IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*, Plaintiffs,	)	
v.	)	Case No. 12-cv-00815-ABJ
KATHLEEN SEBELIUS, *et al.*, Defendants.	)	

DEFENDANTS' SUPPLEMENTAL BRIEF
ADDRESSING THE D.C. CIRCUIT'S ORDER IN *WHEATON COLLEGE V. SEBELIUS*

INTRODUCTION

In moving to dismiss this case for lack of jurisdiction, defendants explained that, in view of the temporary enforcement safe harbor and forthcoming regulatory accommodations – both of which were announced well before the filing of this suit – plaintiffs have not met their burden of establishing Article III standing or that their claims are ripe for review. *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss ("Defs.' Mem."), ECF No. 19-1; Defs.' Reply in Supp. of Mot. to Dismiss ("Defs.' Reply."), ECF No. 24. The D.C. Circuit's order in *Wheaton College v. Sebelius* reinforces defendants' arguments for dismissal; the court's conclusion with respect to standing – even if correct – does not apply here, and the court's order confirms that the present lawsuit is unripe. *See* Nos. 12-5273 & 12-5291, 2012 WL 6652505 (D.C. Cir. filed Dec. 18, 2012) (per curiam) (affirming in part and holding in abeyance appeals in *Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169(ESH), 2012 WL 3637162 (D.D.C. Aug. 24, 2012), and *Belmont Abbey Coll. v. Sebelius*, Civil Action No. 11-1989 (JEB), 2012 WL 2914417 (D.D.C. July 18, 2012)).

To date, nearly every court to have considered defendants' jurisdictional arguments, in similar regulatory challenges, has ruled in defendants' favor.[1] The district courts in *Colorado*

[1] *See Wheaton*, 2012 WL 6652505; *Colo. Christian Univ. v. Sebelius*, No. 1:11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013) (dismissing as unripe without deciding standing); *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013) (same); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012) (dismissing for lack of standing and ripeness); *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12CV158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012) (dismissing as unripe without deciding standing); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012) (dismissing for lack of standing and ripeness); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012) (same), *appeal docketed*, No. 12-6590 (6th Cir. Dec. 20, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, *5-6 (E.D. Mich. Oct. 31, 2012) (denying preliminary injunction as to non-profit plaintiff for lack of standing); *Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 4:12CV3035, 2012 WL 2913402 (D. Neb. July 17, 2012) (dismissing for lack of standing and ripeness), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012).

Only one court has partially denied defendants' motion to dismiss. *See Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012). Defendants believe that case was wrongly decided to that extent because, while professing to assume defendants' good faith, the court nonetheless failed to credit defendants' clear and repeated assurances that they will never enforce the challenged regulations against the plaintiffs in their current form. Instead, the court based its ruling on the mistaken assumption that a "substantial possibility of enforcement" remains. *Id.* at *15. No other court has seen any basis on which to so

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Christian, *Catholic Diocese of Peoria*, *Notre Dame*, *Catholic Diocese of Biloxi*, *Zubik*, *Catholic Diocese of Nashville*, *Wheaton*, and *Belmont Abbey*, and the D.C. Circuit reviewing *Wheaton* and *Belmont Abbey*, all reached the same conclusion regarding ripeness. The courts in *Notre Dame*, *Zubik*, *Catholic Diocese of Nashville*, and *Legatus* also held that plaintiffs in those cases had not shown any injury necessary to establish standing because of the existence of the safe harbor and the forthcoming amendments to the regulations. In short, ten district courts and one court of appeals have now found standing and/or ripeness to be lacking on the same grounds urged in defendants' pending motion to dismiss. Defendants respectfully ask this Court to do the same.

ARGUMENT

I. PLAINTIFFS LACKED STANDING "AT THE TIME OF FILING"

Although the D.C. Circuit concluded that dismissal of the *Wheaton* and *Belmont Abbey* complaints for lack of standing was error, the court's analysis – even if correct – does not apply here. Because standing is "assessed at the time of filing," *Wheaton*, 2012 WL 6652505, at *1, and because the plaintiffs in *Wheaton* and *Belmont Abbey* filed suit *before* defendants established or clarified the enforcement safe harbor, the court held that those plaintiffs had standing at the time their suits were filed. *Id.* That is, at the time of filing, it was not absolutely clear that either Belmont Abbey or Wheaton College was protected by the safe harbor. *Belmont Abbey* was filed in November 2011, well before the safe harbor was established in February 2012. *See* HHS, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf. And although *Wheaton* was filed in July 2012, the plaintiff alleged that it was not eligible for the

conclude, and respectfully, none exists. *See, e.g.*, *Wheaton*, 2012 WL 6652505, at *2; *Catholic Diocese of Peoria*, 2013 WL 74240, at *5; *Notre Dame*, 2012 WL 6756332, at *3. Defendants have moved for reconsideration, or certification for interlocutory appeal, of the court's order in *Archdiocese of New York*.

safe harbor as originally issued because it had provided coverage for certain contraceptives after February 10, 2012, despite efforts to try to exclude or limit such coverage that were not successful as of February 10, 2012. *See* Compl. ¶ 120, *Wheaton Coll. v. Sebelius*, No. 1:12-cv-01169-ESH (D.D.C. July 18, 2012), ECF No. 1. The August 2012 clarification, however, confirmed that Wheaton College was eligible for the safe harbor. *See* HHS, Guidance on the Temporary Enforcement Safe Harbor at 1 n.1, 3-4 (Aug. 15, 2012) ("This bulletin was originally issued on February 10, 2012, to describe the temporary enforcement safe harbor. In reissuing this bulletin, [HHS] is not changing the February 10 policy; it is only clarifying three points . . . ."), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

Here, in marked contrast, plaintiffs filed suit on May 21, 2012, months *after* defendants established the safe harbor, for which it was obvious *before* defendants issued the clarification that plaintiffs qualified. Indeed, plaintiffs acknowledged as much in their complaint. *See, e.g.*, Compl. ¶ 130, ECF No. 1. Assessing their standing at the time of filing thus leads to the opposite conclusion from that reached by the D.C. Circuit in *Wheaton* and *Belmont Abbey* as to standing. The existence of the safe harbor coupled with the ongoing accommodation and amendment process means that these plaintiffs lack, and have always lacked, a current or future injury fairly traceable to the challenged regulations. *See* Defs.' Mem. at 11-15; Defs. Reply at 2-8; *see also, e.g.*, *ViroPharma, Inc. v. Hamburg*, 777 F. Supp. 2d 140, 147 & n.3 (D.D.C. 2011).

Indeed, in similar suits filed by other plaintiffs as to which the safe harbor's application was clear, the courts in *Notre Dame*, *Zubik*, *Catholic Diocese of Nashville*, and *Legatus* held that those plaintiffs had not shown any injury necessary to establish standing because of the existence of the safe harbor, its unambiguous application to those plaintiffs, and the forthcoming amendments to the regulations. *Notre Dame*, 2012 WL 6756332, at *2-4 (plaintiff sued after safe

harbor issued and clearly qualified for it prior to clarification); *Zubik*, 2012 WL 5932977, at *11; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *3-5; *Legatus*, 2012 WL 5359630, at *5.[2] This Court should do the same and dismiss this case for lack of jurisdiction.

II. EVEN IF PLAINTIFFS HAVE STANDING, THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION – RATHER THAN MAINTAIN IT UNDER A STAY – BECAUSE IT IS NOT RIPE

Even if this Court concludes that plaintiffs have standing, however, the D.C. Circuit has determined – as other courts have held – that a challenge to the soon-to-be-amended regulations is not ripe for review. *See Wheaton*, 2012 WL 6652505, at *1-2.[3] In its order, the court noted defendants' consistent, repeated statements that the regulations will never be enforced in their present form against entities like the plaintiffs in those cases or plaintiffs here, and that defendants will finalize amendments to the regulations in an effort to accommodate religious organizations with religious objections to contraceptive coverage before the rolling expiration of the safe harbor begins in August 2013. Indeed, the court also noted that defendants have stated

[2] The plaintiffs in these cases alleged similar future and current harms as plaintiffs allege here. In *Notre Dame*, for instance, the plaintiff alleged injuries with respect to its need to analyze and implement changes to its health plans; its planning and budgeting processes; and its expenditure of administrative and financial resources to address and prepare for the regulations; among others. *See* Compl., *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-0253-RLM-CAN (N.D. Ind. May 21, 2012), ECF No. 1; Affleck-Graves Aff. at ¶¶ 4-25, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-0253-RLM-CAN (N.D. Ind. Aug. 27, 2012), ECF No. 23-1. The court determined that the plaintiff "lacks standing to attack the present regulatory requirement because [plaintiff] isn't subject to that requirement, and, taking the defendants at their word, never will be subject to the present regulation." *Notre Dame*, 2012 WL 6756332, at *4; *see also Zubik*, 2012 WL 5932977, at *11-12; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *4.

[3] In a prior filing, plaintiffs suggested that their claims are ripe even if the claims in *Wheaton* are not, because plaintiffs purport to have supplied a more "extensive factual record" regarding hardship. *See* Pls.' Opp'n to Defs.' Mot. to Stay at 8, ECF No. 29. That argument fails. The *Wheaton* and *Belmont Abbey* plaintiffs alleged similar hardships with respect to ripeness as plaintiffs allege here, which the D.C. Circuit would have taken as true on appeal. *See also* Defs.' Reply at 6, 13-14. The D.C. Circuit necessarily rejected those hardships – including the possibility of third-party ERISA claims, *Wheaton*, 2012 WL 6652505, at *2 – as sufficient to ripen challenges to the preventive services coverage regulations. *See also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) ("Considerations of hardship that might result from delaying review will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions." (quotation omitted)). Furthermore, the overwhelming majority of other district courts faced with similar allegations of hardship (and similar declarations) have nevertheless dismissed for lack of ripeness. *See supra* at 1-2 (citing cases). As these courts have held and defendants' briefs explain, *see* Defs. Mem. at 21-22; Defs.' Reply at 12-15, the hardships of which plaintiffs complain – for example, that the regulations require advanced planning and impact plaintiffs' current decision-making – are not sufficient to overcome the lack of finality and fitness for review of the issues plaintiffs raise.

they will publish a Notice of Proposed Rulemaking in the first quarter of 2013. Based on these assurances, the court held – just as the district courts had – that "the cases are not fit for review at this time because '[i]f we do not decide [the merits of appellants' challenge to the current rule] now, we may never need to.'" *Wheaton*, 2012 WL 6652505, at *2 (quoting *Am. Petroleum Inst.*, 683 F.3d at 387) (alterations in original).

The court ultimately held the appeal in abeyance and ordered defendants to submit periodic status reports. Defendants respectfully submit that, for this reason as well as the traditional presumption of good faith to which the government is entitled, *e.g.*, *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008); *see also* Defs.' Reply at 5, this Court can be assured of defendants' commitment to amend the regulations, in an effort to accommodate the religious concerns of plaintiffs like those here, before the safe harbor expires. It follows that dismissal for lack of ripeness – rather than maintaining the case under stay – is the proper course. Indeed, the courts in *Colorado Christian*, *Catholic Diocese of Peoria*, *Notre Dame*, *Catholic Diocese of Biloxi*, *Zubik*, and *Catholic Diocese of Nashville* all dismissed similar actions in their entirety for lack of ripeness. Most recently, the court in *Colorado Christian* agreed with the D.C. Circuit and the "overwhelming majority of the district courts" that the case was not ripe, but noted that "[a]lthough the D.C. Circuit held the cases before it in abeyance, as opposed to dismissing them, it offered no compelling reason for doing so, nor is any such reason apparent to the Court." Hence, the court "adhere[d] to the customary practice of dismissing an unripe case in its entirety." 2013 WL 93188, at *8. Defendants respectfully urge this court to do the same.

CONCLUSION

For the above reasons, and those set out in defendants' briefs, this Court should dismiss this case for lack of jurisdiction.

Respectfully submitted this 16th day of January, 2013,

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