IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BELMONT ABBEY COLLEGE, *Plaintiff*, v. KATHLEEN SEBELIUS, Secretary of the 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, and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*.	)	Civ. Action No. 1:11-cv-01989-JEB

PLAINTIFF'S MOTION FOR RECONSIDERATION

Eric C. Rassbach, DC Bar No. 493739
Mark Rienzi, DC Bar No. 494336
Hannah C. Smith, DC Bar No. 480368
Eric N. Kniffin, DC Bar No. 999473
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Ste. 220
Washington, DC 20007
(202) 955-0095 (tel.)
(202) 955-0090 (fax)

On July 18, this Court dismissed Plaintiff Belmont Abbey College's First Amended Complaint without prejudice on grounds of standing and ripeness. The Court summarized its holding as follows:

> Because the government has indicated its intention to amend the regulations to better take into account religious objections and because Plaintiff is protected in the interim by a safe-harbor provision, the Court agrees that Belmont's injury is too speculative to confer standing and that the case is also not ripe for decision. Dismissal without prejudice is thus appropriate.

Mem. Op. 2, Dkt No. 29 (July 18, 2012).

In so holding, the Court emphasized its view that Defendants' enforcement safe harbor and Advance Notice of Proposed Rulemaking ("ANPRM") rendered Belmont Abbey's injury "too speculative" because of "the government's clear intention to amend the regulations before the safe harbor lapses," i.e., by August 1, 2013. Op. 14. Relatedly, the Court found that the ANPRM and its promised change by August 1, 2013 rendered the agencies' position "indeterminate," Op. 20. Finally, the Court found that Belmont Abbey's claim of hardship was insufficient to overcome the tentative nature of the rules, because "Plaintiff's desire to prepare for contingencies" is not sufficient, Op. 23, and because the prospect of third-party lawsuits during the safe harbor is a "theoretical possibility of future hardship" that does not overcome the Court's finding that the rules at issue are not "fit" for review, Op. 24. The Court issued its opinion without the benefit of oral argument.

Belmont Abbey College respectfully moves for reconsideration and for oral argument. For the reasons set forth in its briefs and supplemental letter concerning the motion to dismiss, the ANPRM is not sufficient to render the relevant rules "indeterminate." Defendants have made a final policy decision as to which institutions will be exempt from the requirement to provide coverage for contraceptive drugs and devices, and there is no dispute that Belmont Abbey does

not qualify for that exemption. Op. 4. There is therefore no dispute that Belmont Abbey is "non-exempt."

The ANPRM raises not a question of *whether* Belmont Abbey will be forced to provide this coverage, but *how* Belmont Abbey will be allowed to satisfy this legal obligation. This is why the ANPRM expressly refers to the entities who might receive some later accommodation as "non-exempt"—they are *not* exempt from the requirement, but simply might be permitted to satisfy it in a different way. Belmont Abbey, however, has a religious objection to facilitating access to these drugs and devices, even if they are not directly covered by Belmont Abbey's policies. First Am. Compl. ¶30. Thus Belmont Abbey's injury does not turn on the "how" question addressed in the ANPRM; it turns on the "whether" question which Defendants have *already* answered, in a final rule, which they have never suggested might be changed.

If Defendants do not wish to have their rule reviewed, they can revoke it now. But having issued the rule as a final rule, and having allowed the rule to govern Belmont Abbey's conduct and restrict its rights, Defendants should not be able to avoid review by promising to think further on the matter. Put another way, if Defendants' position on the matter is tentative, they should not be issuing final rules that render Belmont Abbey non-exempt and force it to choose, now, between violating its religious beliefs and violating the law. Ruling otherwise treats speculation *by the government* as if it were speculation by Belmont Abbey. Government cannot render a plaintiff's injury speculative by engaging in its own speculation about how it might change currently operative laws.

However, even under the Court's assumptions that a new rule will issue by August 2013, and even if it were known with absolute certainty that the new rule would make Belmont Abbey fully and completely exempt at that time, Belmont Abbey will still need relief from the current version

of the rule in January 2013, and therefore respectfully requests reconsideration of the Court's decision as to (1) Belmont Abbey's injury under the current version of the final rule (as related to the Court's standing and ripeness analyses) and (2) whether the current version of the final rule is "fit" for review now.

1. Injury

The Court's conclusion that the threat of private lawsuits against Belmont Abbey during the safe-harbor is "theoretical" is incorrect. Far from being a mere theoretical possibility, Belmont Abbey has already faced the prospect of eight Title VII lawsuits and an EEOC investigation for its refusal to cover contraceptive drugs. *See* Kniffin Decl. ¶¶ 2-3 and Ex. 1-8 (EEOC determination letters). Defendants' exposure of Belmont Abbey College to additional ERISA lawsuits beginning in January 2013 under the existing final rule is an imminent injury, sufficient for both standing and ripeness purposes. *See Chamber of Commerce of U.S.* v. *F.E.C.*, 69 F.3d 600, 603 (D.C. Cir. 1995) (finding both standing and ripeness because "even without a Commission enforcement decision, appellants are subject to [private party] litigation challenging the legality of their actions if [it is] contrary to the Commission's rule").

As set forth in Plaintiff's Opposition to the Motion to Dismiss at 28-29, by virtue of enacting the Rule, the Defendants have exposed Belmont Abbey to private lawsuits seeking to enforce compliance with the Mandate under ERISA. *See* 29 U.S.C. § 1185d(a)(1) (incorporating Affordable Care Act provisions into ERISA); 29 U.S.C. § 1132(a)(1)(B) (allowing private suits to enforce rights under ERISA). The enforcement safe harbor, by its terms, simply promises that the *defendants* will not enforce the Rule while they think about yet another revision. But the Rule has two enforcement mechanisms—one public (which is covered by the safe harbor) and one

private (which is not covered by the safe harbor, and to which dismissal leaves Belmont entirely exposed).

Rather than dispute that the Rule creates these effects, Defendants simply argue in their reply brief that "plaintiff does not allege that any such suit has been brought against it, and thus, this alleged hardship is purely theoretical." Defs.' Reply in Supp. of Mot. to Dismiss 15, Dkt. No. 25 (May 3, 2012). Of course Belmont Abbey has not *yet* faced these particular suits—all parties agree the Mandate does not begin controlling Belmont Abbey's policies until January 2013. But the Complaint did allege that Belmont Abbey has faced EEOC complaints over precisely this issue. First Amended Complaint ¶31. And the attached Declaration of Eric Kniffin demonstrates that Belmont Abbey has faced no fewer than eight EEOC complaints in the past several years, along with an ensuing EEOC investigation. Thus the prospect of Belmont Abbey being sued by private parties for failure to comply with the Defendants' Mandate in January is not "theoretical" but very real.[1]

Defendants' remaining argument—that Belmont Abbey can simply assert its rights as a defense when it gets sued, Reply Br. at 15—misses the point of pre-enforcement relief entirely. The very reason courts permit pre-enforcement relief is to protect plaintiffs from being forced to choose between exercising their constitutional rights and facing liability. Indeed, permitting parties to sue *before* enforcement is particularly important where, as here, the danger to protected liberties is one of self-censorship. *See, e.g., Virginia* v. *Am. Bookseller Ass'n*, 484 U.S. 383 (1988) (finding justiciability where "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); *Unity08* v. *F.E.C.*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("Our reluctance to require parties to subject them-

[1] Notably, the ERISA lawsuits would not be subject to Title VII's requirement of first proceeding through the EEOC.

selves to enforcement proceedings to challenge agency positions is of course at its peak where, as here, First Amendment rights are implicated and arguably chilled by a "credible threat of prosecution.") (quoting *Chamber of Commerce* v. *F.E.C*, 69 F.3d at 603 (finding standing based on threat of private party lawsuits)).

Defendants could eliminate this injury immediately, simply by completely revoking the Rule to eliminate the burden on Belmont Abbey's religion between January 2013 and August 2013. Instead, Defendants have chosen to leave the Rule in place, offering the half-protection of a promise of no *governmental* enforcement.[2] Defendants' choice to proceed in this manner places Belmont Abbey in precisely the predicament described in the Complaint: starting in about five months, Belmont Abbey must comply with the current version of the Rule (which would violate its religion) or it must violate that rule (and face sanctions through private litigation). Defendants' forcing this Hobson's choice on Belmont Abbey is a redressable injury now, and is therefore sufficient for purposes of standing and ripeness.[3]

The Court likewise minimized Belmont Abbey's need for time to implement the Mandate as merely "Plaintiff's desire to prepare for contingencies." Op. 23. Yet it was Congress and the Defendants who have expressly indicated that employers providing insurance should be given one

[2] Indeed, Defendants have taken the position that rules in this area can be implemented immediately, as "interim final rules" without waiting for notice and comment. *See* 76 Fed. Reg. 46621. Accordingly, if Defendants truly do wish to eliminate the burden on Plaintiff's religion during the next year while Defendants do their thinking, they could immediately do so. Their regulatory pace to date—implementing the burden on Plaintiff urgently and without notice and comment, *see* 76 Fed. Reg. 46621, but then insisting on a lengthy slow-paced deliberation while Plaintiff remains exposed to private litigation—leaves Belmont in need of judicial protection in the near term, even if Defendants do eventually fix their rules.

[3] *See Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (forcing someone to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion" to follow the law imposes "the same kind of burden upon the free exercise of religion" as would a direct fine for worship); Religious Freedom Restoration Act, 42 U.S.C. §2000bb(b)(2) (providing a claim when religious exercise "is substantially burdened by government"); *id.* at (b)(1) (expressly adopting compelling interest test set forth in *Sherbert v. Verner*).

year of advanced notice before having to implement such changes. *See* 76 Fed. Reg. 46621 (noting that health plans "do not have to begin covering preventive services supported in HRSA guidelines until the first plan or policy year that begins one year after the guidelines are issued."); 75 Fed. Reg. 41726 ("The statute requires the Departments to establish an interval of not less than one year between when recommendations or guidelines under PHS Act section 2713(a) are issued, and the plan year (in the individual market, policy year) for which coverage of the services addressed in such recommendations or guidelines must be in effect.").

The Defendants' proposed course—a one-year enforcement safe harbor during which Defendants promise to think up better rules than they have implemented to date—strips Belmont Abbey of the one year lead time to which it is entitled under federal law, and would force Belmont Abbey to litigate quickly, as soon as the new rule issues and the safe harbor expires, to protect its rights. Placing religious objectors like Belmont Abbey in this position, in which they are deprived of the lead time to which every other employer is entitled by statute, injures Belmont Abbey, and does so now.

2. "Fitness"

The Court acknowledged that Belmont Abbey may well face private lawsuits, but found that prospect insufficient to "overcome the finding that the case is not yet 'fit' for judicial resolution." Op. 24. In so doing, the Court incorrectly allowed doubts about the fitness of the rule that will be in place in August 2013 to count against burdens that will be imposed under the current final rule. Even if uncertainty about what the *next* version of the rule will look like makes it unclear what regulatory regime Belmont Abbey will face when the safe harbor expires in August 2013, that uncertainty does not make the current final rule any less final *in January*, when it will begin controlling Belmont's conduct (and exposing Belmont to liability).

At no time have Defendants suggested that they expect to change the rule by January 2013. Indeed, the ANPRM indicates that the expected new rule will only apply to plan years starting on or after August 1, 2013. *See* 77 Fed. Reg. 16501, 16503 ("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; ***that is, the amended final regulations would apply to plan years starting on or after August 1, 2013***.") (emphasis supplied).

Thus there is no "fitness" question about what rule will apply to Belmont Abbey's policies starting with the new plan year in January 2013—it is the currently effective "final" rule. Therefore, there simply is no fitness problem at all to weigh against the actual, real-world government coercion imposed by the Mandate and the allowance of private enforcement of Defendants' final rule this January.

CONCLUSION

For all the foregoing reasons, Belmont Abbey respectfully requests the Court to reconsider its prior order dismissing Belmont's First Amended Complaint. Belmont Abbey further requests oral argument.

Dated: July 23, 2012

Respectfully submitted,

s/ *Mark Rienzi*

Eric C. Rassbach, DC Bar No. 493739
Mark Rienzi, DC Bar No. 494336
Hannah C. Smith, DC Bar No. 480368
Eric N. Kniffin, DC Bar No. 999473
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Ste. 220
Washington, DC 20007
(202) 955-0095 (tel.)
(202) 955-0090 (fax)

Attorneys for Plaintiff
Belmont Abbey College