**ORAL ARGUMENT NOT YET SCHEDULED**

**Nos. 12-5273 & 12-5291**

# In the United States Court of Appeals for the District of Columbia Circuit

WHEATON COLLEGE and BELMONT ABBEY COLLEGE,

*Appellants,*

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,

*Appellees.*

**On Appeal from the United States District Court for the District of Columbia**

## BRIEF FOR APPELLANTS

S. Kyle Duncan
Mark L. Rienzi
Eric S. Baxter
Eric N. Kniffin
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 349-7209
kduncan@becketfund.org
*Attorneys for Appellant*

Dated: October 5, 2012

## RULE 28 CERTIFICATE

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants' counsel certifies as follows:

### A. Parties

1. Appellant Wheaton College
2. Appellant Belmont Abbey College
3. Appellee Kathleen Sebelius
4. Appellee United States Department of Health and Human Services
5. Appellee Hilda Solis
6. Appellee United States Department of Labor
7. Appellee Timothy Geithner
8. Appellee United States Department of the Treasury

### B. Rulings Under Review

1. *Wheaton Coll.* v. *Sebelius*, --- F. Supp. 2d ---, 2012 WL 3637162 (D.D.C. Aug. 24, 2012) (Huvelle, J.); JA 264 (order dismissing suit for lack of standing and ripeness and denying motion for preliminary injunction as moot).

2. *Belmont Abbey Coll.* v. *Sebelius*, --- F. Supp. 2d ---, 2012 WL 2914417 (D.D.C. July 18, 2012) (Boasberg, J.); JA 63 (order dismissing suit for lack of standing and ripeness).

3. *Belmont Abbey Coll.* v. *Sebelius*, 2012 WL 3861255 (D.D.C. Sept. 5, 2012) (Boasberg, J.); JA 108 (order denying plaintiff's motion for reconsideration).

### C. Related Cases

There are two (2) additional cases challenging the same regulation pending in the United States District Court for the District of Columbia:

1. *Roman Catholic Archbishop of Washington* v. *Sebelius*, No. 1:12-cv-815 (D.D.C. filed May 21, 2012).

2. *Tyndale House Publishers, Inc.* v. *Sebelius*, No. 1:12-cv-01635-RBW (D.D.C. filed Oct. 2, 2012).

There are twenty-six (26) additional cases challenging the same regulation pending in federal district courts in other Circuits.

Second Circuit

1. *Priests for Life* v. *Sebelius*, No. 1:12-cv-00753 (E.D.N.Y.).
2. *Roman Catholic Archdiocese of NY* v. *Sebelius*, No. 1:12-cv-2542 (E.D.N.Y.).

Third Circuit

3. *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa.).
4. *Rev. Donald W. Trautman* v. *Sebelius*, No. 1:12-cv-123 (W.D. Pa.).
5. *Most Rev. David A. Zubik* v. *Sebelius*, No. 2:12-cv-676 (W.D. Pa.).

Fifth Circuit

6. *Louisiana Coll.* v. *Sebelius*, No. 1:12-cv-00463 (W.D. La.).
7. *Roman Catholic Diocese of Dallas* v. *Sebelius*, No. 3:12-cv-1589 (N.D. Tex.).
8. *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-314 (N.D. Tex.).
9. *Roman Catholic Diocese of Biloxi* v. *Sebelius*, No. 1:12-cv-158 (S.D. Miss.).

Sixth Circuit

10. *Legatus* v. *Sebelius*, 2:12-cv-12061 (E.D. Mich.).
11. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-cv-440 (S.D. Ohio).
12. *Catholic Diocese of Nashville* v. *Sebelius*, No 3:12-cv-00934 (M.D. Tenn.).

Seventh Circuit

13. *Univ. of Notre Dame* v. *Sebelius*, No. 3:12-cv-00253 (N.D. Ind.).
14. *Diocese of Fort Wayne-South Bend, Inc.* v. *Sebelius*, No. 1:12-cv-159 (N.D. Ind.).
15. *Conlon* v. *Sebelius*, No. 1:12-cv-3932 (N.D. Ill.).

16. *Triune Health Group* v. *Sebelius*, No. 1:12-cv-6756 (N.D. Ill.).
17. *Grace Coll.* v. *Sebelius*, No. 3:12-cv-00459 (N.D. Ind.).

Eighth Circuit

18. *State of Nebraska* v. *HHS*, No. 4:12-cv-03035 (D. Neb.).
19. *O'Brien* v. *HHS*, No. 4:12-cv-00476 (E.D. Mo.).
20. *Archdiocese of St. Louis* v. *Sebelius*, No. 4:12-cv-924 (E.D. Mo.).
21. *College of the Ozarks* v. *Sebelius*, No. 6:12-cv-03428 (W.D. Mo.).

Tenth Circuit

22. *Colorado Christian Univ.* v. *Sebelius*, No. 11-cv-03350 (D. Colo.).
23. *Newland* v. *Sebelius*, No. 1:12-cv-01123 (D. Colo.).
24. *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 12-cv-1000 (W.D. Okla.).

Eleventh Circuit

25. *Eternal Word Television Network, Inc*. v. *Sebelius*, No. 2:12-cv-00501 (N.D. Ala.).
26. *Ave Maria University* v. *Sebelius*, No. 2:12-cv-00088 (M.D. Fla.).

s/ *S. Kyle Duncan*
S. Kyle Duncan
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 349-7209
kduncan@becketfund.org

## CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Appellants Wheaton College and Belmont Abbey College make the following disclosures:

Wheaton College is a non-profit educational institution organized under section 501(c)(3) of the Internal Revenue Code. Wheaton College has no parent corporation, nor is there any publicly held corporation with a 10 percent or greater ownership interest in Wheaton College.

Belmont Abbey College is a non-profit educational institution organized under section 501(c)(3) of the Internal Revenue Code. Belmont Abbey College has no parent corporation, nor is there any publicly held corporation with a 10 percent or greater ownership interest in Belmont Abbey College.

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*A separately bound addendum with pertinent statutes, regulations, and other authorities has been filed in conjunction with this brief.

# TABLE OF AUTHORITIES

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# GLOSSARY

**ANPRM:** Advance Notice of Proposed Rule Making

**FDA:** Food and Drug Administration

## JURISDICTIONAL STATEMENT

Appellants' claims were brought under the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the United States Constitution; the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq*.; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Because these claims arise under the Constitution and laws of the United States, the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1361.

This appeal is taken from two final orders issued by the district court. In the *Belmont Abbey College* case, the district court entered a final order dismissing all claims for lack of jurisdiction on July 18, 2012. Appellants filed a motion for reconsideration, which was denied on September 5, 2012. The Notice of Appeal was filed on September 14, 2012. This Court has jurisdiction over the district court's final decision under 28 U.S.C. § 1291.

In the *Wheaton College* case the district court entered a final order dismissing all claims for lack of jurisdiction and denying Appellant's motion for preliminary injunction as moot on August 24, 2012. The Notice of Appeal was filed on August 29, 2012. This Court has jurisdiction over the district court's final decision and refusal to grant a preliminary injunction under 28 U.S.C. §§ 1291 and 1292(a)(1).

## STATEMENT OF ISSUES

The regulation at issue requires Appellants—two religious colleges—to offer health insurance in violation of their religious convictions. After the colleges sued to enjoin the rule, the government postponed its own enforcement for one year (although not enforcement by private parties) and issued a non-binding "advance notice" soliciting "questions and ideas" for a possible future accommodation for religious objectors like Appellants. The district court dismissed both suits for lack of standing and ripeness. The issues presented are as follows:

*Mootness*

I. Do the government's actions taken after the suits were filed raise the issue of mootness, rather than issues of standing and ripeness?

II. For mootness, do the partial, temporary stay of enforcement and non-binding announcement of a potential future rulemaking satisfy the government's stringent burden of showing it is absolutely clear that the government's allegedly wrongful behavior could not reasonably be expected to recur?

*Standing*

III. Did the colleges sufficiently plead an actual or imminent injury-in-fact, when—at the time their complaints were filed—they faced crippling fines if they refused to violate their religious convictions by complying with the regulation?

*Ripeness*

IV. Is the challenged final rule—which has been published in the Code of Federal Regulation and is currently in effect—susceptible to judicial review?

## INTRODUCTION

This case involves a regulatory mandate that threatens Appellants Wheaton College and Belmont Abbey College (the "Colleges")—both religiously affiliated institutions—with ruinous fines and other penalties unless they offer insurance coverage that violates their religious convictions. Appellees Department of Health and Human Services ("HHS"), Department of Labor, and Department of Treasury (collectively, the "Departments") finalized this mandate and refused to exempt the Colleges, even while exempting other religious organizations. The mandate is applicable to the Colleges' actions *now*. Thus, if they wish to continue offering employee health insurance without violating their religious beliefs, they must do so in violation of federal law and under threat of severe fines, penalties, and private lawsuits.

Nevertheless, the lower courts held that the Colleges lacked standing and that their claims were not ripe, because—after the lawsuits were filed—the Departments offered a non-binding "temporary safe harbor." The safe harbor promises to stay government (but not private) enforcement of the mandate for one year. And during that year, the Departments have promised to consider potential accommodations in the future for religious objectors like the Colleges. But this promise does not bind the Departments to do anything, and to date they have

merely solicited from the public "questions and ideas to help shape . . . discussions" about possible remedies. 77 Fed. Reg. 16503 (Mar. 21, 2012).

And while the Departments ponder these "questions and ideas" about what they might do in the future, they have steadfastly refused to rescind the existing mandate, forcing the Colleges to choose between violating the still-binding final rule or their religious convictions. The lower courts allowed this open-ended promise of possible unspecified future rulemaking to defeat standing and ripeness, even as to the existing final rule, which has not been replaced and may never be replaced.

The lower courts reached this erroneous conclusion by considering the wrong question. The correct issue when a defendant promises to change its conduct is mootness, not standing or ripeness. This is because, when the cases were filed, both Colleges were subject to the mandate and were not protected by any safe harbor. The Departments' argument is that their *subsequent* creation of a temporary safe harbor, combined with a promise to keep thinking about the issue, strips the federal courts of jurisdiction over the existing final rule. Yet, to show mootness, the Departments must prove they have *permanently* stopped the conduct that provoked the lawsuits. They could meet that burden by rescinding the mandate or expanding the exemption for religious employers to include the Colleges. They

cannot meet it by sponsoring an exercise in public brainstorming about a different mandate that may or may not materialize sometime in the future.

Nor can the Department's theoretical future plans strip the federal courts of jurisdiction over the Colleges' lawsuits by defeating standing or ripeness. The mandate is a final rule promulgated in the Code of Federal Regulations. It is fit for review and it harms the Colleges now. The severe penalties it threatens impact planning and budgeting now. And the risk it poses to the Colleges' ability to continue offering an employee health insurance plan interferes with hiring and retention now. These present impacts of the final rule easily establish that the Colleges have standing to challenge the mandate and that their challenge is ripe. The Departments cannot evade judicial review of the currently-binding final rule by vaguely promising to somehow accommodate the Colleges with some other rule at some other time.

This Court should reverse and remand.

## STATEMENT OF FACTS

There is no real dispute that the Departments' contraceptive mandate is a final regulation that binds the Colleges. From the mandate's initial promulgation as an "interim final rule" in July 2010, to its being "finalize[d], without change" in February 2012, it has had the full force and effect of law. 77 Fed. Reg. 8725 (Feb. 15, 2012). The mandate's exemption for "religious employers" unambiguously

excludes organizations like the Colleges. And the Departments' promises not to enforce the mandate against them for one year and to consider a future accommodation offer no real protection that could justify delaying judicial relief.

### A. THE COLLEGES HAVE SINCERE RELIGIOUS BELIEFS CONCERNING THE SANCTITY OF HUMAN LIFE.

Belmont Abbey College was founded in 1876 in North Carolina by Benedictine monks who built the campus with bricks they formed by hand. JA 12. Today, their monastery remains at the center of campus, where the current Abbey monks live and continue to sponsor the College. JA 12. Obedience to the teachings of the Catholic Church is central to Belmont Abbey's identity and mission. JA 12-13. Consequently, it sincerely believes that Catholic teachings regarding the proper ordering of human sexuality and the protection of nascent human life forbid it from providing employees with insurance coverage for contraceptives, abortion-inducing drugs, sterilizations, or related education and counseling. JA 24-25. Accordingly, Belmont Abbey's health care plan does not cover such products or services. JA 14.

Wheaton College is a Christian liberal arts college located in Wheaton, Illinois. JA 133. Wheaton also holds and follows traditional Christian beliefs about the sanctity of life. JA 135. Consequently, it is a "violation of Wheaton's religious beliefs to deliberately provide health insurance that would facilitate access to abortion-inducing drugs, abortion procedures, and related services." JA 136, 165.

Wheaton's employee health plans therefore do not cover abortions or emergency contraceptives. JA 136, 165.

### B. THE MANDATE COMPELS THE COLLEGES TO VIOLATE THEIR RELIGIOUS CONVICTIONS.

The Patient Protection and Affordable Care Act ("ACA")—the new national health care law enacted in 2010—institutes myriad changes to our nation's health care and health insurance systems. *See* Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012). At issue here is the ACA's new mandate that all "group health plan[s]" cover "preventive care and screenings" for women without cost-sharing. 42 U.S.C § 300gg–13(a)(4). In July 2010, the Departments issued an "interim final rule" implementing this provision. *See* 75 Fed. Reg. 41726 (July 19, 2010), *codified at* 45 C.F.R. § 147.130(a)(1)(iv).[1] The interim final rule was issued without a prior notice-and-comment period, because the Departments believed it was "impracticable and contrary to the public interest" to delay putting its provisions into effect. *Id*. at 41730.

The interim final rule provided that "preventive care and screenings" would be defined later by HHS. *Id.* at 41728. On August 1, 2011, HHS adopted guidelines—

[1] This reference is to the regulation issued by HHS. All such references in this brief include the companion regulations issued by the Department of Labor, 29 C.F.R. § 2590.715–2713, and the Department of Treasury, 26 C.F.R. § 54.9815–2713T.

again without a prior notice-and-comment period—defining preventive services to include "[a]ll [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[2]

FDA-approved contraceptives include the drugs *levonorgestrel* (commonly known as Plan B or the "morning-after pill") and *ulipristal acetate* (commonly known as Ella or the "week-after pill"), both of which can prevent implantation of a fertilized egg in the womb, thereby inducing an early-term abortion.[3] Under the ACA, current federal law affirmatively requires the Colleges to provide insurance coverage for these products and services. 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv). Failure to include this coverage triggers an assessment of $100 per employee per day, 26 U.S.C. § 4980D(b). Moreover, plan participants and beneficiaries may sue under ERISA for a plan's failure to cover the mandated products or services. 29 U.S.C. §§ 1185d(a)(1), 1132(a)(1)(B). Dropping employee health coverage altogether would still subject the plan provider to an annual penalty of $2,000 per employee. 26 U.S.C. § 4980H(a), (c)(1).

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[2] 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 Oct. 4, 2012) (Add. 82).

[3] *See* FDA Birth Control Guide (Oct. 19, 2011), http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm282014.pdf (last visited Oct. 4, 2012) (describing action of various FDA-approved contraceptives, including the emergency contraceptives Plan B and Ella).

Under the ACA, health plans were granted one year from the time the mandate was adopted until it takes effect against them. 42 U.S.C. § 300gg-13(b) (establishing "minimal interval" of "not less than 1 year"). This was in recognition of the fact that the "requirements in these interim final regulations require significant lead time in order to implement." 75 Fed. Reg. at 41730. Because the mandate was adopted by the Departments on August 1, 2011, 76 Fed. Reg. 46621, it begins controlling the Colleges' policies at the beginning of their first plan years after August 1, 2012. Both Colleges' plan years run from January 1 of each year. JA 40, 137. The mandate therefore governs the insurance coverage in the Colleges' plans that will go into effect on January 1, 2013, and for which open enrollment must begin soon. JA 174. As of January 1, the Colleges will be in violation of federal law unless they compromise their religious convictions.

### C. THE MANDATE'S "RELIGIOUS EMPLOYER" EXEMPTION PROTECTS FAVORED RELIGIOUS OBJECTORS, BUT NOT THE COLLEGES.

On August 1, 2011, the same day the contraceptive mandate was adopted, the Departments promulgated a narrow exemption for "religious employers," defined as organizations meeting all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization;

(2) The organization primarily employs persons who share the religious tenets of the organization;

(3) The organization serves primarily persons who share the religious tenets of the organization; and

> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) and (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46621, 46626 (Aug. 3, 2011), codified at 45 C.F.R. § 147.130(a)(1)(iv)(B). The narrowness of this exemption—protecting only internally-focused churches and religious orders—provoked significant public outcry.[4] Nonetheless, in January 2012, the Departments announced publicly that the exemption would not be altered.[5] One month later, on February 15, 2012, they finalized the mandate and "religious employer" exemption "without change." 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012). Neither Belmont Abbey nor Wheaton qualifies for the exemption. JA 67, 248-49. Thus, favored religious objectors are fully exempt from the mandate, while disfavored objectors like the Colleges are not.

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[4] Hundreds of thousands of comments were filed in response to the mandate and exemption. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (noting that the Departments "received considerable feedback regarding which preventive services for women should be covered without cost sharing"); 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (noting that the Departments "received over 200,000 responses" to the request for comments on the religious employer exemption).

[5] *See* News Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Oct. 4, 2012).

### D. THE SAFE HARBOR DOES NOT PROTECT THE COLLEGES.

In the face of mounting public pressure, on February 10, 2012, HHS issued a guidance document creating a "Temporary Enforcement Safe Harbor."[6] The document advised that the Departments would not enforce the mandate for one additional year against certain non-exempt, non-profit organizations religiously opposed to covering contraception. Add. 69-74. Under this Safe Harbor, *government* enforcement would not commence until the first plan year beginning after August 1, 2013 (as opposed to August 1, 2012 under the original rule). *Id*. The Departments, however, have conceded that the mandate will still be in effect during the Safe Harbor period. Add. 76; JA 192, 225-26. The ACA continues to require that all group health plans provide women with free "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), which the Departments have now defined. Thus, the Colleges will be in violation of federal law for refusing to comply with the mandate after January 1, 2013. Moreover, the mandate can still be enforced against them via lawsuits by their plan participants and beneficiaries. JA 86-87, 192, 225-26, 254.

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[6] *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 Oct. 4, 2012) (Add. 69).

### E. THE PROMISE OF FUTURE RULEMAKING DOES NOT PROTECT THE COLLEGES.

Not long after the Safe Harbor was announced, the White House suggested a possible future "accommodation," where insurers of objecting, non-exempt religious organizations would "be required to directly offer [participants] contraceptive care free of charge."[7] The Departments indicated they "plan to develop and propose changes to [their] final regulations" to this effect before August 2013. 77 Fed. Reg. at 8727. Shortly after, they issued an Advance Notice of Proposed Rulemaking (ANPRM) seeking comments on how to structure a possible "accommodation." 77 Fed. Reg. 16501 (Mar. 21, 2012).

The ANPRM itself, however, is simply an exercise in public brainstorming, speculating about various proposals, hypotheticals, and "possible approaches." *Id.* at 16507. It solicits "questions and ideas to help shape the[] discussions," but directly rejects the possibility of simply expanding the exemption for religious employers. *Id.* at 16503. The comment period for the ANPRM's proposals ended on June 19, 2012, *id.* at 16501, but—as of the date of this brief—the government has not announced any proposed accommodation. Thus, the ANPRM provides

[7] White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions (last visited Oct. 5, 2012).

nothing more than the suggestion of possible relief from the mandate, in some unspecified way, sometime in the future.

### F. THE COLLEGES' SINCERE RELIGIOUS BELIEFS ARE BURDENED BY THE MANDATE NOW.

Both Colleges are substantially burdened by the mandate now, notwithstanding the Safe Harbor and ANPRM.

Belmont Abbey offers private health insurance coverage to its approximately 200 employees. JA 14. Wheaton offers a combination of private and self-funded health insurance coverage for its approximately 700 full-time employees. JA 136. Once the mandate takes effect on January 1, 2013, both Colleges will be in violation of federal law and subject to private enforcement suits by their plan participants and beneficiaries. *See* 42 U.S.C. § 300gg-13(a)(4); 29 U.S.C. §§ 1185d(a)(1), 1132(a)(1)(B); JA 86-87, 192, 225-26, 254. By January 1, 2014, they will be subject to fines of at least $20,000 per day ($100 per day, per employee) for Belmont Abbey and $70,900 per day ($100 per day, per employee) for Wheaton if they refuse to comply with the mandate. 26 U.S.C. § 4980D. And if they simply drop their insurance plans to honor their consciences, they will still be fined approximately $300,000 per year (Belmont Abbey) and $1.35 million per year (Wheaton). 26 U.S.C. § 4980H.

Furthermore, regardless of the Safe Harbor, the Colleges are now experiencing government pressure to violate their religious convictions, and suffering present

harm as a result. JA 19-20, 142-43. Like any educational institution, they must plan well in advance for their upcoming budget and hiring needs. JA 121; JA 272-73. For instance, Belmont Abbey must begin budgeting in November of this year for its next fiscal year, which runs from June 1, 2013, to May 31, 2014. JA 121. Wheaton's next fiscal year similarly runs from July 1, 2013, to June 30, 2014, meaning it also must begin its budgeting processes within the next couple of months. JA 272. For both Colleges, the Safe Harbor will cease to be in effect during the middle of the next fiscal year. Thus, their budget analyses must account for possible fines imposed by the mandate, as well as the inevitable impact on academic programming, hiring, and tuition. JA 121-22; JA 271-273.

The Colleges are also presently recruiting faculty for the 2013-14 academic year, which requires them to define the insurance benefits that will be available for new employees. JA 122-23; JA 272-73. They must also make representations to returning faculty about their benefits packages. JA 122-23; JA 273. These efforts concerning faculty recruitment and retention—the lifeblood of any college—are going on now and will continue through the winter and spring of 2013. JA 122-23; JA272-73.

## PROCEDURAL HISTORY

Belmont Abbey sued the Departments on November 10, 2011, claiming that the mandate violated the Religious Freedom Restoration Act (RFRA), the First

Amendment, and the Administrative Procedure Act. JA 10. At that time, the mandate was scheduled to go into effect against Belmont Abbey on January 1, 2013. JA 14, 21. The Departments subsequently announced the one-year Safe Harbor and their intention to initiate and complete future rulemaking by August 1, 2013. JA 68-69. They then moved to dismiss for lack of standing and ripeness. JA 70. Belmont Abbey filed an amended complaint to account for the Safe Harbor and other intervening developments, and the Departments again moved to dismiss. *Id*. On July 18, 2012, without having heard oral argument, the district court dismissed Belmont Abbey's lawsuit without prejudice for lack of standing and ripeness. JA 64-87. Belmont Abbey moved for reconsideration, which the district court denied on September 5, 2012. JA 113. Belmont Abbey then appealed. JA 114.

Wheaton sued the government on July 18, 2012, claiming that the mandate violated RFRA, the First Amendment, and the APA. JA 132. It sought preliminary injunctive relief on August 1, 2012. JA 126, 132. At the time, Wheaton did not qualify for the Safe Harbor, because it had previously covered certain emergency contraceptives by error in its health plan and was able to exclude those drugs only after the February 10, 2012, the Safe Harbor's cut-off date. JA 147-48; 165-68. The government responded to Wheaton's lawsuit by changing the terms of the Safe Harbor to include Wheaton, *see* JA 192, 250, n.4, and simultaneously moved to dismiss for lack of standing and ripeness. JA 246. At the same time, the

Departments confirmed that—despite the temporary Safe Harbor against government enforcement—the mandate would still be in effect, exposing Wheaton to private lawsuits by plan participants and beneficiaries during that time. JA 192, 225-26, 254. The district court heard the motion to dismiss on an expedited basis and, following oral argument on August 24, 2012, dismissed without prejudice for lack of standing and ripeness. JA 263-64. Wheaton appealed. JA 265.

This Court subsequently granted each College's motion for expedited consideration and consolidated the cases *sua sponte*.

## SUMMARY OF ARGUMENT

I. The courts below dismissed the Colleges' cases in error because they applied the wrong test: the Departments' post-complaint conduct—issuing a temporary and partial "Safe Harbor" and promising some future accommodation—raises a question of mootness, not standing or ripeness. By confusing these issues, the district courts "placed the burden of proof on the wrong party" and conflated issues that should have been analyzed separately.

II. When disentangled from mootness, the requirements of standing are clearly satisfied. At the time their lawsuits were filed—which is the proper time for measuring standing—the Colleges were only months away from the mandate's crippling fines. And even with the Safe Harbor, the mandate is still in effect and injuring the Colleges today.

III. The Safe Harbor and vague promises of future accommodation have not mooted the Colleges' complaints. These feeble and nonbinding assurances simply cannot satisfy the Departments' stringent burden" under mootness of showing that it is "absolutely clear" that the mandate's burden on the Colleges' religious liberty "could not possibly be expected to recur."

IV. Finally, the Colleges' claims are ripe. Their complaints challenge a final regulation that has the force of law *today* and requires them to give up their convictions or face legal consequences now. The Safe Harbor and promised future accommodation do not render the final mandate tentative and therefore do not render the Colleges' cases unripe.

## STANDARD OF REVIEW

The district courts' dismissals for lack of standing and ripeness are reviewed *de novo*. *LaRoque* v. *Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011); *Nat'l Ass'n of Homebuilders* v. *U.S. Army Corps of Eng'rs*, 440 F.3d 459, 461 (D.C. Cir. 2006). The district courts' determinations regarding mootness are also reviewed *de novo*. *Fund for Animals, Inc.* v. *Hogan*, 428 F.3d 1059, 1063 (D.C. Cir. 2005).

## ARGUMENT

### I. THE SAFE HARBOR AND PROPOSED FUTURE RULEMAKING RAISE QUESTIONS OF MOOTNESS, NOT STANDING OR RIPENESS.

Both lower courts confused a mootness issue with one of standing and ripeness, and therefore "placed the burden of proof on the wrong party." *Adarand*

*Constructors, Inc.* v. *Slater*, 528 U.S. 216, 221 (2000); *see also* JA 64-87, (addressing the Colleges' claims only for standing and ripeness); JA 253 n.6 (declining to apply mootness standard). Consequently, the Departments never had to "bear[] the formidable burden of showing that it is absolutely clear [their] allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs.*, 528 U.S. 167, 189-90 (2000). This is a burden they cannot meet.

After both lawsuits were filed, the Departments reacted by instituting (and then expanding) the Safe Harbor—a temporary moratorium for non-profit organizations against government enforcement—and by soliciting via the ANPRM "questions and ideas" that might lead to a suitable future accommodation. 77 Fed. Reg. 16503.

This post-complaint conduct is a temporary and incomplete attempt to voluntarily cease the challenged conduct in the face of already ripe claims. This tactic raises the issue of whether the Colleges' claims have become moot, not whether they lacked standing or ripeness. *See Advanced Mgmt. Tech*. v. *FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000) (explaining that mootness should be analyzed when it is alleged that "a justiciable controversy existed but no longer remains"); *Pickus v. U.S. Bd. of Parole*, 543 F.2d 240 (D.C. Cir. 1976) (whereas plaintiffs had an adverse interest when suit filed, "whether that interest continues to support adversary action is more properly addressed under the rubric of mootness").

Indeed, this Court has squarely recognized that, where an agency temporarily suspends enforcement of a rule and promises remedial rulemaking, the issue raised is mootness. *CSI Aviation Servs., Inc.* v. *U.S. Dep't of Transp.*, 637 F.3d 408, 414 (D.C. Cir. 2011) ("We reject DOT's mootness arguments … [because] [t]he agency's promised rulemaking has yet to occur, and [plaintiff's] exemption is merely temporary.").

The Supreme Court likewise has taken pains to distinguish standing and mootness. *See, e.g., Friends of the Earth*, 528 U.S. at 189-90 (court of appeals "confused mootness with standing"); *Slater*, 528 U.S. at 221 (same). While both address justiciability, the two doctrines serve distinct purposes. *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing ensures adversity "when the suit was filed," whereas mootness ensures it persists "at all stages of review"); *see also Becker* v. *FEC*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) ("[Q]uestions of standing and questions of mootness are distinct, and it is important to treat them separately."). Ripeness—with distinct separation-of-powers concerns—also differs from mootness. *See Better Gov't Ass'n* v. *Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986) (lower courts "correctly perceived that the crucial question in this case was not one of mootness, but rather one of ripeness"). Crucially, while a plaintiff must prove standing and ripeness, a defendant asserting mootness bears the "formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could

not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189-90 (emphasis added).

In the lower court, Judge Huvelle rejected Wheaton's argument that the proper issue was one of mootness rather than standing.[8] She instead reasoned that the requirement that a plaintiff establish standing continues throughout the course of the litigation. JA 253 n.6. Thus, the court sought to make Wheaton prove a negative—*i.e.*, that its standing was not defeated by the Departments' post-filing tactics—rather than properly requiring the Departments to establish mootness. *Id.*

But the Supreme Court has squarely rejected that approach. *See, e.g., Friends of the Earth*, 528 U.S. at 189 (noting the "confusion" caused by describing mootness as "standing set in a time frame") (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68 n.22 (1997)). *See also Becker*, 230 F.3d at 386 n.3 (explaining that this approach "conflates questions of standing with questions of mootness" and that a plaintiff's interest "is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter") (citing cases). Rather, as the Supreme Court explained in *Friends of the Earth*, once a plaintiff proves standing "at the commencement of the

[8] Although Belmont Abbey also made this argument, *see Belmont Abbey Coll.* v. *Sebelius*, Opp. to Mot. to Dismiss at 13-16 [Dkt. 21], Judge Boasberg never directly addressed it. Rather, he simply proceeded to analyze standing and ripeness without mentioning mootness. *See* JA 72-87.

litigation," a defendant relying on subsequent events to moot the case bears "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 189 (quoting *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).[9]

Thus, the lower courts should have first considered standing as of the time the complaints were filed. Under that rubric, the Colleges easily met their burden to establish a cognizable injury-in-fact. The courts should then have shifted the burden to the Departments to establish mootness, a "formidable" showing they cannot make.

## II. THE COLLEGES HAVE STANDING.

When properly disentangled from mootness, the Colleges' standing to challenge the mandate is straightforward. The Colleges are subject to the mandate and cannot

[9] None of the cases cited by Judge Huvelle, *see* JA 253 n.6, suggest that a *plaintiff* must prove that standing survives a defendant's post-filing cessation of the challenged activity. The court in *McNair* v. *Synapse Group, Inc.* addressed standing only because of doubts about the allegations in the complaint, while "recogniz[ing] that [the issue] might sound in mootness if [plaintiffs] initially had standing to seek injunctive relief but lost it . . ." 672 F.3d 213, 227 n.17 (3d Cir. 2012), In *National Organization for Women* v. *Scheidler*, the court stated that standing is "open to review at all stages of the litigation" only in the sense that the issue may be addressed for the first time on appeal. 510 U.S. 249, 255-56 (1994); *accord Krottner* v. *Starbucks Corp.*, 628 F.3d 1139, 1141 (9th Cir. 2010); *see also Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (each element of standing "must be supported . . . as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation"). None of these cases challenges the proposition that "[s]tanding is assessed 'at the time the action commences.'" *Advanced Mgmt. Technology*, 211 F.3d at 636 (quoting *Friends of the Earth*, 528 U.S. at 189).

qualify for an exemption. Further, when they brought their respective lawsuits, they faced government enforcement on a date certain and in a time-frame well within normal standing parameters. Indeed, they still do. Both lower courts erred, however, by allowing standing to be defeated retroactively by the Departments' subsequent announcement of a future rulemaking—one which has yet to take place, may never take place, and may not sufficiently remedy the mandate if it does take place. This was reversible error, confusing the question of standing at the time the complaints were filed with whether the Departments' subsequent conduct mooted the Colleges' claims.

Standing ensures that a plaintiff "has alleged such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). To show standing, a plaintiff must prove (1) a concrete and imminent injury-in-fact, (2) caused by a defendant's challenged conduct, that (3) will likely be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Where First Amendment rights are involved, the injury requirement is "most loosely applied." *Bloedorn* v. *Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011); *see also Allen* v. *Hickel*, 424 F.2d 944, 946 (D.C. Cir. 1970) (Supreme Court has "made it particularly clear that there is a readiness to find standing conferred by non-economic values in order to consider issues concerning the Establishment Clause and the Free Exercise Clause"); 13A

Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3531.4, at 196 (3d ed. 2008) (same). Finally, "[s]tanding is assessed as of the time a suit commences." *Chamber of Commerce* v. *EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011); *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed").

Below, the only element of standing at issue was whether the Colleges sufficiently alleged an injury-in-fact. JA 72, 252. For numerous reasons, they did.

Belmont Abbey sued in November 2011—months before the Departments announced the Safe Harbor and possible future rulemaking. JA 8; Add. 55; 77 Fed. Reg. 16501 (Mar. 21, 2012). At that point, it was subject to the mandate, could not qualify for the religious employer exemption, and faced enforcement within thirteen months, beginning January 1, 2013. JA 14-21. It alleged numerous present and imminent injuries, including pressure to abandon its religious convictions, the threat of substantial fines, and significant burdens on its ability to recruit and retain employees. JA 19-21, 23; *see also* JA 14 (noting past EEOC complaints and investigations stemming from employee disagreement with Belmont Abbey's decision not to provide contraceptive coverage).

When Wheaton sued in July 2012, it was in an even worse position. It faced the same present and imminent harms to its faith, its integrity, and its finances, but with the crippling financial penalties only five months distant. JA 143, 147-48.

Both Colleges alleged these injuries in their complaints, JA 19-21, 23, 143, 147-48, and have since fleshed them out in affidavits, JA 89-105, 117-123, 163-186, 268-273. *See Haase* v. *Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987) (stating "[t]he plaintiff . . . can freely augment his pleadings with affidavits" to support standing at the motion to dismiss stage); *LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011). Both thus clearly presented straightforward injuries-in-fact for purposes of standing. *See Lujan*, 504 U.S. at 561-62 (where plaintiff is "himself the object of the [challenged] action," there is "ordinarily little question that the action . . . has caused him injury" sufficient to sustain standing).

The fact that the mandate would not have gone into effect for thirteen months after the filing of the complaint for Belmont Abbey or five months for Wheaton presented no obstacle to finding an injury-in-fact. Courts have allowed pre-enforcement challenges to laws that did not take effect against a plaintiff for much longer periods—for instance, for three, six or even thirteen years. *See, e.g., New York* v. *United States*, 505 U.S. 144, 153-54 (1992) (six years); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 530 (1925) (about three years); *Vill. of Bensenville* v. *FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (over thirteen years); *see also Seven-Sky* v.

*Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011) (assuming standing to address constitutionality of ACA individual mandate, which is not enforceable against individual plaintiffs until January 2014), *affirmed by Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566 (June 28, 2012). Indeed, Judge Boasberg agreed that merely postponing enforcement—even until January 2014 under the Safe Harbor—could not defeat standing. JA 77 ("The time until the rule may be enforced in this case . . . is short in comparison with other cases in which courts have found standing.").

Moreover, the Colleges also alleged a number of immediate harms based on the difficulties the approaching penalties caused for their budgetary, planning, and hiring processes. JA 19-21, 23, 89-105, 117-123, 143, 147-48, 163-186, 268-273. Because these considerations inherently require looking to the future, even the anticipation of onerous fines sufficed to establish a present injury as of the time of filing. *See Great Lakes Gas Transmission Ltd. P'ship* v. *FERC*, 984 F.2d 426, 431 (D.C. Cir. 1993) (finding injury because potential future action "affect[ed] [plaintiff's] present behavior").[10]

[10] These present harms in effect at the time of filing and alleged in the Colleges' complaints persist to this day. Thus, while they are detailed in the following section regarding mootness, *see infra* Part III.B.1-5, they are equally relevant to establishing the injury-in-fact supporting standing at the time of filing.

Thus, simply considering the facts extant at the time of the initial filings, there can be no legitimate dispute that the Colleges adequately alleged an injury-in-fact sufficient to establish standing.

## III. THE DEPARTMENTS CANNOT ESTABLISH MOOTNESS.

The Departments' efforts to moot the Colleges' claims by partially staying enforcement for one year and promising to consider potential accommodations in the future are unavailing for at least two reasons. First, temporary enforcement moratoriums and non-binding promises about future relief are—as a matter of well-established law—grossly insufficient to moot a case. Second, regardless of the temporary stay and promises about the future, the mandate continues to impose significant burdens on the Colleges here and now. For these reasons, the Departments' attempt to moot the case fails.

### A. The Safe Harbor and ANPRM are grossly inadequate to satisfy the "formidable" burden of establishing mootness.

The Departments' post-filing maneuvering in issuing (and then, with respect to Wheaton, expanding) a temporary, partial enforcement moratorium and promising some kind of future accommodation cannot moot the Colleges' claims. This Court's recent ruling in *CSI Aviation* explains why. There, the Court held that an agency's "temporary exemption" of a plaintiff from enforcement of a rule—accompanied by the agency's assurance that it "plans to hold a rulemaking . . . [that] will most likely change the legal landscape"—did not moot a controversy

that was live at the time of filing. 637 F.3d at 414. Similarly, in *Friends of the Earth*, the Supreme Court explained that—where a plaintiff had standing to challenge a police practice—a subsequent "citywide moratorium" on that practice "would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent." 528 U.S. at 190 (discussing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983)). Similarly here, the temporary stay and promise of future accommodation in the Departments' Safe Harbor and ANPRM cannot moot the Colleges' claims.

To be sure, the Departments could moot these cases if they wanted to. They could, for instance, permanently rescind the mandate or definitively expand the religious employer exemption to include the Colleges. *See, e.g.*, *White* v. *Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (holding that, in contrast to an agency's "temporary policy" addressing plaintiff's First Amendment concerns, a "permanent change" in policy that was "broad in scope and unequivocal in tone" met the agency's "heavy burden of proving that the challenged conduct cannot reasonably be expected to recur").

But the Departments have done nothing like that. Instead, they have merely issued an "Advance Notice of Proposed Rulemaking"—i.e., a preliminary notice of a potential rulemaking that may or may not be pursued sometime in the future. That tentative and feeble gesture cannot satisfy the Departments' "heavy" burden

of "demonstrating 'that there is no reasonable expectation that the wrong will be repeated.'" *Am. Bar Ass'n* v. *FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Indeed, not even a full-fledged "Notice of Proposed Rulemaking" would meet that burden, because "[t]he protracted nature of agency proceedings and the uncertainty as to whether and when the proposed regulation may be adopted preclude a finding of mootness." *Vanscoter* v. *Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990) (citing *Group Against Smog & Pollution* v. *EPA*, 665 F.2d 1284, 1291 (D.C. Cir. 1981)). But the ANPRM is not even a proposed rulemaking, as the Departments have not reached the point where their vague regulatory musings have even begun to crystallize. Mootness is simply out of the question.

### B. Despite the Safe Harbor and ANPRM, the mandate is still inflicting actual harm on the Colleges now.

Even if the Safe Harbor and ANPRM were somehow deemed final and binding, the Departments still could not establish mootness because the mandate continues to inflict harm here and now on the Colleges' ability to plan, budget, and hire for the 2013-14 school year. Whatever emerges from the proposed rulemaking (assuming anything does), it will be too late to spare the Colleges the harms they are suffering now. The numerous injuries-in-fact established at the time of filing are still in effect, thus precluding any finding of mootness. And for the same reasons, these current harms would also establish standing if standing were

required to be re-established as of the present (which it is not). *See Lac Du Flambeau Band* v. *Norton*, 422 F.3d 490, 498 (7th Cir. 2005) ("[T]he present impact of a future though uncertain harm may establish injury in fact for standing purposes."); *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (finding standing for pre-enforcement First Amendment challenge where "the law is aimed directly at plaintiffs, who … will have to take significant and costly compliance measures or risk criminal prosecution"); *see also Chamber of Commerce*, 642 F.3d at 199 (explaining that a case becomes moot if, after filing, "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future").

***1. The mandate is inflicting present harms on the Colleges' ability to budget and plan for the future.***

First, the mandate is currently impacting the Colleges' budgeting and planning. They are already planning for fiscal years that run from June 1, 2013, to May 31, 2014, for Belmont Abbey, JA 121, and from July 1, 2013, to July 1, 2014, for Wheaton, JA 272. The Departments concede that the Safe Harbor is only temporary and provides no protection for plan years after August 1, 2013. Accordingly, the Colleges are now being forced to address the mandate's anticipated financial consequences.

Both institutions have no choice but to factor into their plans the prospect of hundreds of thousands of dollars in penalties and the pervasive impacts that would

have on institutional integrity. Wheaton has already initiated studies to gauge the impacts of those penalties on its budget, academic programs, hiring, and tuition. JA 272. Belmont Abbey is also planning now for "dramatic changes to the institution" that would be triggered by the fines, including "reductions in academic programming, changes in hiring patterns, [and] raising tuition." JA 121-22. Indeed, because of its modest endowment, Belmont Abbey must contemplate "possibly clos[ing] its doors." JA 122. The concrete steps the Colleges are now being forced to take are "present impact[s]" that establish "injury in fact for standing purposes." *Lac Du Flambeau*, 422 F.3d at 498; *see, e.g., Clinton* v. *City of N.Y.*, 524 U.S. 417, 431 (1998) (finding injury-in-fact for standing purposes based on even "contingent liability" that presently affects "borrowing power, financial strength, and fiscal planning"); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 536 (6th Cir. 2011) (finding actual injury because the future "requirement to buy medical insurance on the private market has changed [plaintiffs'] present spending and saving habits"). Because these harms are still in effect, they preclude any finding of mootness.

***2. The mandate is forcing the Colleges to plan now for changes to their insurance for years outside the Safe Harbor.***

Second, the Colleges must carefully plan how they will structure their insurance to respond to the mandate for plan years that fall outside the temporary Safe Harbor. This injury is "immediate because [Appellants] need[] to plan the substance" of their benefits packages now or in the near future. *See Va. Soc'y for*

*Human Life* v. *FEC*, 263 F.3d 379, 389 (4th Cir. 2001). Managing the complexities of a health plan requires significant advance planning, analysis, and negotiations. *See, e.g.*, *Newland* v. *Sebelius*, No. 12-cv-1123, 2012 WL 3069154, at *4 (D. Colo. July 27, 2012) (noting the "extensive planning involved in preparing and providing [an] employee health insurance plan"); JA 173-75. Careful foresight is particularly necessary here, where the Colleges must consider the sobering possibility of discontinuing employee health insurance altogether. JA 20, 118-123, 143, 173-75, 270-74. Postponing this delicate decision-making process is not an option, because it would undermine the Colleges' ability to recruit and retain employees even further than it has already, with disastrous effects on their institutional integrity and mission. JA 20, 122-23, 143, 171, 270-74.

The Departments cannot credibly deny the necessity of advance planning in the health insurance context. In discarding the prior notice-and-comment period when first enacting the mandate, the Departments conceded that the mandate's provisions "require *significant lead time* in order to implement." 75 Fed. Reg. at 41730 (emphasis added). They acknowledged that health plans subject to the mandate "take the[] changes into account in establishing their premiums, and in making other changes to the designs of plan or policy benefits, and these premiums and plan or policy changes would have to receive necessary approvals in advance of the plan or policy year in question." *Id.* It is for these reasons that the ACA

required the Departments to give health plans a full year from when the mandate was adopted in August 2011 before it would go into effect in August 2012. 42 U.S.C. § 300gg-13(b); *see also* 75 Fed. Reg. at 41760. In light of this candid concession of the need to plan *at least a year in advance* for a new plan year, it is no surprise that the Colleges are *now* experiencing the mandate's effects on their insurance planning, regardless of the Safe Harbor. This ongoing injury not only establishes an injury-in-fact for standing, *see 520 S. Mich. Ave. Assocs., Ltd.* v. *Devine*, 433 F.3d 961, 963 (7th Cir. 2006) (explaining that the "[c]osts that [Plaintiffs] would incur in preparing to comply (or the legal risks they would incur in not doing so) suppl[y] standing"), it also precludes a finding of mootness.

***3. The mandate is now harming the Colleges' ability to recruit and retain employees.***

Third, the mandate currently puts the Colleges at a competitive disadvantage in recruiting, hiring, and retaining faculty members and other employees. JA 20, 143. Both schools are currently recruiting and interviewing faculty candidates for the 2013-2014 academic year. JA 122, 272-73. Not being able to inform potential hires about expected health benefits hamstrings the Colleges' efforts. *Id*. The mandate sows the same uncertainty into the Colleges' relationships with returning faculty: in letters scheduled to go out this fall, it is unclear what the Colleges are supposed to say about the status of 2013-2014 faculty benefits. *Id*.

Indeed, current employees at both institutions have expressed deep concerns about the possibility of losing health insurance, about the possible reduction in academic programming, and about increased costs passed on to them as a result of anticipated fines. JA 122-23, 273. These uncertainties in and of themselves are cognizable harms. *See, e.g.*, *Idaho Power Co.* v. *FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002) ("[A]n agency ruling that replaces a certain outcome with one that contains uncertainty causes an injury that is felt immediately and confers standing.").

Again, each of these current impacts on recruiting, hiring, and retaining employees constitutes an injury-in-fact for purposes of standing. *See, e.g.*, *Pierce*, 268 U.S. at 536 (finding challenge to law banning private schools justiciable nearly three years before effective date due to its impact on schools' recruiting); *Fin. Planning Assn.* v. *SEC*, 482 F.3d 481, 486 (D.C. Cir. 2007) ("The court has repeatedly recognized that parties suffer constitutional injury in fact when agencies . . . allow increased competition against them.") (internal citation omitted); *Great Lakes Gas Transmission Ltd. P'ship* v. *FERC*, 984 F.2d 426, 430 (D.C. Cir. 1993) (finding actual injury where a potential future action impacted an entity's "competitive posture within the industry"). It follows that the continuation of these harms also forecloses any finding of mootness (or that the Colleges lack standing).

### *4. The mandate exposes the Colleges to the threat of private lawsuits during the Safe Harbor period.*

Fourth, the mandate exposes the Colleges to the threat of private lawsuits during the Safe Harbor period. By incorporation into ERISA, the Affordable Care Act authorizes plan participants and beneficiaries to sue the Colleges for failure to cover the mandated drugs and services. 29 U.S.C. §§ 1185d(a)(1), 1132(a)(1)(B). The Departments have conceded that this threat of private lawsuits remains live during the Safe Harbor period. JA 192, 225-26; *see also* JA 86-87, 254. Government-created exposure to private lawsuits—especially where that threat chills First Amendment rights—is *alone* sufficient to create Article III standing. *See Chamber of Commerce* v. *FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995).

Both courts below dismissed the threat of private suits as too "speculative" to support standing. JA 77, 254. As previously noted, *see supra* Part I, the proper question was whether the Departments could meet the "heavy" and "formidable" burden of mootness in light of the possibility of such suits. But in either context, the district courts' rulings were erroneous.

First, the rulings directly conflict with this Court's decision in *Chamber of Commerce*. There, plaintiffs challenged FEC regulations restricting their ability to communicate political messages. 69 F.3d at 601. In an administrative action that preceded the filing in court, the Commission split three-three over whether to grant the plaintiffs relief. Because of that split, the plaintiffs were "not faced with any

present danger of an enforcement proceeding" when their complaint was filed. Nevertheless, this Court found that the plaintiffs had standing because a *private* enforcement mechanism made them "subject to litigation challenging the legality of their actions." *Id.* at 603. Moreover, the rule "infringe[d] on [the plaintiffs'] First Amendment rights." *Id.*[11] The Court thus deemed lack of *government* enforcement to be a "rather weak and easily reject[ed]" argument against standing. *Id*. at 604.

*Chamber of Commerce* controls here. Although the government has said it will not enforce the mandate for the first year it applies, nothing prevents it from changing its mind at any time. *See id.* at 603 (reasoning that "[n]othing . . . prevents the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners"). Since the threat of private suits would give rise to standing, it likewise prevents the Departments from showing that the Colleges' claims are moot.[12]

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[11] The Court further observed that, since pre-enforcement standing is proper to challenge even "a *statute* if First Amendment rights are arguably chilled," a challenge to an *agency rule*—which, "unlike a statute, is typically reviewable without waiting for enforcement"—is "*a fortiori* to the statutory cases." *Id*. at 603-04 (internal citation omitted).

[12] Judge Huvelle's attempts to distinguish *Chamber of Commerce* as "premised on [the court's] belief that a government enforcement action, even if not imminent, was nonetheless likely," JA 256 is, quite simply, a misstatement of that case's holding. The decision instead held that, regardless of whether an enforcement action was likely, the plaintiffs had standing precisely because the statute "permits a private party to challenge the FEC's decision *not* to enforce." 69 F.3d 600, 603. So too, here, the Colleges have standing because the mandate is enforceable by

### *5. The mandate creates present burdens on the Colleges' First Amendment rights.*

The present harms described above are sufficient in and of themselves to create Article III standing. Because they operate in the First Amendment context, however, their harmful effect is magnified. *Allen* v. *Hickel*, 424 F.2d 944, 946 (D.C. Cir. 1970) (noting "readiness to find standing conferred by non-economic values in order to consider issues concerning the Establishment Clause and the Free Exercise Clause"). The Court should therefore easily find an ongoing injury-in-fact here, because that requirement is "loosely applied" in the First Amendment context. *Bloedorn*, 631 F.3d at 1228; *see also* Wright *et al.*, *supra*, at 196.

The mandate places the Colleges in a position where critical institutional decisions—be they in budgeting, insurance, hiring, or setting and honoring the Colleges' own missions—are now being made under threat of the mandate's

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private parties regardless of the Safe Harbor. In contrast, the cases relied on by Judge Huvelle involved the heightened burden for standing that applies to parties challenging a regulation that does not directly regulate their conduct. JA 254 (quoting *Pub. Citizen, Inc.* v. *Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289-90 (D.C. Cir. 2007) ("[S]tanding is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not the object of the government action or inaction they challenge." (citation omitted)); *City of Orrville, Ohio* v. *FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998) (same). Those cases simply do not apply where, as here, the plaintiff is directly subject to the regulation at issue. *See Lujan*, 504 U.S. at 561-62 (where the plaintiff is "himself an object of the [challenged] action," there is "ordinarily little question that the action . . . has caused him injury" sufficient to sustain standing); *Zivotofsky* v. *Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006) (same). The other case Judge Huvelle relied on, *Salvation Army v. Dep't of Cmty Affairs of New Jersey*, 919 F.3d 183 (3d Cir. 1990), is from another Circuit and directly conflicts with *Chamber of Commerce*.

penalties for adhering to their faith. This, in and of itself, is a substantial burden on their religious liberty. *See, e.g.*, *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (explaining "[a] substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs'") (quoting *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981)). Indeed, the uncertainty inherent in the Safe Harbor's partial stay of enforcement and the ANPRM's tentative promise of future accommodation serves only to exacerbate the mandate's "present injurious effect." *See CSI Aviation*, 637 F.3d at 414 (noting that a temporary enforcement moratorium, coupled with promises of future changes to the law, "amplifie[s]" a plaintiff's present injury).[13] Under either standing or mootness, this ongoing harm establishes justiciability.

In sum, the Safe Harbor and ANPRM—unlike the mandate and religious employer exemption—do not constitute a final rule and thus lack the force of law.

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[13] While recognizing that standing would be created by a chill on First Amendment rights, Judge Huvelle believed that any chill here is only "subjective" because Wheaton has "indicated . . . that it will not compromise its beliefs" during the Safe Harbor period. JA 257-58. But on this reasoning, Wheaton *would* have standing the moment it caves to the pressure and covers the mandated drugs. That cannot be the law: a plaintiff does not forfeit standing simply because it has a stiff spine. Moreover, Judge Huvelle argued that the purported "subjective chill" was no substitute for "a claim of specific present objective harm or a threat of specific future harm." *Id.* (quoting *Laird* v. *Tatum*, 408 U.S. 1, 14 (1972)). But Wheaton has already demonstrated both—present harms to its planning, budgeting, and hiring, and imminent harms in the form of the mandate's steep penalties. These harms—particularly against the backdrop of Appellants' chilled First Amendment rights—easily establish injury-in-fact.

They are no different from a general promise not to enforce a particular statute against a particular plaintiff. And it is black letter law that such unilateral promises do not eliminate standing. *See, e.g.*, *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("Nothing, however, prevents the Commission from enforcing its rule at any time with . . . another change of mind."). Moreover, despite the Safe Harbor and ANPRM, the mandate continues to impose crippling burdens on the Colleges. Thus, it is impossible for the Departments to meet the "formidable" burden of showing it is "absolutely clear" that the Safe Harbor and ANPRM will prevent the mandate's harms from continuing to occur. *Friends of the Earth*, 528 U.S. at 189-90. They are still occurring now, confirming that the case is not moot and that the Colleges continue to have standing.

## IV. THE COLLEGES' CLAIMS ARE RIPE.

For many of the same reasons, the Colleges' claims are also ripe. Each complaint pleads concrete legal challenges to a final rule issued by the Departments, published in the Code of Federal Regulations, and currently applicable to the Colleges' conduct. This final rule is fit for review and imposes a host of injuries on the Colleges now. Accordingly, the courts below were wrong to dismiss the cases against the existing and currently operative final rule merely because of the Departments' non-binding and unspecific promise to possibly supplement that rule in the future. Delayed review has imposed, and continues to

impose, substantial burdens on the Colleges' operations and on their First Amendment freedoms. JA 14, 19-21, 23, 89-105, 117-123, 143, 147-48, 163-86, 268-73.

### A. Ripeness Standards

Ripeness "reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (citation omitted). As this Court has explained, the *constitutional* ripeness inquiry is subsumed within the standing analysis discussed above. *See Nat'l Treasury Employees Union* v. *United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996) ("[I]f a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied."). Indeed, here neither the government nor the lower courts raised any constitutional ripeness issue distinct from the standing analysis. Accordingly, constitutional ripeness exists here for the same reasons explained above concerning standing.

*Prudential* ripeness requires courts to consider (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of" delaying a decision. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967). The test "entails a functional, not a formal, inquiry," *Pfizer, Inc.* v. *Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999),

one that "depends on a pragmatic balancing of th[e] two variables and the underlying interests . . . they represent." *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

In the regulatory context, the fitness analysis "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also …. [to] protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs.*, 387 U.S. at 148-49). Withholding judicial review until the agency has formalized its decision protects "the agency's interest in crystallizing its policy before that policy is subjected to judicial review." *Am. Petroleum Inst.* v. *EPA*, 683 F.3d 382, 387 (2012) (citations omitted). Delaying judicial review until the agency formalizes its decision also serves "the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Id.*

This deference to not-yet-formalized agency decisions is not without limit. Rather, "[o]nce the agency publicly articulates an unequivocal position, . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d at 436.

If the fitness prong is satisfied, the ripeness analysis is complete because 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. 2006) (citations omitted). But if there are doubts about fitness, a showing of hardship can "outweigh[] the competing institutional interests in deferring review." *Eagle-Picher Indus.* v. *EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985). As with standing, a lower threshold of harm applies when First Amendment rights are at issue, as courts recognize the "special need to protect against any inhibiting chill" of those rights. 13B Wright et al., *supra*, §3532.3, at 515; *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 380 (D.C. Cir 1980).

Courts conducting ripeness analysis do so using a "'practical common sense' approach" in which the ripeness inquiry "does not turn on nice legal distinctions." *Ciba-Geigy*, 801 F.2d at 434. Indeed, within this "pragmatic balancing" of factors, courts are to be "guided by [a] presumption of reviewability." *Id.*

### B. The Colleges' claims are fit for review because they challenge a final rule that requires them to change their behavior now.

The courts below erred in dismissing the Colleges' claims as unripe. As the Departments concede, the final rule took effect generally on August 1, 2012, and will take effect specifically against the Colleges on January 1, 2013. In dismissing Wheaton's challenge as unripe, Judge Huvelle improperly treated the binding final

rule as "tentative," and the non-binding and twice-changed[14] "temporary" safe harbor as "a final decision."[15] JA 256. The court likewise treated the ANPRM's open-ended public brainstorming session as sufficiently final. Judge Boasberg made the same error. He found that non-binding statements in the federal register about the safe harbor and speculation about possible future changes to the rule "created external accountability" for the government. But he treated the binding final rule that was published in the Code of Federal Regulations and is currently in effect as not binding enough to be ripe for challenge.

Both courts were wrong. Binding final rules published in the Code of Federal Regulations are final agency action, ripe for review. Non-binding government promises of forbearance or about someday possibly changing the rules do not render them unripe.

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[14] The temporary safe harbor was originally announced with one set of conditions on January 20, 2012. *See* Statement by U.S. Dep't of Health and Human Services Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/2012.html (last visited October 4, 2012). The safe harbor was subsequently issued with a different set of requirements in February 2012. Add. 69-74. The safe harbor was subsequently revised yet again in August 2012, in direct response to Wheaton's lawsuit. Add 75-81; JA 250 ("Defendants issued the August 2012 Guidance in response to this lawsuit.").

[15] Notably, Judge Huvelle treated the unilaterally issued "temporary" safe harbor as "a final decision" because it "was the product of sustained agency and public deliberation." JA 256. Whatever support may exist for this characterization (none is cited), it is clear that the mandate, which the court deemed "tentative," was also "the product of sustained agency and public deliberation," given its publication as a final rule "without change" in the Code of Federal Regulations following a public notice-and-comment period.

### *1. The Colleges' claims are legal challenges to the final rule.*

The fitness inquiry 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." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 783 F.2d 237, 250 (D.C. Cir. 1986). 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.

The Colleges' challenges to the mandate raise primarily questions of law. For instance, the Colleges' Free Exercise and Establishment Clause claims present legal challenges to the various exemption schemes in the regulations.[16] *See Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 304, 372 (D.C. Cir. 2006) ("[T]he Establishment Clause is implicated as soon as the government engages in impermissible action."). Their APA and RFRA claims likewise present questions of law. *Eagle-Picher Indus.*, 759 F.2d at 916 (review under APA is "a

[16] *See, e.g.*, JA 25-26, 150-52 (alleging under Free Exercise Clause that the regulations are non-neutral because they exempt favored religious objectors and not generally applicable because they create a system of individualized exemptions; alleging under Establishment Clause that the regulations improperly some religious organizations over others).

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."). The Departments themselves agree. *Belmont Abbey Coll.* v. *Sebelius*, Mot. to Dismiss at 18 [Dkt. 15-1] (noting that plaintiff's complaint "raises largely legal claims"). The Colleges' claims are therefore presumptively ripe. *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").

***2. Notwithstanding the ANPRM, the mandate is a final rule requiring compliance now.***

The Colleges' legal challenges are not brought against some "abstract" policy that has not yet "crystallized." Rather, they are brought against the mandate, which is a final rule, published at 45 C.F.R. § 147.130, and demands compliance now.

Final rules published in the Code of Federal Regulations are the prototypical example of final action fit for review, because "promulgat[ion] in a formal manner after announcement in the Federal Register and consideration of comments by interested parties" shows that the action is not simply "informal" or "tentative." *Abbott Labs.*, 387 U.S. at 151; *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) ("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations.").

In dismissing the Colleges' claims as unripe, both district courts recognized that the mandate is, in fact, a final rule. JA 249 ("final rules"), 68 (noting that Defendants "issued their final rule"). Nevertheless, these courts found the Departments' issuance of the ANPRM rendered the mandate "tentative" and therefore unfit for review. JA 81, 260. This conclusion is wrong for several reasons, not least because it again confuses ripeness for mootness, the heavy burden for which—as set forth in the preceding sections—has not been, and cannot be, met by the Departments. *See Better Gov't Ass'n* v. *Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986) (distinguishing ripeness from mootness). Moreover, the ANPRM is not being challenged by the Colleges. They only challenge the current mandate and the injuries it presently imposes. The mandate unquestionably is a final regulation that is adversely affecting the Colleges now. Speculation about future remedies does nothing to change those basic facts.

*a. The mandate is a final rule governing the Colleges' conduct now.*

Courts may find cases unripe where they involve "abstract disagreements over administrative policies" before "an administrative decision has been formalized and its effects felt in a concrete way." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807-08. Withholding review in those circumstances "protect[s] the agency's interest in crystallizing its policy before that policy is subjected to judicial review." *Am. Petroleum Inst.*, 683 F.3d at 387.

Here, however, the Colleges simply are not challenging some "abstract" policy that has not been "formalized" or "crystallized." Instead, they challenge a final rule that all parties agree is in effect and imposes concrete requirements on the Colleges now. Indeed, when describing the final rule in the August 15, 2012 revised Safe Harbor Guidance Document, the Departments explained that the rule remains in effect *and requires compliance*:

> For all non-exempted, non-grandfathered plans and policies, the regulations *require* coverage of the recommended women's preventive services, including the recommended contraceptive services, without cost sharing, for plan years . . . *beginning on or after August 1, 2012*.

JA 194 (emphasis added). Thus, despite the temporary Safe Harbor against government enforcement, the Departments have been quite clear that the mandate still applies to the Colleges and requires coverage now. *See also* JA 192 (noting Departments' unwillingness to agree, during preliminary injunction negotiations, to make the final rule inapplicable to Plaintiffs during this litigation); JA 224-30 (transcript of hearing on motion to dismiss *Wheaton* case, in which Departments discuss possible sanctions against Wheaton for failure to comply with the mandate during the temporary enforcement safe harbor).

As set forth above, the present applicability of the rule imposes numerous burdens on the Colleges. *See supra* Part III.B.1-5. Having deliberately imposed these burdens on the Colleges with a currently-operative final rule, the

Departments have forfeited any claim that possible future changes render the currently applicable rule "tentative" or "abstract." It is one thing for courts to defer review while an agency is still engaged in its decision-making process and has not yet begun to control the behavior (or, here, restrict the First Amendment freedoms) of others. But once the agency takes the step of *making law* by issuing an effective rule that legally binds people, that rule is necessarily fit for review, no matter how much the government promises to keep thinking about it. As this Court has explained, "[o]nce the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d at 436.

*b. Speculating about possible future rules does not make the currently applicable final rule unfit for review.*

Agency action, once final, does not become unripe merely because it is subject to change. "[T]he mere contingency that [an agency] might revise the regulations at some future time does not render premature [a] challenge to the existing requirements." *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965). For this reason, this Court has explained that the fact "that a law may be altered in the future *has nothing to do with whether it is subject to judicial review at the moment*." *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (emphasis supplied). Thus, an agency's claim that it plans to "again address

th[e] issues" that it has already addressed "cannot transform long-final orders into conditional ones," *La. Pub. Serv. Comm'n* v. *FERC*, 522 F.3d 378, 398 (D.C. Cir. 2008), nor can the "probability" of "future revision," *Gen. Elec. Co*. v. *EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002). If that were true, final rules would never be ripe for review because "an agency *always* retains the power to revise a final rule through additional rulemaking." *Am. Petroleum Inst.*, 906 F.2d at 739-40.

For the reasons set forth above in Part III, claims that an agency will alter an existing final rule are relevant to mootness, not ripeness. This Court's decision in *CSI Aviation* perfectly illustrates the distinction. There, the plaintiff brokered air-chartered services for Federal Departments. The Department of Transportation ("DOT") issued a cease-and-desist letter, stating that plaintiff's operations violated the Federal Aviation Act. 637 F.3d at 410. When the plaintiff objected, DOT granted it a temporary exemption and promised to hold a rulemaking on the subject. *Id.* at 411, 414. Despite the safe harbor and the proposed rulemaking, this Court held that it could review the final agency action embodied in DOT's letter. *Id.* at 411-414. The only relevant question was whether the temporary exemption and planned rulemaking *mooted* the challenge, not whether they rendered it *unripe*. *Id.* Since the rulemaking had yet to occur and the exemption was temporary, "DOT's assurances provide[d] nothing more than the mere possibility" of relief, a possibility that could not moot the challenge. *Id*. Indeed, the Court emphasized that

the uncertainty of a temporary stay and tentative promise of future action "not only raises the specter of future harm to CSI, but actually harms the company now. CSI is in the business of bidding for air-travel contracts and arranging air-charter logistics, *both of which require a substantial amount of advance planning*." *Id*. at 414 (emphasis added). Thus, the "daily difficulties of running such a business" were "*amplified* by the looming threat of a legal kibosh." *Id*. (emphasis added).

The same is true here. The Departments *finalized* 45 C.F.R. § 147.130(a)(1)(iv) and "plan to develop and propose *changes* to the[] *final* regulation[]." 77 Fed. Reg. 8727 (emphases added). They have therefore "provide[d] nothing more than the mere possibility" of relief, *CSI Aviation*, 637 F.3d at 414, which can neither moot the Colleges' claims nor render challenges to the presently-operable and final mandate—which will continue in perpetuity unless and until actually revoked—unripe for judicial review.

*c.* American Petroleum *confirms dismissal was improper.*

The ripeness decisions below were also incorrect because they fundamentally misunderstood the import of this Court's recent decision in *American Petroleum Institute* v. *EPA*, 683 F.3d 382 (D.C. Cir. 2012). *American Petroleum* did not work a sea change in ripeness doctrine by authorizing courts to dismiss claims to existing rules as unripe whenever an agency begins public brainstorming about possible future changes to an existing final rule. To the contrary, *American*

*Petroleum* confirms the general rule that potential changes to the law do not render a case unripe, save in narrow factual circumstances not implicated here.

*American Petroleum* (which remains pending in this Court) concerns a 2008 final rule, wherein the EPA adopted exclusions from the definition of hazardous waste (and the regulations that apply to it). The exclusion did not apply to "spent refinery catalysts." 683 F.3d 385. When issuing the final rule, the EPA noted that it would address whether spent refinery catalysts should be exempted in a proposed rulemaking. *Id.* The petitioner (an entity that wanted an exemption for the catalysts) and the Sierra Club challenged the rule. The EPA settled with the Sierra Club, agreeing to propose a new rule to remedy the Sierra Club's concerns by June 30, 2011. *Id.* at 386. The EPA then actually proposed a rule that completely rewrote the final rule. *Id*.

In addressing the government's ripeness challenge, the Court expressly noted the general principle that an agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way." 683 F.3d at 388. It did not find that the EPA's original *agreement* or *plan* to propose a future rule rendered the case unripe. Instead, the Court found that the case's unique facts called for a narrow exception because (1) the agency had issued an *actual* proposed rule; (2) the agency's rulemaking was not subject to its own discretion but resulted from a binding

settlement agreement that required it to "take final action" by a specific date; (3) the agency's proposed rule was a "complete reversal of course," *id.* at 388-89; and (4) it was "not at all clear" that the petitioner could even take advantage of a favorable decision, due to the interaction of the rules with state regulations, *id.* at 389-90. Indeed, confirming the narrowness of the exception it was applying, the Court did *not* dismiss the case. Instead, it held the case "in abeyance pending resolution of the proposed rulemaking, subject to regular reports from [the agency] on its status." *Id.* at 389.

Here, by contrast, the Departments have not issued an actual proposed rule. Nor are they required to do so by any binding settlement; rather the entire question of when, whether, and how to change the existing final rule remains entirely within their discretion.[17] Moreover, the Departments have certainly not announced a

[17] Judge Boasberg's suggestion that the publication of the ANPRM and the "temporary enforcement safe harbor" in the Federal Register somehow bind the agency by "creating external accountability," JA 85, is incorrect. Defendants can change the Safe Harbor at any moment without notice and comment, *see Chamber of Commerce*, 69 F.3d at 603-04, and have absolutely no legal obligation to follow the ANPRM with any actual proposed rule (much less one that adequately addresses Plaintiffs' First Amendment concerns). Defendants are completely free to announce today, or next month, or any time thereafter, that they are not changing the existing final rule and/or that they are ending the Safe Harbor.

Moreover, it was inconsistent for the courts below to view the government's *non-binding* statements in the Federal Register as "creating external accountability" for the government and yet suggest that the Colleges are not burdened by *binding* and effective final rules, published in the Code of Federal Regulations, which require them to take action or face private suits. The Colleges

"complete reversal of course." To the contrary, they have finalized the rule "without change," and have simply begun publicly brainstorming about perhaps finding some future accommodation. Furthermore, unlike in *API*, here the Colleges are currently subject to the final rule which the government admits "require[s]" them to provide the coverage in their first plan year "beginning on or after August 1, 2012." JA 194; *see also* JA 192, 234-238. This is fundamentally different from the situation in *API*, where the Court doubted whether the soon-to-be-changed rule had any impact on the petitioners whatsoever. And even in *API*, the Court did *not* dismiss the case, but rather simply held it in abeyance subject to regular status reports. *API*, 683 F.3d at 389.

In short, as Judge Boasberg repeatedly recognized, the case for withholding review is weaker here than in *API*. JA 84-85. When the lower courts entered a *stronger* result (dismissal instead of a stay) based on this admittedly *weaker* case, they erred.

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can be sued for not complying with the C.F.R.; the Departments face no consequences at all if their brainstorming fails to yield a new rule, or if they change the Safe Harbor (*see supra* note 15). It makes no sense to say that the pressure on the Departments from their own non-binding statements in the Federal Register "creates external accountability" but that binding rules in the C.F.R. do not even create a cognizable Article III injury to regulated parties who must abide by them.

### C. The Colleges are suffering hardship now.

Because the Colleges' 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 the Colleges face from delay weigh decisively in favor of immediate judicial review.

Both lower courts essentially conceded that dismissal would cause the Colleges hardships, but concluded those hardships were insufficient to sustain ripeness. JA 86-87, 254, 262. These conclusions were legally and factually wrong. As a legal matter, hardship analysis considers both "the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution." *Neb. Pub. Power Dist.* v. *MidAm. Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000). As for traditional damages, courts find sufficient hardship when litigants face the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate," *Abbott Labs.*, 387 U.S. at 152—*i.e.*, "the choice between the disadvantages of complying with a[] [regulation] or risking the harms that come with noncompliance," *Metro Milwaukee Ass'n of Comm.* v. *Milwaukee Cnty.*, 325

F.3d 879, 883 (7th Cir. 2003); *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 406 (D.C. Cir. 1997).

As for uncertainty, when "decisions to be made now or in the short future may be affected" by a challenged regulation, delayed review qualifies as a "palpable and considerable hardship." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conserv'n & Devel. Comm'n*, 461 U.S. 190, 201-02 (1983) (citation omitted). As this Circuit has explained, courts "should have a very good reason" for "resolv[ing] a particular question at another time and place, . . . if in doing so they are refusing a petitioner's request to be relieved of an onerous legal uncertainty." *Cont'l Airlines* v. *CAB*, 522 F.2d 107, 128 (D.C. Cir. 1974); *see also Ciba-Geigy*, 801 F.2d at 434 (noting the "presumption of reviewability"). That is so, even if there is a "lengthy, built-in time delay before [a regulation] takes effect." *Riva* v. *Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995). This "planning" hardship exists when a party needs "adequate time to make effective . . . decisions," *Miller* v. *Brown*, 462 F.3d 312, 321 (4th Cir. 2006), or engages in "long-term transactions [as] a matter of course," *Wis. Pub. Power Inc.* v. *FERC*, 493 F.3d 239, 263 (D.C. Cir. 2007) (per curiam).

Viewed under these standards, the hardships imposed on the Colleges are sufficient for ripeness. For example, as set forth in detail above in Part III.B, delay imposes substantial harms on the Colleges' budgeting, academic planning, and

recruiting efforts. *See* JA 14, 19-21, 23, 89-105, 117-123, 143, 147-48, 163-86, 268-73.[18] These harms are real and significant. For example, several Wheaton employees have expressed fear that, if Wheaton is forced to terminate their insurance coverage, they will not be able to afford health care for themselves or their families. *Id.* Some of them may have to seek expensive medical treatments before January 1 to be assured coverage. JA 175; *see also* JA 178 (Jones) (may elect to have surgery for prostate cancer in 2012 against doctors' advice). Others face the specter of battling chronic conditions without access to affordable care. JA 174 (Ryken); 177-178 (Jones) (Parkinson's disease and prostate cancer); 180-81 (Daniels) (severe burns); JA 183 (Cotton) (pre-existing condition); JA 185-86 (Dawson) (ruptured vertebrae).

[18] Judge Boasberg suggested that the Colleges' present costs "stemming from [their] desire to prepare for contingencies" were insufficient to constitute hardship. JA 86. This was mistaken. The Colleges' planning is not directed to "contingencies" but rather to a final rule that presently constrains their behavior. None of the cases Judge Boasberg relied on involve that scenario. *See Wilmac Corp.* v. *Bowen*, 811 F.2d 809, 813 (3d Cir. 1987) (addressing a "disputed regulation [that] does not compel or penalize any current conduct by [plaintiff]"); *Tennessee Gas Pipeline Co.* v. *FERC*, 736 F.2d 747, 751 (D.C. Cir. 1984) (addressing not a final rule but an agency interpretation of its own powers under the National Gas Act that would impact plaintiff's conduct only if a series of future events occurred); *Bethlehem Steel Corp.* v. *EPA*, 536 F.2d 156, 161-62 (7th Cir. 1976) (addressing a regulation under which "petitioners [were] not required to do anything nor to refrain from doing anything" because the regulation was "merely a listing of areas for further study," and therefore "[a]ny standards for petitioners to follow [would] not be promulgated until the study is completed").

The government pressure imposed on the Colleges by the currently-effective final rule is also quite real. The lower courts dismissed the threat of private suits by beneficiaries as merely "theoretical." This, of course, is flatly inconsistent with this Court's decision in *Chamber of Commerce*, where this Court rejected identical ripeness arguments even though there was no evidence of any actual threatened lawsuit. In any event, here, past experience shows the threat is quite real. Within the past several years, for example, Belmont Abbey has been forced to defend against no fewer than eight employee-initiated EEOC complaints over its refusal to cover contraceptives. JA 14, 89-105.[19] The Departments' issuance of a final rule binding the Colleges, and punishable by private suits (without the need to proceed through the EEOC), exposes the Colleges to real and significant hardship. *See 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

[19] Judge Huvelle's belief that the Wheaton community would somehow be immune from dissent on this highly charged issue was likewise unfounded. *See http://www.ipetitions.com/petition/stop-wheatons-hhs-lawsuit/* (petition by Wheaton alumni disagreeing with the College's position on covering emergency contraceptives) (last visited October 4, 2012); *see also Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) (rejecting ripeness decision based on developments after dismissal because "it is the situation now rather than the situation at the time of the [earlier decision] that must govern").

the Commission's rule").[20] Furthermore, such First Amendment harms are subject to an even lower threshold for the hardship inquiry. *See* 13B Wright et al., *supra*, §3532.3, at 515; *see, e.g.*, *Sullivan* v. *City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007); *New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 380 (D.C. Cir 1980).

In sum, both Wheaton and Belmont Abbey have suffered, are suffering, and will continue to suffer hardship if consideration of their legal challenges to the final rule is further delayed.

## CONCLUSION

For the foregoing reasons, Appellants Belmont Abbey College and Wheaton College respectfully request an order reversing and remanding the judgments below dismissing their cases. In addition, Wheaton requests an order reversing and remanding the trial court's denial of its motion for preliminary injunction, and instructing the court to promptly decide that motion.

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[20] *See also Unity08* v. *FEC*, 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.'"); *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), *vacated on other grounds on reh'g en banc*, *Okpalobi* v. *Foster*, 244 F.3d 405 (5th Cir. 2001).

Respectfully submitted,

s/ *S. Kyle Duncan*

S. Kyle Duncan
Mark L. Rienzi
Eric S. Baxter
Eric N. Kniffin
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, DC 20007
(202) 349-7209
kduncan@becketfund.org
*Attorneys for Appellants*

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

- This brief contains 13,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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s/ *S. Kyle Duncan*

S. Kyle Duncan
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 349-7209
kduncan@becketfund.org

## CERTIFICATE OF SERVICE

I certify that on October 5, 2012, I caused the foregoing *Brief for Appellants* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

Adam C. Jed
Email: adam.c.jed@usdoj.gov

Alisa B. Klein, Attorney
Email: alisa.klein@usdoj.gov

Mark B. Stern, Attorney
Email: mark.stern@usdoj.gov

Craig Lawrence, DOJ Appellate Counsel
Email: craig.lawrence@usdoj.gov

s/ *S. Kyle Duncan*

S. Kyle Duncan
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Washington, DC 20007
(202) 349-7209
kduncan@becketfund.org