[ORAL ARUMENT SCHEDULED FOR DECEMBER 14, 2012]
Nos. 12-5273, 12-5291

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHEATON COLLEGE and BELMONT ABBEY COLLEGE,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary, United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The plaintiffs-appellants in these consolidated appeals are Belmont Abbey College and Wheaton College. The defendants-appellees are Kathleen Sebelius, Secretary, United States Department of Health and Human Services; the United States Department of Health and Human Services; Hilda Solis, Secretary of the United States Department of Labor; the United States Department of Labor; Timothy Geithner, Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

The following groups are participating as amici curiae: American Center for Law and Justice; Regent University; Women Speak For Themselves; Roman Catholic Archbishop of Washington; Consortium of Catholic Academies of the Archdiocese of Washington, Inc.; Archbishop Carroll High School, Inc.; Catholic Charities of the Archdiocese of Washington, Inc.; Catholic University of America; State of Texas; Center for Constitutional Jurisprudence; American Civil Rights Union; Cato Institute; Eagle Forum Education & Legal Defense Fund; Association of American Physicians and Surgeons, Inc.; American Association of Pro-Life Obstetricians and Gynecologists; Catholic Medical Association; National Catholic Bioethics Center; Physicians for Life; National Association of Pro Life Nurses; Christian Legal Society; Association of Rescue Gospel Missions; Prison Fellowship Ministries; Council for Christian Colleges & Universities; Christian Medical Association; Association of

Christian Schools International; National Association of Evangelicals; Queens Federation of Churches; Diocese of the Mid-Atlantic of the Anglican Church in North America; Ethics and Religious Liberty Commission of the Southern Baptist Convention; Patrick Henry College; Institutional Religious Freedom Alliance; Geneva College; Louisiana College; Biola University; Grace Schools; Wayne L. Hepler; Carrie E. Kolesar; Seneca Hardwood Lumber Co.; WLH Enterprises; William Newland; Paul Newland; James Newland; Andrew Newland; Christine Ketterhagen; Hecules Industries; The Cardinal Newman Society; Benedictine College; Catholic Distance University; Christendom Educational Corporation, d/b/a Christendom College; The College of Saint Mary Magdalen; The College of Saints John Fisher and Thomas More; DeSales University; Holy Spirit College; The Ignatius-Angelicum Liberal Studies Program; John Paul The Great Catholic University; Mount St. Mary's University; St. Gregory's University; Thomas Aquinas College; Thomas More College of Liberal Arts; The University of Mary; Wyoming Catholic College; State of Alabama; State of Colorado; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Virginia.

B. Rulings Under Review

Plaintiff Belmont Abbey College is appealing from the July 18, 2012 order entered by Judge James E. Boasberg in Case No. 11-cv-1989 (D.D.C.). The district court's order and opinion are reproduced in the Joint Appendix at JA 63 and 64

respectively. The district court's September 5, 2012 denial of reconsideration is reprinted at JA 108. Neither decision appears in an official reporter.

Plaintiff Wheaton College is appealing from the August 24, 2012 order entered by Judge Ellen Segal Huvelle in Case No. 12-cv-1169 (D.D.C.). The district court's order and opinion are reproduced in the Joint Appendix at JA 264 and JA246 respectively. The decision does not appear in an official reporter.

C. Related Cases

We are aware of two cases raising justiciability questions similar to those raised here, which are pending in courts of appeals or other courts in the District of Columbia. *Nebraska v. United States Dep't of Health & Human Services*, No. 12-3238 (8th Cir.); *Roman Catholic Archdiocese of Washington v. Sebelius*, No. 12-cv-815 (D.D.C.). In addition, we are aware of three other cases presenting merits questions related to the underlying claims raised by the plaintiffs here, which are pending in courts of appeals or other courts in the District of Columbia. *See O'Brien v. United States Dep't of Health & Human Services*, No. 12-3357 (8th Cir.); *Newland v. Sebelius*, No. 12-1380 (10th Cir.); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-cv-1635 (D.D.C.).

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GLOSSARY

ANPRM	Advance Notice of Proposed Rulemaking
HHS	Department of Health and Human Services
HSRA	Health Resources and Services Administration
JA	Joint Appendix
Pl. Br.	Brief for Plaintiffs-Appellants

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF JURISDICTION

The plaintiffs in these two consolidated appeals, Belmont Abbey College and Wheaton College, invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1361. JA 11, 132. The district court entered final judgment dismissing Belmont Abbey's suit on July 18, 2012 (JA 63, 64), and denied reconsideration on September 5, 2012 (JA 108). Belmont Abbey filed a notice of appeal on September 14, 2012. JA 114. The district court entered final judgment dismissing Wheaton's suit on August 24, 2012. JA 246, 264. Wheaton filed a notice of appeal on August 29, 2012. JA265. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district courts correctly held that plaintiffs' claims are not justiciable because the challenged regulations are being amended and plaintiffs are protected by an enforcement safe harbor during the rulemaking process.

PERTINENT STATUTES AND REGULATIONS

Pertinent provisions are reproduced in the addendum to appellants' brief.

STATEMENT OF THE CASE

The plaintiffs in these two cases seek religion-based exemptions from federal regulations that require certain group health plans to cover certain contraceptive services. In both cases, the district courts dismissed the claims on ripeness and standing grounds. The courts explained that the Departments charged with enforcing the regulations (Health and Human Services ("HHS"), Labor, and Treasury) are in the process of amending the regulations to accommodate religious concerns like the ones raised by plaintiffs, and that the Departments have established an enforcement safe harbor that protects plaintiffs and similar entities during the rulemaking. The district courts thus held that the claims are not justiciable.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

The Patient Protection and Affordable Care Act establishes additional minimum standards for certain group health plans. A non-grandfathered plan must cover certain preventive health services without cost-sharing. These preventive health

services include immunizations recommended by the Advisory Committee on Immunizations Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id.* § 300gg-13(a)(1); preventive care and screenings for infants, children and adolescents as provided in guidelines of HHS's Health Resources and Services Administration ("HSRA"), *see id.* § 300gg-13(a)(3); and certain preventive care and services for women as provided in HRSA guidelines, *see id.* § 300gg-13(a)(4).

Collectively, these preventive health services provisions require coverage of an array of services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[1] In addition, and as relevant here, these provisions require coverage for "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The regulations that implement this contraceptive-coverage requirement authorize the exemption of group health plans provided by "religious employers." The regulations define a religious employer as an organization that has as its purpose the inculcation of religious values, that primarily hires and serves persons who share the religious tenets of the organization, and that is a non-profit organization as

[1] *See, e.g.*, U.S. Preventive Services Task Force "A" and "B" Recommendations, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

described in Internal Revenue Code provisions applicable to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *See*, *e.g.*, 45 C.F.R. § 147.130(a)(1)(iv)(B) (HHS regulations).

In addition to providing this exemption, the Departments charged with enforcing the contraceptive-coverage requirement (HHS, Labor, and Treasury) have been developing a way to accommodate religious concerns raised by a broader group of employers with religious objections. When the Departments published their initial, interim regulations authorizing the religious employer exemption, they sought comments on the scope of that exemption, to address religious objections by other employers. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Based on more than 200,000 comments, the Departments simultaneously adopted the religious-employer exemption in the interim regulations, announced that they would develop an additional solution for certain non-exempt organizations with religious objections to contraceptive coverage, and established a temporary enforcement safe harbor for plans sponsored by non-profit organizations with such religious objections. *See* 77 Fed. Reg. at 8726-29; HHS, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012) ("HHS Gudance").[2]

[2] *Available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf.

The safe harbor applies to the group health plans of non-profit organizations that, consistent with applicable state law, have not provided some or all required contraceptive coverage since February 10, 2012, because of religious objections; that have given notice to plan participants that the plan will not provide such contraceptive coverage during the first plan year starting on or after August 1, 2012 when the contraceptive-coverage requirements become effective; and that have certified that they meet the safe-harbor criteria. *See* 77 Fed. Reg. at 8727-29; HHS Guidance 3 (Feb. 10, 2012). The safe harbor is available to any institution of higher education and the issuer of its student health insurance plan if the institution and its student health insurance plan satisfy these criteria. *See, e.g.,* 77 Fed. Reg. 16,453, 16,456-57 (Mar. 21, 2012). It also is available to entities that took some action to try to exclude or limit contraceptive coverage without success prior to February 10, 2012. *See* HHS, Guidance on the Temporary Enforcement Safe Harbor 3 (Aug. 15, 2012).[3]

The safe harbor will remain in effect until the first plan year that begins on or after August 1, 2013. *See* 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012); HHS Guidance 3 (Feb. 10, 2012). Thus, for entities like plaintiffs, which have plan years that begin each January, *see* JA 40 ¶ 33, JA 137 ¶ 43, the safe harbor will remain in effect until the plan year that begins January 1, 2014.

[3] *Available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

In announcing the safe harbor, the Departments stated that "[b]efore the end of the temporary enforcement safe harbor," they would "develop and propose" a way to accommodate certain religious objections by non-exempt organizations. 77 Fed. Reg. at 8727, 8728. The Departments explained that they would "work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage." *Id.* at 8728.

The Departments began the process of amending the regulation, and on March 21, 2012, they published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register. *See* 77 Fed. Reg. 16,501. The ANPRM requested comments "on the potential means of accommodating" the concerns of non-exempt religious organizations "while ensuring contraceptive coverage for plan participants and beneficiaries covered under their plans (or, in the case of student health insurance plans, student enrollees and their dependents) without cost sharing." *Id.* at 16,501. The purpose of the ANPRM was to provide "an early opportunity for any interested stakeholder to provide advice and input into the policy development relating to the accommodation to be made" in the forthcoming amendments to the regulations. *Id.* at 16,503. Among other options, the ANPRM suggested requiring health insurance issuers to offer health insurance coverage without contraceptive coverage to religious organizations that object to such coverage on religious grounds and simultaneously to offer contraceptive coverage directly to the organization's plan

participants, at no charge to organizations or participants. *Id.* at 16,505. The ANPRM also suggested ideas and solicited comments on ways to accommodate religious objections of religious organizations that sponsor self-insured group health plans for their employees. *Id.* at 16,506-07. The ANPRM reiterated that the Departments "intend to finalize these amendments to the final regulations such that they are effective by the end of the temporary enforcement safe harbor." *Id.* at 16,503.

B. Procedural History

Plaintiff Belmont Abbey College is a Catholic Benedictine college located in North Carolina. JA 37 ¶ 12. Plaintiff Wheaton College is a Christian liberal arts college located in Illinois. JA 134 ¶¶ 20, 22. Plaintiffs allege that the regulatory requirement that certain group health plans cover contraceptive services violates their rights under the Religious Freedom Restoration Act, the First Amendment, and the Administrative Procedure Act.

In both cases, the district courts dismissed the claims on ripeness and standing grounds. The courts explained that the Departments charged with enforcing the contraceptive-coverage requirement are in the process of amending the regulations to accommodate the types of religion-based objections raised by plaintiffs, and that, while the rulemaking takes place, plaintiffs have the protection of the enforcement safe harbor. Accordingly, the courts concluded that plaintiffs face no imminent threat

of enforcement action and that their claims are not fit for judicial review. JA 77-87 (Belmont Abbey Op.), JA 252-62 (Wheaton Op.).

SUMMARY OF ARGUMENT

In these consolidated appeals, two non-profit organizations seek to raise religious objections to the regulatory requirement that group health plans cover contraceptive services. It is not controverted, however, that the challenged requirement is in the process of being amended and that the plaintiffs are protected by an enforcement safe harbor. The district courts correctly held that they would not offer advisory opinions with regard to regulations that have not been and likely never will be enforced against these plaintiffs.

When developing the contraceptive coverage requirement, the Departments responsible for implementing the requirement sought comments on the scope of the exemption for "religious employers." *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). After receiving hundreds of thousands of comments, the Departments announced that they would develop and propose changes to the contraceptive-coverage requirement. *See* 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012). The purpose of the rulemaking is to "meet two goals—accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services and assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012); *see also 77* Fed. Reg. at 8727. That process is underway.

The Departments also announced that they would not enforce the existing regulations against certain non-profit organizations during the rulemaking process, and established an enforcement safe harbor that is in effect until the first plan year that begins on or after August 1, 2013. For entities like plaintiffs, which have plan years that begin each January, the safe harbor thus will remain in effect until the plan year that begins January 1, 2014. The district courts thus correctly held that plaintiffs failed to establish a certainly impending injury and, in any event, that plaintiffs could not demonstrate hardship that would justify adjudicating challenges to regulations that are being amended to address their objections.

Plaintiffs recognize that the contours of the contraceptive coverage requirement are unknown. Their assertion that it is necessary to undertake contingency planning in light of "uncertainty" about the amended regulations, does not transform their suit into a justiciable controversy. Plaintiffs also recognize that the current regulation will not be enforced against them, but urge that, before the rulemaking is complete, a plan beneficiary might seek relief under ERISA. That contention remains entirely speculative. And, in any event, a ruling in this case would not be binding on beneficiaries and therefore could not provide redress for this claimed injury.

STANDARD OF REVIEW

The judgments of dismissal are subject to de novo review. *See N.B. v. D.C.*, 682 F.3d 77, 81 (D.C. Cir. 2012).

ARGUMENT

THE DISTRICT COURTS CORRECTLY HELD THAT PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

A. THE DEPARTMENTS ARE IN THE PROCESS OF AMENDING THE REGULATIONS TO ACCOMMODATE RELIGIOUS OBJECTIONS OF NONPROFIT ENTITIES LIKE PLAINTIFFS.

1. To satisfy the "[t]he 'irreducible constitutional minimum of standing," a plaintiff must demonstrate an injury that is "actual or imminent," and also show that it is "likely, not merely speculative, that the relief sought will redress the injury." *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1279 (D.C. Cir. 2012) (quotation marks and citation omitted). Part of the doctrine of ripeness "is subsumed into the Article III requirement of standing, which requires a petitioner to allege *inter alia* an injury-in-fact that is 'imminent' or 'certainly impending.'" *American Petroleum Institute v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012); *see also Nat'l Treasury Emps. Union v. United States,* 101 F.3d 1423, 1427–28 (D.C. Cir. 1996).

Even when the bedrock criteria of standing are satisfied, "there may also be prudential reasons for refusing to exercise jurisdiction." *American Petroleum Institute*, 683 F.3d at 386 (quotation marks and citations omitted). "In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference' in an ongoing decision-making process." *Ibid.* (quoting *Abbott*

Labs. v. Gardner, 387 U.S. 136, 148 (1967)). "Postponing review" also "conserve[s] judicial resources" and "comports with [a court's] theoretical role as the governmental branch of last resort. " *Id.* at 386-87 (citation and quotation marks omitted). "Put simply, the doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Id.* at 387 (citations omitted).

"In assessing the prudential ripeness of a case," the Court focuses "on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" *Ibid.* at 387 (quoting *Abbott Labs.,* 387 U.S. at 149). "The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Ibid.* (quotation marks and citation omitted). "Courts decline to review tentative agency positions because doing so severely compromises the interests the ripeness doctrine protects." *Ibid.* (quotation marks and citation omitted). "The agency is denied full opportunity to apply its expertise and to correct errors or modify positions in the course of a proceeding, the integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule, and judicial economy is disserved because judicial review might prove unnecessary if persons seeking such review are able to convince the agency to alter a tentative position." *Ibid.* (quotation marks and citation omitted).

2. The district courts correctly held that plaintiffs satisfy neither the Article III nor the prudential requirements of justiciability. Plaintiffs challenge a regulatory requirement that certain group health plans cover contraceptive services. The Departments that issued the challenged regulations are in the process of amending the regulations "precisely in order to accommodate" religious objections of non-profit organizations like plaintiffs. JA 262 (Wheaton Op.). "Because they are in the process of being amended, *see* 77 Fed. Reg. at 16,501 (ANPRM), the preventive services regulations are by definition a tentative agency position 'in which the agency expressly reserves the possibility that its opinion might change.'" JA 260 (Wheaton Op.) (quoting *Birdman v. Office of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012) (internal quotation marks and alterations omitted) (quoting *Natural Res. Defense Council v. FAA*, 292 F.3d 875, 883 (D.C. Cir. 2002))); *accord Nebraska ex rel. Bruning v. HHS*, __ F. Supp. 2d __, No. 12-cv-3035, 2012 WL 2913402, at *22 (D. Neb. Jul. 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir.) (dismissing an analogous challenge to contraceptive-coverage requirement in light of the "tentative nature" of the "Departments' position on religious accommodations"); *Legatus v. Sebelius*, __F. Supp. 2d__, 2012 WL 5359630, at *5 -*6 (E.D. Mich. Oct. 31, 2012) (holding that a non-profit organization covered by the safe harbor lacks standing because it seeks what is "essentially" an "advisory opinion" about the current regulations, and the government's amendment process is "entitled to a good faith presumption").

In the interim, while they are developing amendments to the challenged regulations, the Departments have established an enforcement safe harbor that, plaintiffs concede, applies to both Belmont Abbey College and Wheaton College. Plaintiffs thus are not at risk of any imminent or certainly impending injury.

Belmont Abbey argues that a controversy would exist if the agencies had *not* established a safe harbor, and notes that the safe harbor had not yet been announced at the time it filed its complaint. *See*, *e.g.*, Pl. Br. 23. On this basis, plaintiffs argue that they had standing at the time they filed their actions, even if they would not have standing to file suit now.

Even at the time the suits were brought, however, plaintiffs faced no imminent threat of enforcement action. Belmont Abbey filed suit before a final rule was in place and long before the contraceptive-coverage requirement would take effect with respect to Belmont Abbey's plan.[4] And, even at the time, the Departments already had invited comments on the scope of the regulatory exemption for "religious employers." *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). By the time Belmont Abbey challenged the final rules (JA48) and alleged that its plan is not grandfathered and thus is covered by the rules (JA34), the Departments had already established a safe harbor, announced their intent to develop and propose changes to address

[4] *See* JA8 (Belmont Abbey's first complaint dated Nov. 10, 2011); 77 Fed. Reg. 8725, 8726-29 (Feb. 15, 2012) (adopting final rule governing plan years beginning on or after August 1, 2012, which for Belmont Abbey is January 2013).

religious objections like those raised by Belmont Abbey, and were 24 hours away from publishing in the Federal Register the Advance Notice of Proposed Rulemaking, which followed from their prior commitment. *See* 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). By the time Wheaton brought its suit in July 2012 (JA 130), the safe harbor was in place and the rulemaking process for modification was underway. *See* 77 Fed. Reg. 16,501 (ANPRM). Thus, plaintiffs have at no time been able to demonstrate the "certainly impending" injury required by Article III.

Nor do plaintiffs provide any basis to set aside the dismissals of their cases on ripeness grounds. Indeed, the circumstances here are not materially distinguishable from those in *American Petroleum*, in which the Court dismissed a challenge to EPA regulations as unripe because "[a]fter the parties completed briefing, EPA issued a notice of proposed rulemaking that, if made final, would significantly amend" the challenged regulations. *American Petroleum*, 683 F.3d at 384. *See also AT&T Corp. v. FCC*, 369 F.3d 554, 563 (D.C. Cir. 2004) (per curiam) (dismissing case on ripeness grounds because "the matter [was] still under consideration in ongoing rulemaking proceedings"); *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 279 (D.C. Cir. 2003) ("[i]t would be a waste of judicial resources for us to reach the merits of [the] petition while the rulemaking [on the issue] is pending"). Plaintiffs' discussion of the mootness doctrine is beside the point because, as *American Petroleum* illustrates and as

plaintiffs conceded below, a "case has to be ripe at all times." JA 205 (transcript).[5] In any event, as discussed above, plaintiffs had no certainly impending injury when their suits were filed and thus failed to establish standing.

"The ANPRM is "'clearly not some non-substantive, thinly veiled attempt [by defendants] to evade review.'"'" JA 261 (Wheaton Op.) (quoting *Belmont Abbey* Op. (JA 84) (quoting *American Petroleum*, 683 F.3d at 388)). The Departments "have published their plan to amend the rule to address the exact concerns" that plaintiffs raise here, and they have "stated clearly and repeatedly in the Federal Register that they intend to finalize the changes before the enforcement safe harbor ends."' JA 261 n.10 (*Wheaton* Op.) (quoting *Belmont Abbey* Op. (JA 78)). The government "'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."' JA 261 n.10 (*Wheaton* Op.) (quoting *Belmont Abbey* Op. (JA 78) (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("[w]e must presume an agency acts in good faith"))).

[5] Plaintiffs' mootness argument rests on the idea that, when a party voluntarily ceases an activity, there is a rebuttable "presumption of [future] injury." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 191 (2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998)) (alteration in original). But such a presumption does not make sense when a rulemaking is in progress. And, in any event, a presumption of future injury does not establish prudential ripeness. *See, e.g.*, *American Petroleum*, 683 F.3d at 385-89; *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986).

B. PLAINTIFFS HAVE NOT ESTABLISHED HARDSHIP THAT OUTWEIGHS THE INTEREST IN AWAITING THE OUTCOME OF THE RULEMAKING.

Plaintiffs do not dispute that they qualify for the safe harbor. They do not contend that the government has threatened to enforce the existing regulations against them. Instead, they argue that there is a risk that, before the rulemaking is complete, a participant in one of their group health plans could seek relief under ERISA. *See* Pl. Br. 34, 56; *see also* 29 U.S.C. § 1132(a)(3).

This "'theoretical possibility of a suit . . . by a program beneficiary'" does not render plaintiffs' own challenge ripe. JA 254 (Wheaton Op.) (quoting *Salvation Army v. Department of Community Affairs of New Jersey*, 919 F.2d 183, 193 (3d Cir. 1990)). The possibility of an ERISA suit is speculative. And if such a third-party lawsuit were brought, plaintiffs would be free to raise their religious objections as defenses in that litigation, *see*, *e.g.*, 42 U.S.C. § 2000bb-1(c), and the plan participant would be free to contest those defenses. Indeed, plan participants, who are not parties to this proceeding, would be free to bring such a suit even if plaintiffs prevailed in an action against the federal government.

The theoretical prospect that a plan participant might seek relief under ERISA thus provides no basis for the courts here to adjudicate the claims in these suits brought by plaintiffs. This case is unlike *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), on which plaintiffs rely, where the combined threat of government and private enforcement caused the plaintiffs to change their conduct and refrain

from exercising their First Amendment rights. *See Chamber of Commerce*, 69 F.3d at 602 ("Once the FEC promulgated its new rule, the [organizational plaintiffs] ceased making their traditional political communications and solicitations to the individuals whose status is in dispute, rather than risk enforcement proceedings by the FEC."). Although the FEC commissioners were at loggerheads as to whether to take enforcement action, this Court emphasized that "[n]othing . . . prevent[ed] the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners." *Id.* at 603. Moreover, this Court noted that "a political competitor" could sue to require government enforcement. *Id.* at 603-04. And violations of the FEC rule could result in substantial penalties and criminal sanctions. *See* 2 U.S.C. § 437g(d).

Although plaintiffs attempt to liken this case to *Chamber of Commerce* and assert that the possibility of third-party enforcement "chills" their exercise of religion, Pl. Br. 34, the declarations they filed in support of their expedition motion belie that contention. In those declarations, plaintiffs informed this Court that they have *not* changed the terms of their group health plans in a way that would be inconsistent with their religious beliefs. *See* JA 120 ¶¶ 9, 11 (declaration of the Belmont Abbey College President) ("Belmont Abbey simply is not at liberty to ignore its religious obligations to satisfy the government's rule. . . . Accordingly, Belmont Abbey has no choice but to go ahead and offer health insurance that violates federal law and exposes Belmont Abbey to private ERISA lawsuits beginning in January 2013");

JA 270 ¶ 6, 271 ¶ 8 (declaration of the Wheaton College Vice President for Finance and Treasurer) (same for Wheaton).

The opinion in *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408 (D.C. Cir. 2011), also cited by plaintiffs, is even farther afield. The agency in that case had already taken enforcement action, issuing cease and desist orders to seven companies including the plaintiff, informing them that their operations violated several provisions and that the companies and their principals were subject to penalties of up to $27,500 for each day of challenged operations. *Id.* at 410. Six of those companies had complied by shutting down the challenged operations. *Ibid.* The temporary exemption the agency granted to the plaintiff reiterated the agency's position that the challenged operations were unlawful, and "gave no indication that it was subject to further agency consideration or possible modification." *Id.* at 411-12. In that context, the Court rejected the agency's contention that its plan to hold a rulemaking on the subject rendered the case moot, noting that the "promised rulemaking has yet to occur." *Id.* at 414. And in concluding that there had been final agency action, the Court noted that "the very purpose of DOT's legal pronouncements, accomplished with six other companies, was to prompt CSI to shut down its operations." *Id.* at 413. Here, of course, the Departments have taken no enforcement action against plaintiffs and are in the process of developing amendments to the challenged rules.

Plaintiffs themselves recognize that the contours of what the amended rules will be are conjectural. They urge that the case is ripe for review precisely because they must plan for various contingencies in light of "uncertainties" about the outcome of the rulemaking process. Pl. Br. 33; *see id.* at 28-33, 54-55. Plaintiffs' decision to plan for the possibility that the Departments will not change the regulations, however, is a choice that does not itself transform an unlikely, future event into a present controversy justiciable under Article III. *See Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Indeed, even if plaintiffs obtained the relief they seek, they would still face "uncertainties" about how the amended rules will affect their 2014 health plans. Moreover, as the district courts recognized, "'[c]osts stemming from [plaintiffs'] desire to prepare for contingencies are not sufficient . . . to constitute a hardship for purposes of the [prudential] ripeness inquiry—particularly when [defendants'] promises and actions suggests that the situation [plaintiffs] fear[] may not occur.'" JA 262 (Wheaton Op.) (quoting Belmont Op. (JA 86)). Although Wheaton asserted that it "will not be satisfied with whatever amendments defendants ultimately make," *ibid.*, a court must review the content of the regulations as ultimately amended to determine whether Wheaton's predicted dissatisfaction will have any legal basis. *See ibid.* (noting that this argument "only serves to underscore why [the court] ought not address the merits of Wheaton's claims until the preventive services regulations 'have taken on fixed and final shape so

that [the Court] can see what legal issues it is deciding'") (quoting *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 244 (1952)).

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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NOVEMBER 2012

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,476 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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