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April 23, 2012

BY ECF

The Honorable Frederic Block
United States District Judge
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Priests for Life v. Sebelius*, 12-cv-00753 (FB) (E.D.N.Y.)

Dear Judge Block:

The government requests that the Court hold a conference in connection with the government's contemplated motion to dismiss this action for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

The Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and implementing regulations, require all group health plans and health insurance issuers that offer non-grandfathered group or individual health plans to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible). As relevant here, except as to group health plans of certain religious employers as defined by recently promulgated regulations (and health insurance coverage sold in connection with those employers' plans), *see* 45 C.F.R. § 147.130(a)(1)(iv), 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, as prescribed by a health care provider.

Plaintiff, a non-profit organization called Priests for Life, filed suit on February 15, 2012, seeking to have the Court declare invalid and enjoin the preventive services coverage regulations. Plaintiff alleges that its sincerely held religious beliefs prohibit it from providing the required coverage for certain services. But plaintiff lacks standing to raise this challenge because it has not alleged a concrete and imminent injury resulting from the operation of the preventive services coverage regulations.

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) (quotations omitted). The harm must be "distinct and palpable" and "actual or imminent." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (internal citation and quotation marks omitted). 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) (quotation omitted). 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.* Plaintiff has not met these standards.

As an initial matter, plaintiff lacks standing because its complaint fails to allege that its health insurance plan is subject to the preventive services coverage regulations at all. Those 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. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T(a), (g)(1); 29 C.F.R. § 2590.715-1251(a), (g)(1); 45 C.F.R. § 147.140(a), (g)(1). A grandfathered plan may lose its grandfather status 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 benefits. 26 C.F.R. § 54.9815-1251T(a), (g)(1); 29 C.F.R. § 2590.715-1251(a), (g)(1); 45 C.F.R. § 147.140(a), (g)(1). Plaintiff makes no effort to show that its health insurance plan is not grandfathered.

Even if plaintiff's plan is not grandfathered, plaintiff lacks standing because it cannot show that the federal government will take any enforcement action against it until at least January 1, 2014. Recently, the government announced a temporary enforcement safe harbor for the plans of many employers that do not qualify for the religious employer exemption from the preventive services coverage regulations (and coverage sold in connection with those plans). Under the temporary enforcement safe harbor, the government will not take any enforcement action against an employer, group health plan, or group health insurance issuer with respect to a non-exempt, non-grandfathered group health plan that fails to cover recommended contraceptive services and that is sponsored by an organization that meets certain criteria. The enforcement safe harbor will be in effect until the first plan year that begins on or after August 1, 2013. Because plaintiff alleges that its plan year begins on January 1, the earliest any enforcement action could be taken against it by the government is January 1, 2014. Plaintiff makes no effort to allege that the temporary enforcement safe harbor will not apply to it. And because of forthcoming changes to the preventive services coverage regulations, it is likely that plaintiff's

objections will be addressed before the safe harbor period expires.

Indeed, those forthcoming changes to the regulations, among other factors, render plaintiff's claims unripe, as the preventive services regulations have not "taken on fixed and final shape." *Jenkins v. United States*, 386 F.3d 415, 418 (2d Cir. 2004) (internal quotation marks omitted). On March 21, 2012, defendants began the process of amending the regulations by publishing an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register. 77 Fed. Reg. 16501 (Mar. 21, 2012). Their intended changes, which were first announced when defendants finalized the religious employer exemption, will establish alternative means of providing contraceptive coverage without cost-sharing while also accommodating non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

Once defendants complete the rulemaking outlined in the ANPRM, plaintiff's challenge to the current regulations may well be moot. *See The Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (rejecting purely legal claim as unripe due to the possibility that it may not need to be resolved by the courts). And judicial review of any future amendments to the regulations that result from the pending rulemaking is currently impossible. The ANPRM offers ideas and solicits input on potential, alternative means of achieving the goals of providing women access to contraceptive services without cost-sharing and accommodating religious organizations' religious liberty interests. 77 Fed. Reg. at 16503. It does not preordain what amendments to the preventive services coverage regulations defendants will ultimately promulgate; nor does it foreclose the possibility that defendants will adopt alternative proposals not set out in the ANPRM. Thus, review of any of the suggested proposals contained in the ANPRM would only entangle the Court "in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967); *see also Motor Vehicle Mfrs. Assoc. v. N.Y. State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1306 (2d Cir. 1996) (concluding claims were not ripe where "plaintiffs' arguments depend upon the effects of regulatory choices to be made by [the State] in the future"); *Tex. Indep. Producers v. EPA*, 413 F.3d, 479, 484 (5th Cir. 2005); *Lake Pilots Ass'n v. U.S. Coast Guard*, 257 F. Supp. 2d 148, 162 (D.D.C. 2003). Because judicial review at this time would inappropriately interfere with defendants' pending rulemaking and may result in the Court deciding issues that may never arise, this case is not fit for judicial review.

The government is prepared to file its motion to dismiss for lack of subject matter jurisdiction promptly.

Respectfully submitted,

/s/ Michelle R. Bennett
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Trial Attorney
U.S. Department of Justice, Civil Division