IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA,

Plaintiffs,

v.

Civil Action No. 12-cv-00815

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,

Defendants.

PLAINTIFFS' MEMORANDUM REGARDING THE D.C. CIRCUIT'S DECISION IN *WHEATON COLLEGE*

Plaintiffs respectfully submit this memorandum in response to the Court's order of January 2, 2013, directing the parties to file briefs addressing whether in light of the D.C. Circuit's order in *Wheaton College v. Sebelius*, Nos. 12-5273 & 12-5291, 2012 BL 340588 (D.C. Cir. Dec. 18, 2012), this case should be dismissed on ripeness grounds or maintained under stay. Although this case and the D.C. Circuit appeal share common legal issues, the factual scenarios are distinct. Most notably, Plaintiffs here have established hardship that not only exceeds that demonstrated in *Wheaton*, but also independently justifies the conclusion that this case is ripe for review. *See Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-2542, 2012 BL 316574 (E.D.N.Y. Dec. 5, 2012). Accordingly, the Government's motion to dismiss should be denied. At a minimum, if this Court concludes that this case is controlled by *Wheaton*, the D.C. Circuit has now made clear that the proper course of action is to hold the case in abeyance. *See Wheaton*, 2012 BL 340588, at *2; *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012); *see also La. Coll. v. Sebelius*, No. 12-463, Dkt. # 68 (W.D. La. Jan. 4, 2013) (staying case); *E. Tex. Baptist Univ. v. Sebelius*, No. 12-03009, Dkt. # 25 (S.D. Tex. Dec. 20, 2012) (same).

BACKGROUND

In its order of December 18, 2012, the D.C. Circuit held that the district courts in both *Belmont Abbey* and *Wheaton* had wrongly dismissed the colleges' claims. After concluding that both schools had standing to challenge the Mandate, the court noted that at oral argument, the Government made representations relevant to ripeness that "went further" than the issuance of an Advance Notice of Proposed Rulemaking. *Wheaton*, 2012 BL 340588, at *2. Specifically, the Government "represented to the court that it would *never* enforce [the Mandate] in its current form against the appellants or those similarly situated as regards contraceptive services." *Id.*

Such entities would be covered by a "different rule" embodied in a "Notice of Proposed Rulemaking [that would be promulgated] in the first quarter of 2013." *Id.* The Court declared that it would take the Government's promise never to enforce the current rule against objecting religious institutions as "a binding commitment," stating that it "t[ook] the government at its word and w[ould] hold it to it." *Id.*

Accordingly, "[b]ased expressly upon the understanding that the government will not deviate from its considered representations," the court held that the colleges' challenges were not yet fit for review. *Id.* Rather than dismissing the claims, however, the court held the "cases in abeyance, subject to regular status reports to be filed by the government . . . every 60 days." *Id.* The court limited its discussion of the hardship prong of the prudential ripeness analysis to the possibility that employees or beneficiaries could sue the colleges under ERISA, concluding that it did not alter the "conclusion that the [colleges'] lawsuits should be held in abeyance pending the new rule that the government has promised will be issued soon." *Id.*

ARGUMENT

For reasons addressed in this brief and in prior filings with this Court, Plaintiffs submit that dismissal would cause significant and immediate hardship. Because of that hardship, this Court should find Plaintiffs' claims ripe and deny the pending Motion to Dismiss. At minimum, this case should be held in abeyance.

1. Ripeness—particularly the hardship analysis—is by its very nature a fact-bound inquiry. *United States v. Quinones*, 313 F.3d 49, 58 (2d Cir. 2002) ("[I]n addressing *any and all* ripeness challenges, courts are required to make a *fact-specific determination* as to whether a particular challenge is ripe . . . ." (emphasis added)). This is significant, because even absent a finding of fitness, a showing of hardship from delayed review may nevertheless illustrate that a case should be decided now. *See Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010); *see*

also Am. Petroleum, 683 F.3d at 389 (stating that "'immediate and significant'" hardships can outweigh "'institutional interests in the deferral of review'" (citation omitted)).

Here, Plaintiffs have presented far more evidence of hardship than was at issue in *Belmont Abbey* and *Wheaton.* The D.C. Circuit's hardship inquiry addressed only the potential for private suits to enforce the Mandate under ERISA. Here, in contrast, Plaintiffs have submitted seven affidavits—the contents of which are uncontested—demonstrating myriad hardships above and beyond the possibility of private ERISA lawsuits.

Among other things, Plaintiffs must *conclude* their 2013-2014 budgeting process by May 1 and July 1, 2013. Indeed, that process is now underway. *See* Pls.' Opp'n to Mot. to Dismiss at 14–16. Dismissal would mean that Plaintiffs would not know whether they would be responsible for millions of dollars in crippling fines until *after* their final budgets are complete. Likewise, because of the "extensive planning involved in preparing and providing [an] employee insurance plan," *Newland v. Sebelius*, No. 1:12-CV-1123, 2012 WL 3069154, at *4 (D. Colo. July 27, 2012); Pls.' Opp'n at 16, any changes to Plaintiffs' health plans must be made now or in the near future. Dismissal would guarantee that the Plaintiffs would not be able to inform teachers and staff of any substantial changes to their healthcare benefits for the upcoming school year, resulting in potentially "devastating" staffing shortages. *See* Pls.' Opp'n at 16–18. And this is to say nothing of the uncertainty triggered by the Mandate, which places Plaintiffs at a competitive disadvantage *right now* relative to employers who do not have similar religious objections, *id.* at 16–18, and which has imposed a tremendous strain on Plaintiffs' current staffing resources, *id.* at 18; *see also* Pls.' Opp'n to Mot. to Stay at 8–9 (distinguishing *Wheaton* and *Belmont Abbey*).

Indeed, Judge Cogan of the Eastern District of New York recently concluded that plaintiffs alleging comparable harms "adequately demonstrated hardship from withholding

judicial review," noting that the "Mandate has caused and will continue to cause plaintiffs harm so long as it remains in place." *Archdiocese*, 2012 BL 316574, at *24–25; *see also id.* at *21 (distinguishing other cases, including *Wheaton* and *Belmont Abbey*, because plaintiffs "made a more concrete and compelling showing of present injury"). Significantly, the court held that the case would be justiciable "*even if . . . the Coverage Mandate was not fit for review*," as "plaintiffs' hardship would 'outweigh[] the competing institutional interests in deferring review.'" *Id.* at *24 (emphasis added) (quoting *Eagle-Picher Indus. Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985)). There, as here, "[i]f [plaintiffs] anticipated that" the Mandate would be modified or struck down "and guessed wrong," they would be "inadequately prepared" to deal with the onerous fines that would follow. *Riva v. Massachusetts*, 61 F.3d 1003, 1012 (1st Cir. 1995). "Conversely, if [they] anticipated that the [Mandate]" would be upheld and "guessed wrong, [they] may needlessly deprive [their employees and those they serve], preparing for a rainy day that never dawns." *Id.* In such circumstances, dismissal creates an unacceptable risk "of a fait accompli that would cause plaintiffs either financial or First Amendment injury." *Archdiocese*, 2012 BL 316574, at *25.

Moreover, the New York court emphatically rejected the notion that these hardships "are simply the result of [plaintiffs'] 'desire to prepare for contingencies.'" *Id.* at *21–22. To the contrary, it held that the failure to prepare "might well be inconsistent with the fiduciary duties that plaintiffs' directors or officers owe to their members." *Id.* at *21–22; *cf.* Duffy Aff. ¶¶ 19, 23, 38 ("Indeed, it would be financially and morally reckless to not begin planning for the payment of substantial fines . . . ."). "[T]he practical realities of administering health care coverage for large numbers of employees—which defendants' [sic] recognize—require plaintiffs to incur these costs in advance of the impending effectiveness of the Coverage Mandate. That is

a business reality that any responsible board of directors would have to appreciate." *Archdiocese*, 2012 BL 316574, at *22. Nor are these hardships alleviated by the promise of a future remedy. Simply put, "the First Amendment does not require citizens to accept assurances from the government that, if the government later determines it has made a misstep, it will take ameliorative action. There is no, 'Trust us, changes are coming' clause in the Constitution." *Id.*; *see also CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 411–14 (D.C. Cir. 2011) (employing a safe harbor and a promise of future rulemaking "amplif[ies]" plaintiffs' hardship).

In short, irrespective of *Wheaton*, the numerous hardships imposed by the Mandate, along with the "presumption of reviewability" that "permeates the *Abbott Laboratories* ruling," *Cont'l Air Lines, Inc. v. CAB*, 522 F.2d 107, 128 (D.C. Cir. 1974) (en banc), render this case ripe.[1]

2. At a minimum, even if this Court deemed Plaintiffs' claims unripe, there can be no doubt that the proper response is to stay the case pending the issuance of the Government's promised new rule. On two separate occasions, the D.C. Circuit has held that where a change to a final rule is alleged to be forthcoming, a stay, not dismissal, is the proper response to a ripeness challenge. *See Wheaton*, 2012 BL 340588, at *2; *Am. Petroleum Inst.*, 683 F.3d at 389; *see also La. Coll.*, No. 12-463, Dkt. #68 (staying case); *E. Tex. Baptist*, No. 12-03009, Dkt. #25 (same).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied. Alternatively, this case should be held in abeyance.

[1] Though beyond the scope of the requested briefing, Plaintiffs have standing for the reasons articulated in their Opposition to the Motion to Dismiss and Judge Cogan's opinion. *See* Pls.' Opp'n at 9–23; *see also Clinton v. City of New York*, 524 U.S. 417, 431 (1998) (stating that the creation of even a "substantial contingent liability immediately and directly" conferred standing); *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."); *Archdiocese*, 2012 BL 316574 at *13–22 (holding that similarly situated plaintiffs had standing to challenge the Mandate because they established both imminent future injury and present injury).

Respectfully submitted, this the 16th day of January, 2013.

/s/ Noel J. Francisco

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 16, 2013, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which will send notification of such filing to all counsel of record.

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