Fed. Reg. at 8728-29. Therefore, unlike in *Abbott Laboratories* – where the challenged regulations were definitive and no further administrative proceedings were contemplated – the preventive services coverage regulations will be modified.

Moreover, because these modifications are intended to address the very issue that plaintiff raises here, there is a significant chance that the modifications will alleviate altogether the need for judicial review, or at least narrow and refine the scope of any actual controversy to more manageable proportions. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe . . . if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). Once the modifications are finalized, if plaintiff's concerns are not laid to rest, plaintiff "will have ample opportunity [] to bring its legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998).

Further, although plaintiff's Complaint raises largely legal claims, those claims are leveled at the amended interim final regulations, not the final regulations or, more importantly, the proposed modifications to the final regulations that defendants have announced. Plaintiff therefore challenges regulations that, as applied to it and similarly-situated organizations, have not "taken on fixed and final shape," *Public Serv.*, 344 U.S. at 244, and are not "presented in clean-cut and concrete form," *Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437, 1443 (10th Cir. 1997). Once defendants complete the rulemaking outlined in the preamble to the final regulations, plaintiff's challenge to the current regulations will be moot. And judicial review of these future changes to the preventive services coverage regulations as a result of the forthcoming rulemaking would be too speculative to yield meaningful review; it would only entangle the Court "in abstract

disagreements over administrative policies." *Abbott Labs.*, 387 U.S. at 148. Because judicial review at this time would inappropriately interfere with defendants' forthcoming rulemaking and may result in the Court deciding issues that may never arise, this case is not fit for judicial review.

Withholding or delaying judicial review also would not result in any hardship for plaintiff. Unlike the plaintiffs in *Abbott Laboratories*, plaintiff here is not being compelled to make immediate and significant changes in its day-to-day operations under threat of serious civil and criminal penalties. As explained above, if the group health plan made available by plaintiff to its employees is eligible for grandfather status – and there are no allegations in the Complaint to indicate that it is not – then the plan is not required to cover emergency contraceptives. Moreover, even if plaintiff sponsors a non-grandfathered group health plan, it can qualify for the temporary enforcement safe harbor, meaning defendants will not take any enforcement action against plaintiff for failure to cover emergency contraceptives until July 1, 2014, at the earliest. And, by the time the enforcement safe harbor expires, defendants will have issued modified regulations to accommodate plaintiff's religious objections to providing contraceptive coverage. Therefore, this is simply not a case where plaintiff is "forced to choose between foregoing lawful activity and risking substantial legal sanctions." *See Abbott Labs.*, 387 U.S. at 153. Accordingly, the case should be dismissed as unripe.

For all of these reasons, the Court should grant defendants' motion to dismiss.

Respectfully submitted,

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**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on February 27, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non- CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by nonparticipant's name:

None.

s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney