IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHEATON 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,	)	**Case No. 1:12-cv-01169**
	)	
***Defendants*.**	)	
	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO MOTION TO DISMISS

TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

This case concerns a prominent evangelical Christian school—Wheaton College—that simply wishes to practice its faith free from coercion by a government insurance mandate. The mandate in question is composed of two parts. Part one is a statute—found in the Patient Protection and Affordable Care Act—that requires most employers to provide free insurance coverage for "preventive care and services." Part two is a regulation that defines "preventive care and services" to include emergency contraceptive drugs such as the "morning after pill" and the "week after pill." Wheaton's religious convictions prohibit it from covering those drugs.

Both sides agree that the mandate's requirements apply to Wheaton as of January 1, 2013. As of that date—less than five months from now—Wheaton's insurance for its 709 full-time employees will be in violation of federal law. Wheaton has therefore asked this Court for a preliminary injunction against the mandate.

Defendants now move to dismiss Wheaton's complaint for lack of standing and ripeness. In response to this lawsuit, defendants have expanded the one-year "safe harbor" to promise Wheaton it will not face *government* enforcement of the mandate for an additional year. Yet the safe harbor does not protect Wheaton from *private* ERISA lawsuits to enforce the mandate, a distinct enforcement mechanism specifically incorporated into the Affordable Care Act. Indeed, defendants have now expressly refused to exempt Wheaton from the mandate's requirements during the safe harbor period, recognizing that Wheaton will be subject to private enforcement during that time. Defendants' motion to dismiss confirms that: they admit that during the safe harbor period, Wheaton will be legally exposed to ERISA actions to force it to comply with the mandate. Defs.' Mem. in Supp. of Mot. to Dismiss ("MTD") (Dkt. 17-1) at 22 n.7. Defendants could have relieved Wheaton from that burden, but they have refused.

That present burden on Wheaton's faith easily creates standing and ripeness to challenge the mandate. Particularly when First Amendment rights are chilled—as they are here—the D.C. Circuit has recognized that the threat of private enforcement creates standing and ripeness to challenge a regulation, even where the government has said it will not presently enforce the regulation. *See Chamber of Commerce v. F.E.C.*, 69 F.3d 600, 603-04 (D.C. Cir. 1995). The Court should follow that rule and find that Wheaton's challenge satisfies standing and ripeness.

The present burden of private enforcement is enough to defeat the motion to dismiss. Defendants' additional argument for dismissal is also unfounded. They say the prospect of future rulemaking during the safe harbor period will likely redress Wheaton's complaints about the mandate. This is irrelevant. Any future rulemaking—even assuming it happens and actually redresses Wheaton's injury—would come far too late to spare Wheaton the actual, present burden of private enforcement it faces in less than five months. *That* burden pressures Wheaton to violate its faith; *that* burden easily creates standing and ripeness.

Furthermore, even on its own terms, the proposed future rulemaking cannot render Wheaton's challenge to the mandate uncertain or unripe. The anticipated rulemaking—again, assuming it actually happens—does not even purport to remove emergency contraception from the definition of "preventive care and services," nor to exempt Wheaton from the mandate's requirements. In other words, whatever comes out of a future rulemaking, Wheaton's situation with respect to the mandate will remain the same as now: the mandate will require it to provide coverage for emergency contraception, contrary to its faith.

The Court should deny the motion to dismiss.

STATEMENT OF FACTS[1]

I. HHS MANDATE

A. Promulgation of the mandate and the religious employer exemption

The Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), institutes numerous reforms to our nation's health care and health insurance systems. Among other things, the ACA mandates that employer health insurance cover women's "preventive care and screenings" without cost-sharing. 42 U.S.C § 300gg–13 (a)(4); 75 Fed. Reg. 41726, 41728 (July 19, 2010). Defendant Department of Health and Human Services (HHS),[2] issued a rule stating that these required preventive services include "[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[3] FDA-approved contraceptive methods include "emergency contraceptives," such as Plan B (commonly known as the "morning-after pill") and Ella (commonly known as the "week-after pill").[4]

Following public comments, HHS amended the rule to allow exemptions for certain religious employers. *See* 76 Fed. Reg. 46621, 46623 (published Aug. 3, 2011) ("provid[ing] [the Health Resources and Services Administration] additional discretion to exempt certain religious employers … where contraceptive services are concerned"). As promulgated, the exemption is

---

[1] A more complete statement of facts appears in Wheaton's memorandum suppporting its motion for preliminary injunction. *See* Mem. in Supp. of Pl. Mot. for Prelim. Inj. (Dkt. 4-1) ("PI"), at 2-11.

[2] Unless context indicates otherwise, all references to "HHS" or "Defendants" also include Defendants Department of Labor and Department of Treasury.

[3] *See* Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Aug. 16, 2012).

[4] *See* FDA Birth Control Guide (Aug. 2012), http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last visited Aug. 16, 2012) (describing various FDA-approved contraceptives, including the "emergency contraceptives" Plan B and Ella); *see also* MTD, at 7 (confirming that "FDA-approved contraceptive methods include … emergency contraceptives (such as Plan B and Ella)").

available only to entities organized as "churches," church "auxiliaries," or "religious orders" under the Internal Revenue Code. *See* 77 Fed. Reg. 8725, 8729 (published Feb. 15, 2012) (explaining that a qualifying entity must be 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"); MTD at 7.[5] Defendants finalized this exemption, "without change," in February 2012. 77 Fed. Reg. at 8729.

The mandate takes effect beginning with an organization's first plan year after August 1, 2012. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. at 46623.

B. The Original Safe Harbor

Following further public comment,[6] HHS issued a guidance document on February 10, 2012, describing a "Temporary Enforcement Safe Harbor" from the mandate.[7] The document advised that "the Departments" (*i.e.*, HHS, Labor and Treasury) would not enforce the mandate for one additional year against certain non-exempt non-profit organizations religiously opposed to covering contraception. Guidance at 3. Under the safe harbor, government enforcement would not commence until the first insurance plan year beginning after August 1, 2013 (as opposed to August 1, 2012 under the original rule). *Id.* The safe harbor, however, was available only to non-profit organizations "whose plans have not covered contraceptive services for religious

---

[5] Additionally, an employer must have as its purpose "[t]he inculcation of religious values," and must "primarily" serve and hire "persons who share the religious tenets of the organization." *See* 45 C.F.R. § 147.130(a)(1)(iv)(B); *see also* MTD at 7 (discussing religious employer exemption).

[6] Hundreds of thousands of comments were filed in response to the mandate and the religious employer exemption. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Additionally, non-exempt religious organizations began to file lawsuits challenging the mandate in November 2011. To date some twenty-four suits on behalf of over fifty religious organizations, businesses, and individuals have been filed. *See* PI at 3 n.4 (listing pending lawsuits).

[7] *See* HHS, Guidance on the Temporary Enforcement Safe Harbor ("Guidance"), at 3, 6 (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Aug. 16, 2012).

reasons at any point from. . . [February 10, 2012] onward," and who could sign a certification to that effect. *Id*.; *but see infra* part III (discussing defendants' recent expansion of the safe harbor).

The safe harbor did not alter the religious employer exemption. On that same afternoon, defendants adopted the exemption "as a final rule without change." 77 Fed. Reg. 8725, 8729 (published Feb. 15, 2012). Thus, despite the safe harbor, federal law requires non-exempt employers to cover all FDA-approved contraceptives after August 1, 2012.

C. The Advance Noticed of Proposed Rulemaking

On March 16, 2012, Defendants announced an "Advance Notice of Proposed Rulemaking" (ANPRM).[8] *See* 77 Fed. Reg. 16501 (published Mar. 21, 2012). The ANPRM did not alter the mandate or the religious employer exemption; instead, it proposed an additional mandate that would require insurers to assume the financial and administrative burdens of providing contraceptive services to the insured employees of non-exempt religious employers. 77 Fed. Reg. at 16505.[9] The ANPRM, however, only solicited "questions and ideas to help shape these discussions," *id.* at 16503, and indicated that defendants would initiate and complete this new rulemaking by August 1, 2013 (the end of the safe harbor period). *Id.* at 16501, 16503, 16508. At the same time, the ANPRM emphasized that the mandate would remain in full force and effect. 77 Fed. Reg. at 16503 (stating that "the Departments aim to maintain the provision of contraceptive coverage without cost sharing to individuals who receive coverage through non-

[8] *See* Press Release, U.S. Dep't of Health and Human Servs., Administration releases Advance Notice of Proposed Rulemaking on preventive services policy (Mar. 16, 2012), *available at* http://www.hhs.gov/news/press/2012pres/03/20120316g.html (last visited Aug. 16, 2012).

[9] *See also* MTD at 10 (explaining that "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").

exempt, non-profit religious organizations with religious objections to contraceptive coverage in the simplest way possible").

II. WHEATON COLLEGE

Wheaton College is a Christian liberal arts college located in Wheaton, Illinois. Decl. of Pres. Philip G. Ryken ("Ryken Decl.") (Exh. B to Memo ISO PI, Dkt. 4-4) ¶ 4. Wheaton holds and follows traditional Christian beliefs about the sanctity of life. Ryken Decl. ¶ 13. Consequently, "it is a violation of Wheaton's teachings for it to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services." Ryken Decl. ¶ 14. Wheaton's employee health plans therefore do not cover abortions or emergency contraceptives. Ryken Decl. ¶ 19.

In late 2011, Wheaton comprehensively reviewed its health plans to ensure they were consistent with Wheaton's beliefs. Ryken Decl. ¶ 23. During that review, an employee discovered that emergency contraception had been included in its plans through an oversight unknown to the College's leadership. Ryken Decl. ¶ 24. Wheaton worked diligently with its insurer and plan administrator to exclude emergency contraception. Ryken Decl. ¶¶ 25-28. Because Wheaton offers non-grandfathered plans, Wheaton must soon begin to comply with all aspects of the ACA, including the mandate.

Although Wheaton's plans now fully reflect its religious beliefs, the timing of the amendments made Wheaton ineligible for the original safe harbor because it could not sign the required certification. Ryken Decl. ¶ 30, 45, 51; *but see infra* (discussing defendants' recent expansion of the safe harbor). Wheaton therefore faced imminent government enforcement of the mandate—enforcement which includes severe fines and regulatory penalties—upon the beginning of its new plan year: January 1, 2013. Ryken Decl. ¶ 46, 54, 55, 57; *see* 26 U.S.C. §

4980H; 26 U.S.C. § 4980D. And, regardless of the safe harbor, Wheaton faces the imminent prospect of exposure to private ERISA lawsuits to enforce the mandate. *See* 29 U.S.C. § 1132.

The effect of the mandate on Wheaton's ability to continue to offer health insurance is a matter of gravest concern to Wheaton's employees and their families, many of whom depend on the College's insurance plan and could not afford to purchase individual insurance. *See* PI, Exhs. B-F (employee affidavits).

III. PROCEDURAL HISTORY

Wheaton College filed its complaint on July 18, 2012, challenging the mandate on various constitutional and statutory grounds. Dkt. 1. On August 1, 2012, Wheaton sought a preliminary injunction. Dkt. 4.

The Court convened a conference call with both sides' counsel on Friday, August 3. During the call, defendants' counsel indicated they believed Wheaton does qualify for the safe harbor; that defendants would offer a declaration to that effect; and that defendants would therefore move to dismiss Wheaton's complaint for lack of standing and ripeness. The Court set an expedited briefing and argument schedule for the motion to dismiss, and, in advance of that filing, the Court asked counsel to confer about the forthcoming declaration.

On Wednesday, August 8, defendants' counsel e-mailed to Wheaton's counsel a draft of the declaration filed by HHS official Michael Hash with defendants' motion to dismiss ("Hash Decl.").[10] The Hash Declaration sets forth HHS' interpretation that, despite the recent amendments to its coverage, Wheaton nonetheless qualifies for the safe harbor. That same day, both sides' counsel conducted a telephone conference to discuss these matters. Rienzi Decl. ¶ 2.

[10] The declaration states that Mr. Hash is Acting Deputy Administrator and Director of the Center for Consumer Information and Insurance Oversight within the Centers for Medicare & Medicaid Services within HHS. Hash Decl. ¶ 1.

Defendants' counsel explained their view that, as interpreted in the Hash declaration, Wheaton did qualify for the safe harbor. Rienzi Decl. ¶ 3. At the same time, however, defendants would not agree to say that, during the safe harbor, the actual requirements of the mandate would not apply to Wheaton. Rienzi Decl. ¶¶ 4-5. Defendants then filed a motion to dismiss on Friday, August 10, in accordance with the Court's briefing schedule. Finally, on the afternoon of Wednesday, August 15, Defendants issued a revised guidance document which reflects the interpretation of the safe harbor in the Hash declaration.[11]

Defendants argue the Court should dismiss Wheaton's complaint on both standing and ripeness grounds.

LEGAL STANDARD

In evaluating a motion to dismiss, the Court "'must accept as true all material allegations of the complaint,' drawing all reasonable inferences from those allegations in [Wheaton's] favor." *LaRoque* v. *Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (internal quotation marks omitted). Wheaton bears the burden of demonstrating the Court's subject matter jurisdiction, including standing and ripeness. *U.S. Ecology, Inc.* v. *U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). If an agency rule chills First Amendment rights, however, a plaintiff can bring a pre-enforcement challenge to the rule, provided the rule exposes the plaintiff to a credible threat of government or private enforcement. *See, e.g.*, *Chamber of Commerce*, 69 F.3d at 603-04 (despite no "present danger of an enforcement proceeding" by the Commission, plaintiff had

[11] *See* HHS, Guidance on Temporary Enforcement Safe Harbor ("Revised Guidance"), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Aug. 16, 2012).

standing to bring a pre-enforcement First Amendment challenge based on the statute's authorization of "private party" enforcement).[12]

ARGUMENT

Defendants' standing and ripeness arguments are unfounded.

I. WHEATON HAS STANDING TO CHALLENGE THE MANDATE.

To show Article III standing, Wheaton must allege (1) it suffers an actual or imminent injury (2) fairly traceable to defendants' actions and (3) likely to be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Ord* v. *Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009). Defendants do not challenge the second and third prongs. Rather, they argue only that Wheaton has failed to allege an actual or imminent injury from the mandate. Defendants are mistaken.

Wheaton's complaint alleges in detail how the mandate coerces it to violate its religious beliefs under threat of heavy fines, regulatory penalties, and governmental and private enforcement actions. Specifically, it asserts that Wheaton (1) offers health insurance to its employees; (2) has more than fifty employees and is therefore subject to penalties for failing to offer insurance; (3) cannot qualify for the "religious employer" exemption; and (4) cannot offer coverage for the mandated drugs without violating its faith. Compl. ¶¶ 30-33, 35-38, 44, 86-87, 90-91, 100-02, 104. Wheaton also states it has already devoted considerable time and resources to determine how to respond to the mandate, and must continue doing so. Compl. ¶¶ 40, 104. Furthermore, following the parties' discussion of the expanded safe harbor, it is now clear that

[12] *See also Unity08* v. *F.E.C.*, 596 F.3d 861, 865 (D.C. Cir. 2010) (explaining that "[o]ur reluctance to require parties to subject themselves 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'") (citing *Chamber of Commerce*, 69 F.3d at 603); *New Hampshire Right to Life Political Action Comm.* v. *Gardner*, 99 F.3d 8, 14, 15 (1st Cir. 1996) (explaining that the "credible threat of prosecution" standard for pre-enforcement challenges in First Amendment cases is "quite forgiving" and sets a "low threshold").

both sides agree that the mandate's requirements will apply to Wheaton as of January 1, 2013 and will continue throughout the safe harbor. Rienzi Decl. ¶¶ 4-5; MTD at 22 n.7. These allegations easily demonstrate that Wheaton faces both actual and imminent injury from the mandate. *See, e.g.*, *Lujan*, 504 U.S. at 561-62 ("[T]here is ordinarily little question that the action or inaction has caused [the plaintiff] injury" if "the plaintiff is himself an object of the action . . . at issue.").

Defendants make one argument against Wheaton's standing. They say that, given the terms of the revised safe harbor guidance (which defendants issued on Wednesday, August 15, 2012), Wheaton does qualify for the safe harbor and will therefore not face government enforcement until January 1, 2014. MTD at 12-13. Defendants therefore argue Wheaton has not alleged a sufficiently "imminent" injury because, during the safe harbor, Defendants' promised rulemaking will likely resolve the mandate's religious liberty violation. *Id.* at 14-16. This argument cannot defeat Wheaton's standing.

A. Even under the newly expanded safe harbor, defendants admit Wheaton is still exposed to the threat of private ERISA lawsuits during the safe harbor period.

Defendants have now formally expanded the safe harbor guidance (and the accompanying certification), in such a way that Wheaton appears to qualify for the safe harbor and can truthfully sign the revised certification.[13] *See* Revised Guidance at 3, 6; Hash Decl. ¶¶ 4, 5 (applying revised criteria to Wheaton's circumstances). Wheaton is grateful for this. But the

[13] Defendants claim they are "not changing" but "only clarifying" the original safe harbor. Revised Guidance at 1 n.1. That is not the case. Defendants have expanded the safe harbor in two ways. *Compare* Guidance at 6 (original safe harbor requiring certification that "at any point from February 10, 2012 onward, contraceptive coverage has not been provided by the plan, consistent with any applicable State law, because of the religious beliefs of the organization"), *with* Revised Guidance at 6 (replacing "contraceptive coverage" with "all or the same subset of the contraceptive coverage otherwise required"), *and with id.* (allowing alternative certification that "the organization … took some action before February 10, 2012, to try to exclude from coverage under the plan some or all contraceptive services because of the religious beliefs of the organization, but that, subsequently, such contraceptive services were covered under the plan despite such action, and that, but for that coverage, I could make the certification above").

fact remains that the mandate's requirements *will apply* to Wheaton as of January 1, 2013, and as of that date, Wheaton's health insurance will be in violation of federal law. Defendants admit this. *See* Rienzi Decl. ¶¶ 4-5; MTD at 22 n.7. In other words, the expanded safe harbor does not entirely remove the mandate's burden from Wheaton. While Wheaton will now be relieved from *government* enforcement of the mandate for an extra year, it will still violate federal law and therefore be exposed to *private* enforcement of the mandate under ERISA as soon as January 1, 2013. Facing the prospect of imminently violating federal law and thus being subject to private enforcement suits—which, as explained below, defendants have not only admitted but also expressly refused to remedy—is more than enough to create standing and ripeness to challenge the mandate.

The gravamen of Wheaton's complaint is that, by making it unlawful to offer insurance that excludes emergency contraceptives, the mandate coerces Wheaton to violate its religious beliefs. Compl. ¶¶ 1-9; *see generally Sherbert* v. *Verner*, 374 U.S. 398 (1963). The mandate imposes this coercion by threatening Wheaton with two distinct kinds of enforcement: one public and the other private. The safe harbor, by its terms, will temporarily protect Wheaton from *government* enforcement only. *See, e.g.*, Revised Guidance at 3 (relieving employers from "any enforcement action *by the Departments* for failing to cover some or all of the recommended contraceptive services") (emphasis added). But the mandate also triggers a right to private enforcement under ERISA, to which the safe harbor leaves Wheaton completely exposed. *See* 29 U.S.C. § 1132(a) ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan"); 29 U.S.C. § 1185d(a)(1) (incorporating portions of ACA).

Defendants do not deny that Wheaton will be in violation of federal law as of January 1, 2013, nor do they deny that the mandate is made enforceable through private lawsuits. *See* Rienzi Decl. ¶¶ 4-5; MTD at 22 n.7. Instead, defendants merely assert that deliberately leaving Wheaton exposed in those ways for refusing to violate its faith is not a sufficiently certain injury to create standing. MTD at 22 n.7; *see also Belmont Abbey* v. *Sebelius*, __ F.Supp.2d __, 2012 WL 2914417 at *15 (July 18, 2012) (in context of ripeness analysis, referring to risk of third-party lawsuits as "the theoretical possibility of future hardship"). But this argument confuses uncertainty about whether and when private enforcement suits will be filed (something currently unknowable) with the actual coercion the prospect of those lawsuits imposes on Wheaton today.

Defendants' uncertainty argument would apply equally well to laws authorizing private suits against people who speak from a disfavored viewpoint, or who belong to a disfavored religion, or who provide disfavored abortions. While there would be uncertainty as to the timing of the suits authorized by those laws, those laws would plainly impose a present burden on rights actionable the moment they were enacted. *See, e.g., Chamber of Commerce*, 69 F.3d at 603-04 (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 contrary to the Commission's rule").[14] The same is true here. The ERISA enforcement action,

[14] *See also Unity08* v. *F.E.C.*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("Our reluctance to require parties to subject themselves 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*, 69 F.3d at 603); *Bland* v. *Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases"). Courts have found standing and ripeness even outside the First Amendment context, when the threat of private litigation threatens to chill protected action. *See, e.g., Okpalobi* v. *Foster*, 190 F.3d 337, 349 (5th Cir. 1999) ("Plaintiffs' assertion that they will be forced to discontinue offering legal abortions to patients because of the untenable risks of unlimited civil liability under an unconstitutional Act, sets forth a judicable case or controversy"), *vacated on other grounds on reh'g en banc*, *Okpalobi* v. *Foster*, 344 F.3d 405 (5th Cir. 2001); *Causeway Medical Suite* v. *Foster*, 43 F.Supp.2d 604, 610 (E.D. La. 1999) ("Plaintiffs, as many before them, should not be required to await in apprehension of civil or criminal suit").

after all, was created by the government and explicitly incorporated into the ACA. *See* 29 U.S.C. § 1185d(a)(1) (explicitly incorporating portions of ACA).

The D.C. Circuit's decision in *Chamber of Commerce v. F.E.C.* is illustrative. There, plaintiffs challenged a Commission rule limiting political messages. Plaintiffs were "not faced with any present danger of an enforcement proceeding," because the Commission split on whether to issue an advisory opinion explaining how the rule applied to them. 69 F.3d at 603. The Commission thus argued plaintiffs lacked standing and ripeness, but the D.C. Circuit disagreed. The Court reasoned that, despite the Commission's non-enforcement posture, plaintiffs could still challenge to the rule because:

- "Nothing … prevent[ed] the Commission from enforcing the rule at any time" if one of the Commissioners changed his mind.
- Although not then enforced by the government, "[t]he rule constitutes the purported legal norm that binds the class regulated by the statute," and thus "not surprisingly" constrained plaintiff's behavior.
- A statute "permit[ted] a private party to challenge the FEC's decision *not* to enforce," and "[t]herefore, even without a Commission enforcement decision, [plaintiffs] are subject to litigation challenging the legality of their actions if contrary to the Commission's rule."
- Plaintiffs "claim that the rule infringes their First Amendment rights" and therefore should be allowed to bring a pre-enforcement challenge, "so long as there is a credible threat of prosecution."

Id. at 603-04; *see also, e.g., New Hampshire Right to Life Political Action Comm.* v. *Gardner*, 99 F.3d 8, 14, 15 (1st Cir. 1996) (explaining that the "credible threat of prosecution standard" for pre-enforcement challenges in First Amendment cases is "quite forgiving" and sets a "low threshold") (relying on *Chamber of Commerce*). The D.C. Circuit's reasoning in *Chamber of Commerce* vindicates Wheaton's standing (and ripeness) because Wheaton challenges a rule (1) the government has temporarily decided not to enforce; (2) that nonetheless binds Wheaton's

behavior during the non-enforcement period; (3) that is subject to private enforcement actions; and (4) that infringes First Amendment rights.

Counsel for Wheaton raised the problem of private enforcement directly with defendants' counsel when the parties conferred on August 8. Wheaton's counsel asked whether defendants would agree that the requirements of the mandate would not apply to Wheaton during the safe harbor, so that Wheaton would not experience pressure from the prospect of private enforcement actions. Defendants' counsel did not deny that the ACA and ERISA authorized such suits. Instead, counsel asserted that the burden on Wheaton from those suits was insufficient to create standing, and that defendants would therefore not agree that the mandate "does not apply" to Wheaton during the safe harbor. Rienzi Decl. ¶¶ 4-5.

Defendants' motion to dismiss reiterates this position. In a footnote, they advert to "[t]he possibility that third-parties may bring suit against [Wheaton] under the Employee Retirement Income Security Act of 1974 ('ERISA') to enforce the preventive services coverage regulations," but they deny that such a "possibility" creates injury. MTD at 22 n.7. Defendants add that, were such a lawsuit filed, Wheaton could simply "raise all the claims it asserts here as a defense in that action." *Id.* (citing 42 U.S.C. § 2000bb-1(c)).[15] And while they assure Wheaton that it "would not be subject to any *civil or criminal penalties*" should it lose those lawsuits, they gloss over the fact that Wheaton *would* face an injunction to provide the very same coverage its faith prohibits it from providing. MTD at 22 n.7 (emphasis added) (citing 29 U.S.C. § 1132(a)(1)(B), (a)(3)).

[15] Nor is it clear that RFRA would provide Wheaton with such a defense. The D.C. Circuit does not permit RFRA claims against private actors absent state action. *See Vill. of Bensenville* v. *F.A.A.*, 457 F.3d 52, 61 (D.C. Cir. 2006). Other courts of appeals have refused to allow a RFRA defense to private-party actions. *See, e.g., Gen. Conference Corp. of Seventh-Day Adventists* v. *McGill*, 617 F.3d 402, 411 (6th Cir. 2010) *cert. denied*, 131 S. Ct. 2097 (2011) (observing "the other two circuits to have reached the issue have held that RFRA does not apply to suits between private parties" and concluding "[w]e now join their ranks").

Defendants appear to believe they have discovered a loophole in standing law—one that lets the government pressure Wheaton to violate its beliefs, yet avoid judicial review of the statutory scheme that creates the pressure. This is an untenable position. If there is no real threat of private enforcement actions against Wheaton, then defendants would lose nothing by simply agreeing that the mandate does not apply to Wheaton during the safe harbor. To do so is demonstrably within defendants' power (otherwise they could not have exempted churches already), and yet they have expressly refused to do so. The upshot is that defendants, by their own actions, have left in place a regulatory requirement that *now* places pressure on Wheaton to violate its faith.

Wheaton needs more than the half-protection defendants are offering. Because the requirements of the mandate apply to Wheaton even during the safe harbor—as defendants insist they do—then Wheaton experiences an actual burden today in the form of government-backed coercion to violate its faith. That present burden easily gives Wheaton standing and ripeness to seek legal redress.

B. The promise of future rulemaking during the safe harbor period cannot, by its own terms, render the mandate's impending injury to Wheaton any less certain than it is today.

Finally, defendants claim that the ANPRM relieves Wheaton from any "imminent" injury from the mandate. MTD at 12. They say that the ANPRM's projected future rulemaking guarantees "there is no reason to suspect that [Wheaton] will be required to sponsor a health plan that covers contraceptive services in contravention of its religious beliefs once the enforcement safe harbor expires." MTD at 15. "[A]ny suggestion to the contrary," Defendants claim, "is

entirely speculative at this point." *Id.* But it is Defendants who speculate. The plain terms of the ANPRM belie Defendants' arguments.[16]

1. The ANPRM cannot relieve Wheaton's injury because it promises no change to the definition of "preventive services" nor to the religious employer exemption.

The ANPRM expressly disclaims any intention to alter *anything* about the mandate or the religious employer exemption that would relieve Wheaton's injury. *See* 77 Fed. Reg. at 16502-03. Wheaton claims injury because Defendants have defined "preventive services" to include emergency contraception, and because Defendants' "religious employer" exemption excludes Wheaton. *See* Compl. ¶¶ 3, 31-33, 76-77, 118. The ANPRM promises *no* change to that status quo—that is, it promises neither to subtract emergency contraception from the definition of "preventive services," nor to expand the religious employer exemption to include entities like Wheaton. Instead, the ANPRM only solicits ideas for crafting future rules that would somehow route free emergency contraceptive coverage to Wheaton's employees, subject to Wheaton's compliance and cooperation.[17] And the ANPRM merely promises a future rulemaking process.

In other words, the ANPRM does not raise the question *whether* Wheaton will be required to provide emergency contraceptive coverage through its insurance, but merely *how* Wheaton will be allowed to satisfy this legal obligation. That is why the ANPRM refers to the entities who

---

[16] To the extent Defendants suggest that merely delaying enforcement of the mandate for one year makes Wheaton's injury "too remote temporally," they are incorrect. *See* MTD at 14 (quoting *McConnell* v. *FEC*, 540 U.S. 93, 226 (2003), *overruled in part on other grounds, Citizens United* v. *FEC*, 130 S. Ct. 876 (2010)). A one-year delay "is short in comparison with other cases in which courts have found standing." *Belmont Abbey*, 2012 WL 2914417, at *8; *see also id.* (observing that "[t]he Supreme Court has allowed plaintiffs to proceed when challenging laws that would not take effect for three and even six years (or thereabouts)") (citing *New York* v. *United States*, 505 U.S. 144, 153-54 (1992); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 530, 536 (1925)). Defendants therefore cannot rely on the one-year delay *alone* to defeat Wheaton's standing.

[17] *See* 77 Fed. Reg. at 16503 (announcing defendants' "plans for a rulemaking to require issuers to offer group health insurance coverage without contraceptive coverage to such an organization … and *simultaneously to provide contraceptive coverage directly to the participants and beneficiaries covered under the organization's plan with no cost sharing*") (emphasis added).

might receive some future accommodation as "non-exempt"—*i.e.*, they are *not* exempt from the preventive services requirement, but they may be allowed to satisfy that requirement in some other way. *See* 77 Fed. Reg. at 16503. Wheaton, however, has a religious objection to the requirement that it facilitate access to emergency contraception, period. *See* Compl. ¶ 38. Thus Wheaton's injury does not turn on the "how" question addressed by the ANPRM; rather, it turns on the "whether" question which Defendants have already answered, in a final rule, and 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 that rule to govern Wheaton'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 truly tentative, they should not be issuing final rules that render Wheaton 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 Wheaton. But government cannot render a plaintiff's injury speculative by engaging in its own speculation about how it might change currently operative laws.

2. Defendants' real claim is mootness, which fails.

To be sure, nothing prevents Defendants from attempting to *moot* the case by altering the mandate or the exemption during the litigation. Indeed, Defendants' argument sounds more like mootness than standing. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68 n.22 (1997) (standing addresses "personal interest that must exist at the commencement" of a suit, whereas mootness requires that interest continue "throughout [the suit's] existence"). But there is no doctrine of anticipatory mootness. Rather, under the "stringent" mootness standards, it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected

to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000). This "heavy burden" lies with the party claiming mootness. *Id; see also, e.g., Sheely* v. *MRI Radiology Network, PA*, 505 F.3d 1173, 1184 (11th Cir. 2007) (noting *Laidlaw*'s "formidable . . . burden" on "party asserting mootness").

Mootness is simply out of the question at this point, because there has been no change to the mandate or the exemption. *See, e.g.*, Wright & Miller, 13C Fed. Prac. & Proc. Juris. § 3533.7 (3d ed.) ("It hardly need be added that mootness does not occur when there has been no change in the challenged activity."). Defendants must do far more than offer prospects for future corrective action to moot ongoing litigation. *See, e.g., Am. Bar Ass'n* v. *F.T.C.*, 636 F.3d 641, 648 (D.C. Cir. 2011) (case is mooted if "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation") (emphasis added). But "an agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *Am. Petroleum Inst.* v. *EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). Similarly, "agencies cannot avoid judicial review of their final actions merely because they have opened another docket that may address some related matters." *Am. Bird Conservancy, Inc.* v. *FCC*, 516 F.3d 1027, 1031 n.1 (D.C. Cir. 2008) (citations omitted).

Here, Defendants concede they have presented only "questions and ideas" to shape future discussions about an hypothesized insurer mandate. MTD at 10; 77 Fed. Reg. at 16503. They have not amended the original mandate; they have confirmed it. *Id.* at 16502. Statements of future good intentions are irrelevant. *See Sackett* v. *EPA*, 132 S. Ct. 1367, 1372 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' … does not suffice to make an otherwise final agency action nonfinal."); Wright & Miller § 3533.7 ("Nor

does mootness follow announcement of an intention to change or adoption of a plan to work toward lawful behavior.").

3. The ANPRM's only concrete ideas are unworkable and unhelpful.

Finally, what few ideas are actually sketched out in the ANPRM are deeply flawed and, regardless, would not relieve Wheaton's injuries. Wheaton would still be required to "provide coverage for" objectionable drugs and services. 42 U.S.C. § 300gg-13(a)(4). Although its insurer ostensibly would administer them, Wheaton would still have to provide "access to information necessary to communicate with the plan's participants." 77 Fed. Reg. at 16505. This would not budge the status quo, since Wheaton *already* does not directly provide health care to employees. Wheaton selects and pays for its plans, but the medical care, payment, and administration are handled directly between the insurer and employees' medical providers. Thus, even under the hypothesized new rule, Wheaton would be forced to serve as a gatekeeper, making objectionable drugs and services available to employees through plans it sponsors, just as under the current final rule.

It is also fanciful to suppose that coverage for the objectionable services can be provided without financial contributions from Wheaton. Nothing guarantees that covering emergency contraception (let alone more expensive counseling and education) will reduce costs, or that savings would be passed on to Wheaton. Indeed, the ANPRM itself assumes these services have costs and discusses how those costs can be recovered by insurers, including through "rebates, service fees, disease management program fees, or other sources." 77 Fed. Reg. at 16507 (stating "[t]hese funds may inure to the third-party administrator *rather than* the plan or its sponsor") (emphasis added).

***

Defendants' argument against standing ultimately amounts to a prediction that the unforeseeable results of a speculative proposed rulemaking might, sometime in the future, remove Wheaton's injury. Prophecies like this, however, cannot change the fact that Wheaton faces the real prospect of harm from a concrete regulatory mandate on January 1, 2014 at the very latest—crippling fines and other penalties for which it must plan well in advance and which place burdens on its religious faith *now*. This is more than enough to show imminent harm.[18] And, quite apart from that, Wheaton faces exposure to private actions to enforce the mandate a full year earlier—on January 1, 2013. On either basis, the Court should find that Wheaton has standing to contest the legality of the mandate.

II. WHEATON'S CLAIMS ARE RIPE FOR REVIEW.

"[I]f a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied" as well. *Casanova* v. *Marathon Corp.*, 256 F.R.D. 11, 13 (D.D.C. 2009) (citing *Nat'l Treasury Employees Union* v. *United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996)). As set forth in the preceding section, Wheaton faces an imminent injury under the mandate and it is therefore unnecessary to consider defendants' ripeness challenge. Nevertheless, analyzing the ripeness issues confirms that defendants' motion to dismiss must be denied.

Courts apply a two-pronged test to determine whether a case is ripe for adjudication. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967); *Vill. of Bensenville*, 376 F.3d at 1119-20. They evaluate "the fitness of the issues for judicial decision," and then "the hardship to the parties of

[18] *See, e.g.*, *Seven-Sky* v. *Holder*, 661 F.3d 1, 4 (D.C. Cir. 2011) (addressing constitutionality of provision of Affordable Care Act that takes effect "beginning in January 2014."); *Vill. of Bensenville*, 376 F.3d at 1119 (thirteen-year gap between agency decision and action did not eliminate standing); *see also Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 536-37 (6th Cir. 2011) (noting that "[i]mminence is a function of probability" and finding imminent injury over two years in the future where "[t]he only developments that could prevent this injury from occurring are not probable and indeed themselves highly speculative").

withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. If the fitness prong is satisfied, "[lack of] hardship cannot tip the balance against judicial review." *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2005) (citations omitted). But if there are doubts as to fitness, a showing of "hardship to the parties" can "outweigh[] the competing institutional interests in deferring review." *Eagle-Picher Indus.* v. *EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985). Here, both prongs show that Wheaton's claims are ripe.

A. Wheaton's claims are fit for review.

"An issue is 'fit for judicial resolution' under the ripeness test, if it is (a) essentially legal, and (b) 'sufficiently final.'" *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 783 F.2d 237, 249 (D.C. Cir. 1986) (citation omitted). Both requirements are satisfied here.

1. The mandate is a final rule that is legally binding.

A regulation is "final" when it has been "promulgated in a formal manner" and is "quite clearly definitive," not "tentative" or "only the ruling of a subordinate official." *Abbott Labs.*, 387 U.S. at 151. Where a regulation comes "at the end of a rulemaking proceeding in which [the agency] solicited and received public comments" the resulting rule clearly "represents the agency's 'final' position on the issue." *Consol. Rail Corp.* v. *United States*, 896 F.2d 574, 577 (D.C. Cir. 1990) (internal citation omitted).

Wheaton challenges a regulation that is definite and concrete, and that emerged at the conclusion of a lengthy administrative process. *See, e.g., Abbott Labs.*, 387 U.S. at 149-51 (assessing ripeness by reference to finality of agency action); *Atlanta Gas Light Co.* v. *FERC*, 140 F.3d 1392, 1404 (11th Cir. 1998) (assessing ripeness by asking, *inter alia*, whether "challenged agency action constitutes 'final agency action'"). Defendants included contraception within the mandated "preventive services" after lengthy deliberation that included

an "extensive science-based review" by the Institute of Medicine. MTD at 6. And they finalized the religious employer exemption after "carefully considering"—over an additional six months—"thousands of comments." *Id.* at 8. Consequently, the challenged regulation is "quite clearly definitive" because it was "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties." *Abbott Labs.*, 387 U.S. at 151. It is not "informal," nor is it "only the ruling of a subordinate official," nor is it "tentative." *Id.* (citations omitted). To the contrary, the mandate "mark[ed] the 'consummation' of the agency's decisionmaking process." *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1181 (11th Cir. 2011) (quoting *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997)). These indicia of finality mark Wheaton's claims as ripe—especially since they involve First Amendment rights.[19]

2. Wheaton's claims raise questions that are essentially legal.

The ripeness doctrine favors disputes that are "purely legal" over those that would "benefit from a more concrete setting." *Vill. of Bensenville*, 376 F.3d at 1120. The latter category covers disputes raised "in the context of a specific attempt to enforce the regulations," *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967), that may become "more concrete from further factual development." *Brock*, 783 F.2d at 250. In contrast, a challenge to the constitutionality of a regulation is "a relatively pure legal one that subsequent enforcement proceedings will not elucidate." *See Chamber of Commerce*, 69 F.3d at 603-04.

Wheaton's challenge to the mandate raises questions of law largely independent of context-specific facts. For instance, its Free Exercise and Establishment Clause claims present purely

[19] Even "interim" final rules are generally ripe for adjudication. *See Ark. Dairy Co-op Ass'n, Inc.* v. *U.S. Dep't of Agric.*, 573 F.3d 815, 827 (D.C. Cir. 2009) ("[T]he *Interim Rule* they challenge constitutes final agency action."); *Career Coll. Ass'n* v. *Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996) ("The key word in the title 'Interim Final Rule,' . . . is not interim, but *final*. 'Interim' refers only to the Rule's intended duration – not its tentative nature.").

legal challenges to the various exemption schemes found in the regulations.[20] Its APA and RFRA claims likewise turn on questions of law. *See Eagle-Picher Indus.*, 759 F.2d at 916 (review under APA is "a purely legal question"); *Hamilton* v. *Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) ("[T]he ultimate conclusion as to whether [a] regulation deprives [the plaintiff] of his free exercise right [under RFRA] is a question of law."). Defendants themselves agree. *See* MTD at 20 (noting that plaintiff's complaint "raises largely legal claims"). Wheaton's claims are therefore presumptively ripe for review. *See Eagle-Picher Indus.*, 759 F.2d at 915 ("[I]f the issue raises a purely legal question . . . we assume its threshold suitability for judicial determination").

3. The proposed future rulemaking cannot impact the mandate's finality or legality.

Nonetheless, defendants insist that the ANPRM's proposed rulemaking renders Wheaton's lawsuit unripe by raising a "significant chance" that future amendments to the mandate will either moot or alter Wheaton's claims before the mandate's effective date. MTD at 18-19. Defendants' argument is misguided.

First, Defendants misunderstand the nature of Wheaton's claims. Wheaton challenges the preventive services mandate because—and only because—Defendants have defined "preventive services" to include emergency contraception.[21] The ANPRM promises *no* change to that status quo—that is, it promises neither to alter the preventive services mandate itself, nor to subtract

---

[20] *See, e.g.*, Compl. ¶ 56-57, 64-65 (alleging implementing regulations non-neutral under Free Exercise Clause because they expressly exempt a favored class of religious objectors in 45 C.F.R. § 147.130 (a)(1)(iv)(A)-(B)); Compl. ¶¶ 58-62, 67 (alleging same regulations not generally applicable under Free Exercise Clause because they expressly create a system of individualized exemptions); Compl. ¶¶ 159-62 (alleging same regulations violate Establishment Clause by expressly preferring one religious denomination over another).

[21] *See* 42 U.S.C. § 300gg-13 (a)(4) (requiring group health plans to "provide coverage" without cost-sharing for "preventive care … as provided for in [HRSA] guidelines"); HRSA Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited August 16, 2012) (defining "women's preventive services" to include "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling").

contraception from the ambit of "preventive services." Nor does it propose to expand the finalized religious employer exemption to include Wheaton. Instead, the ANPRM merely proposes rulemaking to consider how to route free contraception coverage to Wheaton's employees, subject to Wheaton's compliance and cooperation.[22]

Consequently, Defendants are wrong that the parameters of the rulemaking sketched out by the ANPRM could do anything to undermine the ripeness of Wheaton's claims. "[A]gencies cannot avoid judicial review of their final actions merely because they have opened another docket that may address some related matters." *Am. Bird Conservancy*, 516 F.3d at 1031 n.1 (and collecting authorities).[23] Here, Defendants' proposed future rulemaking will, by its own terms, address matters that cannot impact Wheaton's claims.

Defendants cite no case to support their novel argument that a speculative and irrelevant future rulemaking derails a challenge to a final and concrete regulation. The cases Defendants cite, *see* MTD at 19-21, stand for the ordinary proposition that challenges to open-ended, non-binding, or rescinded laws and regulations are unripe.[24] In such cases, additional rulemaking

---

[22] *See* 77 Fed. Reg. at 16503 (announcing defendants' "plans for a rulemaking to require issuers to offer group health insurance coverage without contraceptive coverage to such an organization … and *simultaneously to provide contraceptive coverage directly to the participants and beneficiaries covered under the organization's plan with no cost sharing*") (emphasis added).

[23] This situation is distinct from that in *American Petroleum Institute* v. *E.P.A.*, 683 F.3d 382, 389 (D.C. Cir. 2012). There, the court held the case in abeyance where "the happening or timing of the future event we are waiting for . . . is *not within discretion or controlled by the agency* as would usually be the case" (emphasis added).

[24] *See, e.g.*, *Texas* v. *United States*, 523 U.S. 296, 300-01 (1998) (declaratory judgment that school district law would never trigger Voting Rights Act preclearance was unripe because, absent application, impossible to determine how the law implicated elections); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998) (suit against forestry plan unripe because plan "d[id] not command anyone to do anything," "create[d] no legal rights or obligations," and required further agency action to flesh out application to specific land); *Pub. Serv. Comm'n of Utah* v. *Wycoff Co., Inc.*, 344 U.S. 237, 244 (1952) (dismissing claims where plaintiff did "not request an adjudication that it [had] a right to do, or to have, anything in particular" and did not seek "a judgment that the [state was] without power to enter any specific order or take any concrete regulatory step," but merely sought a declaration that its conduct constituted interstate commerce, for no apparent purpose); *Tex. Indep. Producers and Royalty Ass'n* v.

undermined ripeness—not because it automatically renders challenges to definite rules unripe—but because, there, new rulemaking was necessary to flesh out open-ended rules that courts could not apply in their present form. Those cases might have affected Wheaton had it sued *before* "preventive care" was defined to include FDA-approved contraceptives and sterilization methods. But nothing like that situation is presented here. To the contrary, Wheaton has brought facial legal challenges to a concrete and carefully-defined regulatory scheme whose application to religious objectors like Wheaton is as clear as it is unconstitutional.

Like their standing argument, *supra*, Defendants' ripeness argument really concerns mootness. Indeed, in arguing why the challenged regulations "have not 'taken on fixed and final shape,'" MTD at 20, Defendants promise that—following the proposed rulemaking—Wheaton's challenge "*likely will be moot*." *Id.* (emphasis added). But Defendants misunderstand which regulations Wheaton challenges. Wheaton challenges the mandate and exemption—regulations that were finalized after an extensive process on August 1, 2011 and February 10, 2012, respectively. Wheaton is not challenging whatever might come out of the proposed rulemaking. Such a challenge would be incoherent because, as Defendants point out, the ANPRM "does not

---

EPA, 413 F.3d 479, 483-84 (5th Cir. 2005) (challenge to EPA permitting rule unripe where, *inter alia*, rule's scope impossible to determine on its face; EPA had officially deferred rule and initiated rulemaking to clarify rule); *Toca Producers* v. *FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (dismissing claims on ripeness grounds where both parties agreed their dispute was the subject of an ongoing agency proceeding); *AT&T Corp.* v. *F.C.C.*, 369 F.3d 554, 561-62 (D.C. Cir. 2004) (challenge to agency action was not ripe where agency had not yet made a final, reviewable decision on the issue); *Util. Air Regulatory Group* v. *E.P.A.*, 320 F.3d 272, 278 (D.C. Cir. 2003) (challenge unripe where the challenged action was "an agency policy statement—issued without the signature of any Agency official and applied, it appears, on a purely ad hoc basis—[that] in no way binds the Agency or regulated entities"); *Wyo. Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999) (Forest Service had no duty to produce environmental impact statement unless and until it issues oil and gas leases and Forest Service had issued no such leases when case filed); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dep't. of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) (suit against state unripe where the state had yet to "pass the necessary legislation, promulgate the appropriate regulations, and build and staff testing facilities," and there was no guarantee it would ever do so); *Lake Pilots Ass'n, Inc.* v. *U.S. Coast Guard*, 257 F. Supp. 2d 148, 161 (D.D.C. 2003) (challenge unripe because agency had admitted its error respecting challenged rule, had reinstated prior rule, and undertaken new rulemaking).

preordain what amendments to the preventive services coverage regulations defendants will ultimately promulgate." MTD at 20. More importantly, any such future amendments could not, *by the very terms of the ANPRM*, change the nature of Wheaton's current challenge.

B. Wheaton faces imminent hardship absent immediate review.

Because Wheaton's claims fully satisfy the "fitness" requirement, it is not necessary to consider the hardship factor. *Askins* v. *Dist. of Columbia*, 877 F.2d 94, 97-98 (D.C. Cir. 1989) ("[W]hen a case is clearly 'fit' to be heard, the 'hardship' factor is irrelevant in applying the ripeness doctrine."). But even if fitness were in question, the hardships Wheaton faces from delay weigh decisively in favor of immediate judicial review.

First, since by its own terms the ANPRM cannot alter Wheaton's claims, *see supra*, Wheaton will still be compelled to drop employee insurance and pay heavy fines. And, even under the safe harbor, Wheaton must plan *now* to address that negative consequence (which will be consummated in sixteen months). Inability to offer insurance will severely impact Wheaton's ability to retain and recruit employees. These hardships flowing from the mandate demand immediate review. *See* Compl. ¶¶ 88-89, 104 (discussing current hardships); *see also Retail Indus. Leaders Ass'n* v. *Fielder*, 475 F.3d 180, 188 (4th Cir. 2007) (finding ripeness where plaintiff had to alter "accounting procedures and healthcare spending *now*" to plan for new law).

Second, the safe harbor protects Wheaton only from enforcement by *defendants*, not third parties. The Affordable Care Act empowers private parties to enforce the mandate, through its incorporation into Part 7 of ERISA. 29 U.S.C. § 1185d (a)(1). Under that part, a plan participant or beneficiary may bring a civil action to recover plan benefits or enforce or clarify plan rights. 29 U.S.C. § 1132 (a)(1)(B). Thus even without enforcement by defendants, Wheaton would still be subject to actions by plan participants or beneficiaries. *Chamber of Commerce*, 69 F.3d at 603 (retaining jurisdiction in part because "even without a Commission enforcement," plaintiffs

would be "subject to [private] litigation challenging the legality of their actions"). Indeed, Defendants themselves admit this, MTD at 22 n.7, and have expressly refused to offer Wheaton any protection through the simple device of declaring that Wheaton is simply not subject to the mandate during the safe harbor period. Rienzi Decl. ¶¶ 4-5.

These "direct and immediate" consequences of the mandate warrant immediate review. *See Abbott Labs.*, 387 U.S. at 152-53.

CONCLUSION

The Court should deny the motion to dismiss.

Respectfully submitted,

s/Mark L. Rienzi
Eric N. Kniffin (DC Bar No. 999473)
S. Kyle Duncan (LA Bar No. 25038)
(admitted *pro hac vice*)
Mark L. Rienzi (DC Bar No. 494336)
Lori Halstead Windham (DC Bar No. 501838)
The Becket Fund for Religious Liberty
3000 K St. NW, Suite 220
Washington, DC 20007
(202) 955-0095
(202) 955-0090 (fax)
mrienzi@becketfund.org
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on August 16, 2012, and was thereby electronically served on counsel for Defendants.

s/ Mark L. Rienzi
Mark L. Rienzi
Counsel for Plaintiff

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHEATON 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,	)	**Case No. 1:12-cv-01169**
Defendants.	)	
	)	

DECLARATION OF MARK L. RIENZI

I, Mark L. Rienzi, under 28 U.S.C. § 1746, declare as follows:

1. I am an attorney at the Becket Fund for Religious Liberty, which is a non-profit, non-partisan religious liberties law firm. I am a member of the bar of this Court and counsel for Plaintiff Wheaton College ("Wheaton") in the above-captioned case. I have practiced law for twelve years.

2. On Wednesday, August 8, 2012, pursuant to this Court's instructions, I conferred with Sheila Lieber and Michelle Bennett, counsel for Defendants, about Defendants' position concerning Plaintiffs' preliminary injunction motion.

3. During that conference, Ms. Lieber and Ms. Bennett indicated Defendants' belief that Wheaton is eligible for the temporary enforcement safe harbor, which protects Wheaton from government enforcement of the relevant mandate. Ms. Lieber and Ms. Bennett also stated their expectation that a new safe harbor guidance document would issue shortly explaining that institutions in Wheaton's position will be eligible for the safe harbor.

4. I asked Ms. Lieber and Ms. Bennett whether Defendants would also agree that the relevant mandate does not apply to Wheaton during the safe harbor. I expressed my concern that the safe harbor only stops *government* enforcement of the mandate but leaves Wheaton exposed to private enforcement.

5. Ms. Lieber responded that the Defendants would not agree that the mandate does not apply to Wheaton during the safe harbor. Ms. Lieber explained that Defendants do not believe the threat of private enforcement is sufficient to create standing, and that Wheaton can raise its religious liberties arguments in defense of private suits if and when they are filed.

I declare under penalty of perjury that the foregoing is true and correct.

Mark L. Rienzi