ORAL ARGUMENT SCHEDULED FOR DECEMBER 14, 2012

Nos. 12-5273 & 12-5291

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

WHEATON COLLEGE and BELMONT ABBEY COLLEGE,

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

REPLY BRIEF FOR APPELLANTS

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* The statutes, regulations, and rules relevant to this appeal may be found in the addendum filed with the Colleges' opening brief.

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GLOSSARY

ANPRM: Advance Notice of Proposed Rulemaking

EEOC: Equal Employment Opportunity Commission

ERISA: Employee Retirement Income Security Act

NPRM: Notice of Proposed Rulemaking

INTRODUCTION AND SUMMARY OF ARGUMENT

Starting on January 1, 2013, the regulatory mandate at issue in this appeal requires Appellants ("the Colleges") to offer insurance for contraceptive and abortion-causing drugs in violation of their religious convictions. That mandate is a final rule—formally promulgated by Appellees ("the Departments"), subjected to extensive public commentary, and published in the Code of Federal Regulations. It became effective on August 1, 2012, and now governs the insurance plans of the Colleges, along with millions of other employers. *See* 45 C.F.R. § 147.130; Br. 5, 7-10. Indeed, the Departments are now litigating in ten different federal courts the merits of whether the *same* final rule infringes the rights of religious business owners. Two of those courts have already preliminarily enjoined the Departments from enforcing the mandate.[1] There can simply be no question that the mandate is a final rule ripe for review which the Colleges have standing to challenge.

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[1] *See* Order, *Newland* v. *Sebelius*, No. 1:12-cv-1123, Doc. No. 30 (D. Colo. July 27, 2012); *Legatus* v. *Sebelius*, ___ F. Supp. 2d ___, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *see also Hobby Lobby* v. *Sebelius*, No. 5:12-cv-1000 (W.D. Okla.); *Tyndale House Publishers, Inc.* v. *Sebelius*, No. 1:12-cv-1635 (D.D.C.); *O'Brien* v. *U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-476 (E.D. Mo.); *Triune Health Group* v. *U.S. Dep't of Health & Human Servs*, No. 1:12-cv-6756 (N.D. Ill.); *Autocam Corp.* v. *Sebelius*, No. 1:12-cv-01096 (W.D. Mich.); *Korte & Luitjohan Contractors* v. *U.S. Dep't of Health & Human Servs*, No. 3:12-cv-01072 (S.D. Ill.); *Griesedieck* v. *U.S. Dep't of Health & Human Servs*, No. 6:12-cv-03459 (W.D. Mo.); *Grote Indus.* v. *Sebelius*, No. 4:12-cv-00134 (S.D. Ind.); *Annex Med.* v. *Sebelius*, No. 0:12-cv-02804 (D. Minn.).

Yet instead of litigating the Colleges' claims on the merits, the Departments have reacted to them with regulatory gamesmanship. After the Colleges sued, the Departments created (and then expanded) a temporary enforcement moratorium, *see* Br. 11 (discussing the "Safe Harbor"), and issued a non-binding promise to "accommodate" the Colleges in some to-be-determined way through a future rulemaking that the Departments have not even initiated. *See* Br. 12-13 (discussing the "Advance Notice of Proposed Rulemaking" (ANPRM)); *see also generally* HHS, "Guidance on the Temporary Enforcement Safe Harbor" (Aug. 15, 2012); 77 Fed. Reg. 16,501. Based on those tactics, the Departments convinced the lower courts that the Colleges lacked standing and ripeness. That was reversible error.

As the Colleges' opening brief explained, Br. 17-21, the Departments' post-filing behavior raises the issue of mootness, not standing or ripeness. It is settled law that a temporary moratorium on rule enforcement—accompanied by a promise of future remedial rulemaking—implicates mootness. *CSI Aviation Servs., Inc.* v. *U.S. Dep't of Transp.*, 637 F.3d 408, 414 (D.C. Cir. 2011). The Departments' post-complaint tactics cannot defeat the Colleges' standing because standing is assessed when the complaint is filed. Here, when the lawsuits were filed, the Colleges both faced (and still face) enforcement of the mandate on a date certain well within the normal standing parameters. Nor is ripeness a serious question because the Colleges challenge a final rule on legal grounds—a rule, moreover, which

presently governs the Colleges' conduct, and presently inflicts on them severe institutional hardships that only immediate judicial review can alleviate. The Colleges' claims are therefore "presumptively" fit for review. *Cement Kiln Recycling Coal.* v. *EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007); *see also Chamber of Commerce* v. *FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995).

Neither Defendants nor the lower courts addressed mootness, although the Colleges repeatedly argued below that mootness was the real issue. In this Court, the Departments' skeletal brief—with fewer than 2,700 words of argument—ignores mootness altogether. Instead, the Departments simply repeat that they are "in the process of amending" the mandate and that the Colleges' challenges are therefore speculative and premature. Yet this mantra ignores the fact that the mandate is a final rule that presently applies to the Colleges and presently interferes with their budgeting, planning, and hiring. And what the Departments optimistically call a "process of amending" the mandate consists, in reality, of merely announcing their intention to "accommodate" the Colleges in some unspecified way through a future rulemaking that has not begun, may never begin, and may not meaningfully change in the mandate if it goes forward at all.

The Departments' desire to re-cast mootness as a question of standing and ripeness is understandable. The mootness doctrine requires the *Departments* to "show[] that it is absolutely clear" that the harms inflicted by the mandate "could

not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs.*, 528 U.S. 167, 189-90 (2000). The Departments cannot possibly meet that burden by pointing to a *temporary* one-year delay on government (but not private) enforcement accompanied by a vague, non-binding promise to fix the mandate in the future.

This is perhaps why—instead of attempting to satisfy the mootness standards—the Departments foist on the Colleges the impossible burden of proving that the Departments will not remedy the mandate in the future. The Departments may change the mandate, or they may not. *If* they do, they can demonstrate at that future date that the change has mooted the case. But the final rule challenged here is the law right now, and it is not up to the Colleges or this Court to predict the future. "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).

The Colleges' claims are not moot and should be allowed to proceed. The Court should reverse and remand.

ARGUMENT

I. THE CASES ARE NOT MOOT.

A. The Departments bear a heavy burden to prove mootness.

The Departments' cursory brief ignores the justiciability issue at the heart of this case: mootness. The lower courts erred by focusing solely on standing and ripeness, placing the burden of proof on the wrong party. While this was the Colleges' primary argument in their opening brief, Br. 17-21, 26-38, the Departments' entire response consists of a single footnote, one that is replete with errors of fact and law and that does not even try to explain why the Departments have met their heavy mootness burden. *See* Opp. 15 n.5. In short, the Departments have effectively conceded the issue.

When a live controversy is present at the outset of a lawsuit but subsequently called into doubt by the defendant's actions, the issue is one of mootness. *See, e.g.*, *CSI Aviation*, 637 F.3d at 414; *Advanced Mgmt. Tech*. v. *FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000); *Pickus* v. *U.S. Bd. of Parole*, 543 F.2d 240 (D.C. Cir. 1976); Br. 17-21. Courts are reluctant to find such cases moot: "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012).

Here, it is the Departments' burden to demonstrate that their post-filing actions—*i.e.* creating (and then expanding) the Safe Harbor and issuing the

ANPRM—have mooted the Colleges' lawsuits. *See, e.g., Friends of the Earth, Inc.*, 528 U.S. at 190 (explaining that "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness)." This is no small feat: the "party urging mootness [must] demonstrate[] that (1) 'there is no reasonable expectation that the alleged violation will recur' and (2) 'interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" *Initiative and Referendum Inst.* v. *U.S. Postal Serv.*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (quoting *Nat'l Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997)). By mistaking a mootness issue for one of standing and ripeness, the lower courts failed to assign the burden properly. Given the opportunity to meet this burden on appeal, the Departments have failed to do so.

B. The Departments cannot carry their mootness burden.

The Departments do not even attempt to explain why a one-year enforcement delay, accompanied by a non-specific and non-binding promise to fix the mandate sometime next year, moots a controversy that was live when the Colleges filed their lawsuits. *See* Br. 26-38 (discussing mootness). Instead, in a single footnote, the Departments strangely dismiss the Colleges' mootness argument as based on the "idea" of a "presumption of [future] injury." Opp. 15 n.5 (quoting *Friends of the Earth*, 528 U.S. at 191). But the Departments incorrectly state the law of

mootness.[2] The injuries relevant to assessing mootness are not "presumptive future injuries," but rather the *present* injuries the Colleges are suffering because of the mandate, *see* Br. 29-38, injuries which the Departments make no attempt to dispute. Equally strange is Defendants' argument that their putative "presumption [of future injury] does not make sense when a rulemaking is in progress." Opp. 15 n.5. That argument is contradicted by the precedent of this Court and common sense, particularly given that the mandate is a final rule, effective now, and being enforced by Defendants in other contexts.

In *CSI Aviation,* the government made—and this Court rejected—an identical argument. A plaintiff had been granted a temporary exemption, and the department had promised to engage in rulemaking to correct the problem. Even so, this Court held the case was not moot because "[t]he agency's promised rulemaking has yet to occur, and [the plaintiff's] exemption is merely temporary." *CSI Aviation,* 637 F.3d at 414. Here, the exemption is incomplete (the final rule still imposes requirements that can be enforced through ERISA), temporary, and malleable, and

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[2] The "presumption of future injury" language referenced in *Friends of the Earth* was the United States' formulation, not the Supreme Court's. *See* 528 U.S. at 191 (quoting the United States' amicus argument in *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 109 (1998)). Elsewhere in the opinion, *Friends of the Earth* sets forth what mootness actually means: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 528 U.S. at 189 (quoting *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

the Departments admit that the conclusions of the promised rulemaking are tentative and uncertain. Opp. 12, 19. Under *CSI Aviation,* this case is not moot.

Rather than attempt to satisfy their heavy burden of demonstrating mootness, the Departments advance ripeness arguments premised upon the Safe Harbor, which delays government enforcement, and the ANPRM, which promises a second rule to augment the existing final rule. *See* Opp. 12-13. In their opening brief, the Colleges explained why neither the Safe Harbor nor the ANPRM moots this case. Br. 26-38. In addition to the admittedly tentative and uncertain nature of the outcome of the ANPRM, the Colleges face present government coercion and harms from the final rule published in the Code of Federal Regulations. Those harms include: (1) the government's ongoing pressure to change currently existing insurance plans beginning January 1, 2013, (2) the need to budget and plan for the penalties for failing to comply, (3) the need to prepare and issue insurance documents for new plan years; (4) the negative impact on employee hiring and recruitment; (5) the threat of private lawsuits for non-compliance; and (6) current harms to First Amendment rights. *See* Br. 29-37; *see also Clinton* v. *City of New York*, 524 U.S. 417, 431 (1998) (case not moot where government action creates "a substantial contingent liability immediately and directly affects the borrowing power, financial strength, and fiscal planning of the potential obligor.").

In response, the Departments do not dispute any of these points. They merely repeat their counterintuitive assertion that the final rule, published in the Code of Federal Regulations, is "tentative." *See* Opp. 12. But mere brainstorming about possible future accommodations does not render a final action non-final. "If the possibility (indeed, the probability) of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law." *General Elec. Co.* v. *EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002); *see also Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965) ("[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."). This is particularly true, where, as here, the law is presently effective while the government brainstorms.

The Departments give no reason why the Safe Harbor—a non-binding guidance document which has already been revised—should be sufficient to override the text of an existing final rule. *See* Opp. 12-14. Nor do they it explain why the ANPRM, which may or may not result in a final rule which may or may not help the Colleges, should derail a challenge to a final rule already in effect. The Departments' contrary "assurances provide nothing more than the mere possibility" that they will relieve the Colleges of the final rule's burden. *CSI Aviation*, 637 F.3d at 414.

As a last resort, the Departments assert that they are entitled to a presumption of good faith. *See* Opp. 12, 15. But the precedents they rely upon for this presumption say nothing about the heavy burden of establishing mootness; they mention the presumption only in passing,[3] or are primarily concerned with ripeness in factually distinct situations.[4] The only similar cases the Departments cite are two other district court opinions in challenges to the same mandate, at least one of which is currently on appeal.[5] Notably, neither of these opinions discusses mootness.

By failing to show that "it is absolutely clear [their] allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 189-90, the Departments have not carried their heavy burden of showing that their post-complaint conduct has mooted the Colleges' lawsuits.

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[3] *See Comcast Corp.* v. *FCC*, 526 F.3d 763, 769 & n.2 (D.C. Cir. 2008) (no mootness or ripeness issues, only a footnote with a general statement of presumption of good faith).

[4] *See Birdman* v. *Office of Governor*, 677 F.3d 167, 173-74 (3d Cir. 2012) (no allegation of changed policy or new rulemaking; action premature at time plaintiffs filed suit); *Natural Resources Defense Council* v. *FAA*, 292 F.3d 875, 881-83 (D.C. Cir. 2002) (no mootness allegation; action premature due to undeveloped record).

[5] *See Legatus* v. *Sebelius*, ___ F. Supp. 2d ___, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Nebraska ex rel. Bruning* v. *U.S. Dep't of Health & Human Servs*, __ F. Supp. 2d __, 2012 WL 2913402 (D. Neb. Jul. 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir.).

II. THE COLLEGES HAVE STANDING.

A. The Colleges had standing when they filed their complaints.

The Colleges amply demonstrated standing as of the time their cases were filed. As set forth in their opening brief, both were faced with a final rule, impending enforcement of that rule, and current harms flowing from that rule. *See* Br. 21-26. In response, the Departments make little attempt to dispute the Colleges' standing.

"[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). To establish standing, a litigant must show, *inter alia*, a concrete and imminent injury-in-fact. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where the injury is caused by a law, speculative future changes in the law do not defeat standing. *See, e.g.*, *Appalachian Power Co.*, 208 F.3d at 1022 ("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."); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 537 (6th Cir. 2011) (a potential change in the law is "not the kind[] of future development[] that enter[s] into the imminence inquiry" for standing purposes), *rev'd on other grounds, Nat'l Fed. of Indep. Bus.* v. *Sebelius*, 132 S.Ct. 2566 (2012).

When their complaints were filed, the Colleges faced concrete, imminent injuries. *See* Br. 21-26. Both filed at a time when they had no protection from the Safe Harbor. Br. 23-24. Both faced disastrous fines on a date certain. Br. 13, 23-25.

Both continue to face serious present harms stemming from the final rule. Br. 25, 29-38. Both had, and continue to have, standing.

B. The Defendants' standing arguments make mistakes of fact and law.

The Departments' standing arguments rest on facts that are either irrelevant or incorrect. First, the Departments assert that Belmont Abbey "filed suit before a final rule was in place." Opp. 13. This is a distinction without a difference. Interim final rules can cause "certainly impending" injury just as well as final rules: "'Interim' refers only to the Rule's intended duration—not its tentative nature." *Career College Ass'n* v. *Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996).

Next, the Departments claim that Belmont Abbey filed suit long before the final rule would impact it. This is both incorrect and irrelevant. When Belmont Abbey sued, it faced (1) a government regulation with the force of law, (2) government pressure to violate its religious beliefs, (3) impending government and private enforcement on January 1, 2013, and (4) immediate harms flowing from that regulation. At the time Belmont Abbey amended its complaint, it faced precisely the same scenario, except that the Safe Harbor had delayed government enforcement of the mandate to January 1, 2014 (but not private). *See* Br. 21-23.

Put another way, when Belmont Abbey filed, it faced a 13-month enforcement delay. When it amended its complaint, it faced an additional 12-month delay in government (but not private) enforcement. *See* Br. 11, 15. But these time gaps are

irrelevant to Belmont Abbey's standing. A 13-month lag in enforcement, or even a 21-month lag, do not change the "certainly impending" nature of an injury for standing purposes. *See, e.g., Vill. of Bensenville* v. *FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (thirteen-*year* enforcement lag did not defeat standing); Br. 24-25. The Departments, moreover, fail to note that Judge Boasberg himself *agreed* that the Safe Harbor delays could not defeat Belmont Abbey's standing. *See* JA 77 (explaining that "[t]he time until the rule may be enforced in this case … is short in comparison with other cases in which courts have found standing"). Finally, these impending enforcement injuries are in addition to the immediate harms Belmont Abbey faces now. *See* Br. 29-37. There can be no question that Belmont Abbey faced a concrete and immediate injury at the time its complaint was filed.

The Departments' response with respect to Wheaton's standing is even weaker. They claim that when Wheaton filed suit, "the safe harbor was in place." Opp. 14. They are mistaken. At the time Wheaton filed suit, the Safe Harbor *did not cover Wheaton*. Indeed, the Departments were forced to revise and expand the Safe Harbor guidelines in August 2012 specifically to include Wheaton. *See* Br. 15, 24; JA 192. As Judge Huvelle noted, "Defendants issued the August 2012 Guidance *in response to this lawsuit*." JA 250 n.4 (emphasis supplied). Given these facts, there can be no dispute that the Colleges' injuries were concrete and "certainly impending" at the time their complaints were filed.

The remainder of the Departments' standing argument amounts to a reiteration that the Safe Harbor plus the ANPRM deprives the Colleges of standing. But that, again, is a mootness argument. The ANPRM did not exist at the time of either the original or amended complaint in Belmont Abbey. *See* 77 Fed. Reg. 16,501, ANPRM (issued Mar. 21, 2012); JA 8 (Compl. filed Nov. 10, 2011); JA 34 (Am. Compl. filed Mar. 20, 2012). The fact that the administration had previously announced a planned future rulemaking during a press conference could not defeat the Colleges' standing to challenge existing and effective regulations. The Departments cite no precedent to suggest that it does. *See* Opp. 13-14 (stating that defendants "announced their intent to develop and propose changes to address religious objections"). And, as described above, the ANPRM's promise of an "accommodation" by August 2013 could not have helped Wheaton, because when it filed suit it did not even qualify for the Safe Harbor and therefore faced government enforcement of the mandate by January 2013. Br. 24.

Both Colleges have standing and the district courts committed reversible error by finding to the contrary.

II. THE DEPARTMENTS HAVE FAILED TO REBUT THE COLLEGES' SHOWING THAT THE FINAL RULE IS RIPE FOR REVIEW.

The Departments' ripeness arguments fare no better. "The 'basic rationale' of the ripeness doctrine 'is to prevent 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.'" *Cement Kiln Recycling Coal.* v. *E.P.A.*, 493 F.3d 207, 214 (D.C. Cir. 2007). When a party brings a "purely legal" challenge, as the Colleges have done here, the lawsuit is "presumptively reviewable." *Id.* at 215.

There is nothing "abstract" or informal about the mandate: it has been published in final form in the Code of Federal Regulations for more than a year. 45 C.F.R. § 147.130. It is also "concrete": it can be printed out, marked up, read and analyzed and—most significantly—the Departments are enforcing it now against for-profit employers. Indeed, at least ten other district courts are currently considering the merits of the very same final rule on challenges brought by for-profit employers. *See supra* n.1 (collecting cases). The final rule is therefore ripe for review.

The Departments' opposition only confirms this conclusion. They have not identified a single case to support their argument that the nonbinding and tentative ANPRM renders the final rule unripe. That is not surprising; as this Court recognized in *American Petroleum*, if an agency could "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking," then "a savvy agency could perpetually dodge review." *Am. Petroleum Inst.* v. *EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012).

If that were not enough to establish ripeness (and it is), it is equally clear that delaying this lawsuit while the Departments mull the contours of a potential future rulemaking will harm the Colleges in at least three ways. First, delay substantially burdens the Colleges' First Amendment rights, because the final rule is currently exerting pressure on them to change or violate their religious beliefs, and it is black letter law that such pressure establishes ripeness in First Amendment cases. Br. 36-37 (collecting cases). The Departments suggest that the Colleges' unwillingness to buckle under such pressure somehow strips this Court of its Article III jurisdiction, Opp. 17, an untenable argument with no support in First Amendment jurisprudence. Second, delay exposes the Colleges to the imminent risk of ERISA suits, which in this Circuit is an independent and sufficient reason for immediate review. *Chamber of Commerce*, 69 F.2d at 603-04. Finally, delay harms the Colleges by preventing them from effectively planning, budgeting, hiring, and even retaining existing employees. This is not because (as the Departments claim) the Colleges are over-planning for unlikely contingencies about a yet-to-be-written rule, Opp. 19, but because the Colleges are reasonably planning their response to the Departments' final rule as it exists *now*. The Colleges should not be forced to wager that the Departments will relieve the mandate's burden on their religious exercise when—to date—the Departments have never acknowledged that the burden exists. Even the proposed accommodations floated in the ANPRM fail to

recognize the basic point that organizations like Wheaton and Belmont Abbey cannot pay for *or provide access to* the objectionable drugs and devices without violating their faith. *See* Br. 6-7 (setting forth Colleges' religious convictions). Nothing has ever been proposed by the Departments that could assure Wheaton and Belmont Abbey that they will not inevitably face crippling fines for following their conscience.

In short, the significant harms that the final rule is presently causing to the Colleges and which they must anticipate provide independent reasons for this case to go forward without delay.

A. The mandate is fit for review because it is embodied in a final rule.

The Departments do not dispute that the mandate has been published as a final rule in the Code of Federal Regulations, and that this rule is already in effect for employers whose insurance plan years began after August 1 of this year.[6] *See* Opp. at 3; *see also* 45 C.F.R. § 147.130 (mandate); *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) (holding that an agency action is ripe for review when the agency has "publicly articulate[d] an unequivocal position" to which they

[6] As explained above, the Departments are already defending the substance of the final rule in numerous challenges brought by religious business owners. *See supra* n. 1; *see also* Roman Catholic Archbishop of Washington *Amicus* Br. at 25. The difference between those cases and the Colleges' is not the substance of the final rule (which is identical), but the mere fact that the Departments have promised to delay enforcement for one class of plaintiffs and not the other.

"expect regulated entities" to "conform"). Thus the final rule governs the Colleges' insurance policies that will issue on January 1, 2013. Indeed, when asked during negotiations early in the case whether they would agree to make the rule inapplicable to Wheaton, the Departments refused. *See* Br. 11; Add. 76; JA 192, 225-26. Nor do they dispute that their Safe Harbor is, like the exemption letter in *CSI*, a nonbinding, temporary document that "provide[s] nothing more than the mere possibility" that the Colleges will not be forced to comply with the final rule going forward. *CSI Aviation*, 637 F.3d at 414. Most importantly, they have no answer to the admitted fact that the Colleges have "raised largely legal claims" that are *presumptively* ripe for this Court to review. *Belmont Abbey Coll.* v. *Sebelius*, Mot. to Dismiss at 18 Document No. 15-1; *see Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985); *Better Gov't Ass'n* v. *Dep't of State*, 780 F.2d 86, 92-93 (D.C. Cir. 1986); *Chamber of Commerce*, 69 F.3d at 604 (dismissing an agency's lack of fitness argument where the plaintiffs' First Amendment challenge was "a relatively pure legal [question] that subsequent enforcement proceedings will not elucidate"); *Cement Kiln Recycling Coal.*, 493 F.3d at 215 (stating that a "purely legal claim in the context of a facial challenge . . . is 'presumptively reviewable.'"). In short, these undisputed facts establish that this case is fit for review at this time.

The Departments' only real response to this showing is to assert over and over again that this dispute is not ripe because they "are in the process of amending the regulations." Opp. at 12; *see also id.* at 2, 6-10, 13, 15, 18, 19. But that is simply not accurate. As a matter of administrative law, the ANPRM is not even a *promise* to amend the final rule; it is merely "a preparatory step, antecedent to a potential future rulemaking[.]" *P & V Enter.* v. *U.S. Army Corps of Eng'rs,* 516 F.3d 1021, 1026 (D.C. Cir. 2008). It is also not legally binding: if the Departments had issued an actual *Notice* of Proposed Rulemaking, then the affected employers sue to ensure the completion of the process within a reasonable time, but with the ANPRM, the Colleges have no such remedy should the Departments fail to issue new final rules before the fast-approaching end of the current Safe Harbor.[7] *See Sierra Club* v. *Thomas,* 828 F.2d 783, 794 (D.C. Cir. 1987) (recognizing the claim that "agency delay deprives the petitioner of a statutory '[r]ight to [t]imely [d]ecisionmaking'").

[7] As one *amicus* explains, "[w]hile an actual proposed rulemaking is subject to the 'arbitrary and capricious' standard, an Advance Notice of Proposed Rulemaking can be withdrawn with impunity." Cato Institute *Amicus* Br. at 10; *compare Ctr. for Auto Safety* v. *Nat'l Hwy. Traffic Safety Admin.,* 710 F.2d 842, 846 (D.C. Cir. 1983) (stating that "an "[advance] notice of proposed rulemaking … may or may not be adopted or enforced"), *with Int'l. Union, United Mine Workers of Am.* v. *U.S. Dept. of Labor*, 358 F.3d 40, 45 (D.C. Cir. 2004) (holding that agencies must "provide an adequate explanation for [their] decision[s] to withdraw the . . . propos[ed rule]"). Consequently, "[t]he actual rulemaking process . . . does not begin until the agency publishes a Notice of Proposed Rulemaking in the Federal Register." Cato Institute *Amicus* Br. at 16.

Significantly, the ANPRM makes clear that the Departments do not actually intend to change core aspects of the final rule at all: it affirms that "the Departments aim to maintain the provision of contraceptive coverage without cost sharing to individuals who receive coverage through non-exempt, non-profit religious organizations," and that "'contraceptive coverage' means the contraceptive coverage required under the HSRA"—that is, the full range of contraceptive drugs to which the Colleges object. 77 Fed. Reg. 16,503-04. And, while the ANPRM proposes various "accommodations" for "non-exempt" non-profit religious organizations, it rejects the possibility of expanding the religious exemption to cover them. *Id.* at 16,502-03. These two issues—what drugs must be offered, and which organizations qualify for the religious exemption—are at the heart of the Colleges' lawsuits. *See* Br. 6-10. The ANPRM itself confirms that these aspects of the mandate are final and therefore fit for this Court's review.

Both of these facts—the Departments' failure to launch the formal rulemaking process and their stated intention to leave the most objectionable aspects of the final rule unchanged—distinguish this case from *American Petroleum*, 683 F.3d 382. *Compare* Opp. 14 (mischaracterizing *American Petroleum* as a materially indistinguishable dismissal). *American Petroleum* established a narrow, fact-bound exception to the general rule that final agency actions are reviewable by Article III

Courts. But even a brief review of the facts in *American Petroleum* shows why that exception cannot be stretched to protect the Departments in this case.

Instead of an informal, non-binding ANPRM, the agency in *American Petroleum* had actually issued a "proposed rule," which is "the official document that announces and explains the agency's plan to address a problem or accomplish a goal."[8] 683 F.3d at 388. Instead of the aspirational and unenforceable timeline offered in the ANPRM, the agency in *American Petroleum* had entered into a binding settlement agreement with another stakeholder which required it to issue a final rule within seven months of the opinion. *Id.* at 388-89. And while the Departments here have made it clear that they intend to leave the core of the final rule untouched, the proposed rule in *American Petroleum* was "a complete reversal of course" that would have mooted plaintiffs' lawsuit. *Id.* Finally, even under *American Petroleum*'s exceptional circumstances (which do not apply here), this Court *still* did not believe it was appropriate to dismiss the plaintiffs' suit outright, because it recognized that the rulemaking could take an "unforeseen turn" that might restore the plaintiffs' suit to ripeness before the final rule was issued. *Id.* at 389. Instead, the Court held the case in abeyance and ordered the agency to provide regular status reports. *Id.*

[8] OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Nov. 12, 2012).

The Departments are thus wrong when they assert that *American Petroleum* is "not materially distinguishable" and resulted in a dismissal. Opp. at 14. And without the support of *American Petroleum*, the rest of their ripeness argument simply falls apart, because they have not identified any other case in which a final rule published in the Code of Federal Regulations became "unripe" as a result of later *formal* rulemaking—much less an informal step like issuing an ANPRM.

Indeed, there is nary an officially-published final rule to be found among the other cases the Departments cite on this point. Opp. at 14. In *Birdman* v. *Office of the Governor*, the plaintiffs sued because of agency *inaction*: they sought to force the tax authority of the U.S. Virgin Islands to issue a formal determination of the amount of taxes the plaintiffs owed to the territory so they could use that document in separate litigation against the IRS. The Third Circuit found their suit was unripe because "the Virgin Islands has taken no action whose legality we can resolve." 677 F.3d 167, 173-74 (3d Cir. 2012). In *AT&T Corp.* v. *FCC*, this Court held that review was premature because the agency had commenced formal rulemaking by publishing two official Notices of Proposed Rulemaking ("NPRMs") on a particular topic, but specifically noted that the case was also likely unripe because the agency itself had never previously issued a final rule on the topic. 369 F.3d 554, 558, 562 (D.C. Cir. 2004). In *Utility Air Regulatory Group* v. *EPA* there was no existing final rule because the agency's prior position had only been captured in

an informal policy statement. 320 F.3d 272, 278-79 (D.C. Cir. 2003). And in *Better Gov't Ass'n* v. *Department of State*, this Court found that the plaintiffs' challenge to informal agency guidance *was* ripe notwithstanding the fact that none of the agencies involved in the lawsuit had ever published their informal policy as a final rule. 780 F.2d at 92-93.

It is not surprising that the Departments found no cases to support their position: as *American Petroleum* recognized, if an agency could "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way," then "a savvy agency could perpetually dodge review." 683 F.3d at 388. This Court was not concerned about the risk of agency gamesmanship in *American Petroleum*, because it was clear that the new rulemaking was initiated as a condition of a settlement between the agency and an environmental group and represented "a complete reversal of course" for the agency, not a "non-substantive, thinly veiled attempt to evade review." *Id.* at 388-89. Here, however, the Departments' suspiciously-timed position changes and refusal to reconsider the mandate's core give rise to the opposite inference. *See* Br. at 15, 26-28 (describing changes); *see also supra* at 20-21 (discussing the scope of the changes proposed in the ANPRM). In short, none of the unusual factors which counseled forbearance in *American Petroleum* are present here, and the final rule is fit for review.

B. The Colleges' present hardships also justify prompt review.

Although it is unnecessary for this Court to even reach hardship where the final rule is already fit for consideration, *Askins* v. *District of Columbia*, 877 F.2d 94 (D.C. Cir. 1989), in this case the severe burdens that the Colleges face strongly counsel in favor of immediate review.

It is undisputed that, beginning January 1, 2013, the Colleges may be sued under ERISA for failing to comply with the final rule *as it exists now. See* Opp. at 16 (admitting that "plan participants . . . would be free to bring such a suit"); *see also* Br. at 56-57. It is also undisputed that the Safe Harbor does not protect the Colleges from such a suit. JA 192 (Rienzi Decl.). The existing final rule thus imposes government pressure on the Colleges to violate their religious beliefs now. This alone is enough to establish hardship, because this Court has held that even the *possibility* of third party lawsuits like this can establish injury-in-fact and, by extension, ripeness for review.[9] *Chamber of Commerce*, 69 F.3d at 603. And, while the Departments claim that "plan participants . . . would be free to bring [an ERISA] suit even if [the Colleges] prevailed" in this case, they ignore the fact that a favorable decision here would effectively demolish the legal basis for such a

[9] The Department dismisses the possibility of such suits as "speculative," but as the Colleges showed in their opening brief, certain members of each schools' communities have already indicated that they oppose the Colleges' stand in this case, and some at Belmont Abbey have even gone so far as to file EEOC complaints to force the school to offer contraceptives. Br. at 56 & n.19; JA 14, 89-105.

lawsuit by depriving the ERISA plaintiff of a plausible claim that the Colleges have violated the law. *See* Opp. at 16. Indeed, this is precisely the effect of the exemptions for religious employers and for grandfathered plans: ERISA suits are no concern because the government has made the rule inapplicable to those parties.

The Departments attempt to distinguish *Chamber of Commerce* on the disturbing ground that, unlike the plaintiffs in that case, the Colleges' beliefs have not been "chilled" because they have so far resisted the government's pressure to cover the objectionable drugs. *See also* JA 257-58 (relying on same argument). But this quixotic argument turns First Amendment law on its head: it cannot be the case that the steadfast believer who bucks government pressure and braves millions of dollars in fines to practice his religion is *less protected* than the less ardent believer who gives in to government pressure to conform.[10] Religious freedom is not a right reserved only for the faint of heart.

The fact is that the final rule puts pressure on the Colleges to change their beliefs now, not just in the future. Under cases like *Sherbert* v. *Verner* and

[10] Indeed, the Departments' argument on this point is completely unmoored from the purpose of the chilled speech doctrine. The Supreme Court has described this doctrine as an "*exception* to the usual rules governing standing" under which "we have not required that all of those subject to overbroad regulations risk prosecution to test their [First Amendment] rights." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965) (emphasis added). Thus, if anything, the fact that the Colleges are willing to "risk prosecution" rather than violate their consciences makes their cases stronger than the "chilled speech" cases.

Kaemmerling v. *Lappin*, this pressure is itself an actionable burden. *See Sherbert*, 374 U.S. 398, 404 (1963); *Kammerling*, 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'"); *see also* 13B Wright et al., *Federal Practice and Procedure* §3532.3, at 515 (3d ed. 2008); *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 380 (D.C. Cir 1980).

The uncertainty created by the Departments' position is likewise a significant burden that justifies review. As the Colleges showed in their opening brief, delaying a decision in this case imposes substantial harms on the Colleges' budgeting, academic planning, hiring, and employee retention, all of which are presently impacted by the existing final rule. Br. at 28-33, 54-55. Delay also imposes special hardships on individual employees, many of whom will not be able to procure their own insurance coverage should the Colleges be forced to terminate their health plans altogether. *Id.* at 55.

The Departments do not dispute that the Colleges face these harms, but they argue that "even if [the Colleges] obtain[] the relief they seek, they would still face 'uncertainties' about how the amended rules will affect their 2014 health plans." Opp. at 19. But unlike the Departments' case *National Family Planning* v. *Gonzalez* (which does not even discuss ripeness), the uncertainties here are not the result of the Colleges' own failure to seek agency guidance. Opp. 19 (citing *Nat'l*

Family Planning, 468 F3d 826, 831 (D.C. Cir. 2006). More to the point, a preliminary injunction in this case would, at a minimum, give the Colleges certainty for the coming year. By contrast, the Departments' current approach—which requires the Colleges to wait as late as August 2013 for further agency guidance—gives the Colleges far less certainty and advance notice than they need to craft viable employee insurance plans, as the Congress and the Departments acknowledged when they built a one-year delay into the Affordable Care Act. *See* 42 U.S.C. § 300gg-13 (establishing a minimum one-year delay between the time that the Departments issue certain preventive care guidelines and their effective date); *see also* 76 Fed. Reg. 46,624 (confirming that insurers would not be required to implement the contraceptive mandate until "at least a full year" after the Departments issued the relevant guidelines).

In short, delaying this lawsuit will burden the Colleges in numerous ways: by exposing them to present government pressure to violate their religious beliefs, by exposing them to the immediate risk of ERISA suits starting in January 2013, by substantially burdening their First Amendment rights now, and by preventing them from effectively planning, budgeting, hiring, and even retaining existing employees. Although it is not necessary to show harm in a case involving a final rule that is already fit for review, the harm that the Departments' position has

already caused to the Colleges provides an independent reason for this Court to find that this dispute is ripe.

CONCLUSION

For the reasons stated above and in their opening brief, 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.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I certify that on November 16, 2012, I caused the foregoing *Reply Brief for Appellants* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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