[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; SETH D. HARRIS, in his official capacity as Acting Secretary of the U.S. Department of Labor, JACOB J. LEW, 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,

Appellees.

Case No. 13-5091

APPELLANTS' MOTION FOR SUMMARY REVERSAL

Appellants Roman Catholic Archbishop of Washington (the "Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Archbishop Carroll High School, Catholic Charities of the Archdiocese of Washington, and the Catholic University of America (collectively, "Appellants") are challenging a federal regulation that requires them to provide, pay for, and/or facilitate access by their employees to contraception, abortion-inducing drugs, sterilization, and related counseling, in direct conflict with their religious beliefs (the "Mandate"). Appellants seek summary reversal of the district court's decision because it directly contradicts binding Circuit precedent announced by this Court in *Wheaton College v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012).

In *Wheaton*, this Court held that the appropriate disposition of a case that, for all relevant purposes, is indistinguishable from the present case was to hold it in abeyance. In so holding, this Court recognized that in a case, like this one, that implicates core principles of religious freedom, abeyance allows for more expeditious treatment in the event that the Government's unilateral and unenforceable promise to eliminate the problem goes unfulfilled. The district court, however, rejected this binding holding, citing an out-of-circuit district court decision that *criticized* this Court's decision in *Wheaton*. *See Roman Catholic Archbishop of Washington,* No. 12-cv-0815, slip op. at 7–8 (D.D.C. Jan. 25, 2013)

(citing *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350, 2013 WL 93188, at *8 (D. Colo. Jan. 7, 2013)) (attached as Exhibit A).

Needless to say, it is this Court's decisions, not contrary decisions from out-of-circuit district courts, that govern this dispute. Abeyance, moreover, is particularly appropriate here, because, as Appellants predicted, the Government's recently announced Notice of Proposed Rulemaking ("NPRM"), 78 Fed. Reg. 8456 (Feb. 6, 2013), does not eliminate the Mandate's burden on religious exercise.[1] To the contrary, in a significant respect, it makes that burden worse. Accordingly, Appellants respectfully request that the Court summarily reverse the district court's decision below and remand with instructions that this case be held in abeyance in accordance with this Court's binding holding in *Wheaton*.

BACKGROUND

Appellants are Catholic entities that provide a wide range of spiritual, educational, and social services to residents in the greater Washington, D.C., community, Catholic and non-Catholic alike. This case arises out of their challenge to the Mandate, a federal regulation that requires Appellants to provide insurance coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling, *see* 76 Fed. Reg. 46,621 (Aug. 3, 2011); 75 Fed.

[1] Appellant Archdiocese has submitted comments to that effect. *See* Comment of the Archdiocese of Washington on the Notice of Proposed Rulemaking (Apr. 4, 2013), attached as Exhibit C.

Reg. 41,726 (July 19, 2010), in direct conflict with their sincerely held religious beliefs. Set forth below is a more detailed account of the facts and circumstances surrounding this appeal.

1. Appellees have issued a rule that requires all group health plans to provide plan participants and beneficiaries with abortion-inducing drugs, contraceptives, sterilization, and related education and counseling, without cost-sharing. *See* 77 Fed. Reg. 8725 (Feb. 15, 2012). The rule has two related components.

First, it set forth the Mandate, which requires all group health plans to provide "coverage, without cost sharing, for all Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," beginning in the first plan year starting on or after August 1, 2012.[2] *Id.* at 8725–26 (internal quotation marks omitted).

Second, it included an exemption from the Mandate for a narrow class of "religious employers," defined as "organization[s] that meet[] all of the following criteria":

(1) Has inculcation of religious values as its purpose;

[2] There are some exceptions to this requirement—for example, for "grandfathered" health plans—but Appellants do not fall within the relevant categories. *See* 42 U.S.C. § 18011 (grandfathering of existing health care plans).

> (2) primarily employs persons who share its religious tenets;
>
> (3) primarily serves persons who share its religious tenets; and
>
> (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

45 C.F.R. § 147.130(a)(iv)(B). In creating this exemption, the Government defined "religious employer" more narrowly than anywhere else in federal law, thereby ensuring that very few entities could gain the benefit of the exemption.

2. On May 21, 2012, Appellants filed this lawsuit challenging both aspects of the Mandate. *See* Compl. (Dist. Ct. Dkt. No. 1). First, Appellants sought declaratory and injunctive relief from the Mandate, which substantially burdens their religious exercise in violation of the First Amendment and the Religious Freedom Restoration Act, *id.* ¶¶ 177–212, and violates their First Amendment right to be free from compelled speech, *id.* ¶¶ 248–61. Second, they also challenged the exemption, because applying it would involve an impermissible Government inquiry into Appellants' religious beliefs and because it discriminates among religious denominations in violation of the First Amendment. *Id.* ¶¶ 213–47. Appellants also brought challenges under the Administrative Procedure Act, based on the haphazard manner in which the Government

promulgated the Mandate and its conflict with federal statutory bans on publicly-funded abortions. *Id.* ¶¶ 262–305.

3. On August 6, 2012, Appellees moved to dismiss Appellants' suit, arguing that the case was not ripe for review and that Appellants lacked standing because the Government had (1) announced a one-year safe harbor during which the Government would not enforce the Mandate against nonprofit entities like Appellants, and (2) issued an Advance Notice of Proposed Rulemaking ("ANPRM") announcing that the Government intended to change the law. *See* Mot. to Dismiss (Dist. Ct. Dkt. No. 19). The district court initially set a October 17, 2012, hearing date for this motion. *See* Sept. 28, 2012 Dist. Ct. Dkt. Entry. Appellees, however, then filed a "Motion to Stay Case Pending Resolution of Expedited Appeal Raising Identical Issues," in light of this Court's decision to grant expedited appeal in the consolidated cases of *Wheaton College v. Sebelius* and *Belmont Abbey College v. Sebelius* (hereafter, "*Wheaton*"). *See* Mot. to Stay (Dist. Ct. Dkt. No. 26).

The sole basis of Appellees' Motion to Stay was that the *Wheaton* appeal "involve[d] the same legal claims and relevant facts as plaintiffs allege in this case" and, therefore, that resolution of the *Wheaton* appeal would "control the outcome" of this case. *Id.* at 1–2; *see also id.* at 3 (stating that *Wheaton* "involv[es] legal claims and facts that are essentially identical to this case"); *id.* at 4 ("[T]he D.C.

Circuit's review of *Wheaton* and *Belmont Abbey* will require consideration of jurisdictional issues that are essentially identical to those raised by defendants in this case."); Reply in Supp. of Mot. to Stay at 2 (Dist. Ct. Dkt. No. 31) (stating that *Wheaton* "will require consideration of virtually identical standing and ripeness issues as are presented here"); *id.* at 3 (stating that the D.C. Circuit's decision in *Wheaton* is "very likely . . . to control the Court's analysis of standing and ripeness here"); *id.* at 4 (noting "the obvious similarities between the D.C. Circuit appeals and this case").

4. On November 2, 2012, the district court held a hearing on Appellees' Motion to Stay, at the end of which it issued a ruling from the bench granting the Motion. In doing so, the court agreed with the Appellees that the "relevant facts in this case are nearly identical to those in *Belmont Abbey* and *Wheaton*" and that the case presented the "same issues" as those matters now on appeal. Tr. of Nov. 2, 2012 Hr'g at 3:11–12, 29:10–11 (attached as Exhibit B). The court reasoned that "litigating the same issue in two forums is not really in the interests of judicial economy," *id.* at 31:5–6, because "the D.C. Circuit[]" is "hearing [the issue] and its opinion's going to be binding on me," *id.* at 9:1–2; *see also id.* at 11:10 (stating that the D.C. Circuit opinion in *Wheaton* "could be completely binding"); *id.* at 29:8–10 (finding it "very likely that the appeal before the D.C. Circuit [in *Wheaton*] will either control or at least substantially affect how I would rule in this case"); *id.*

at 31:7–8 ("[I]nevitably, my ruling is going to have to be shaped by what the DC Circuit is already thinking about.").

5. Less than a month later, on December 18, 2012, this Court issued its Order in *Wheaton*, in which it held that the appropriate disposition in that case was *not* to dismiss it, but rather, to hold it in abeyance pending issuance of the new rule promised in the ANPRM and at oral argument. More specifically, this Court first held that Wheaton College and Belmont Abbey College both had standing to challenge the Mandate. *Wheaton*, 703 F.3d at 552. It further held, however, that the case was not yet fit for review given the Government's "represent[ation] 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," and that, as a result, 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.* Significantly, however, rather than dismissing the colleges' claims, this Court held the "cases in abeyance, subject to regular status reports to be filed by the government . . . every 60 days." *Id.* at 553.

6. The district court thereafter requested supplemental briefing "addressing whether in light of the D.C. Circuit's Order in *Wheaton College v. Sebelius*, No. 12-5273, and *Belmont Abbey College v. Sebelius*, No. 12-5291 (Dec. 18, 2012), the Court should dismiss this case on ripeness grounds or maintain the

case under stay." *See* Jan. 2, 2013 Dist. Ct. Dkt. Entry. Then, after receiving the parties' supplemental briefs, the district court held that, under *Wheaton*, this case was not fit for review. *See Archbishop*, slip op. at 5–7. Significantly, however, the district court rejected this Court's holding that the appropriate disposition was to hold the case in abeyance and, instead, dismissed this case outright. *Id.* at 7–8. The district court cited two bases for this holding. *First,* it invoked a Colorado federal district court decision that held that "'[a]lthough the D.C. Circuit [in *Wheaton*] 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.'" *Id.* (quoting *Colo. Christian*, 2013 WL 93188, at *8). *Second,* it noted that in other, different cases, courts in this Circuit have "dismiss[ed] cases for the absence of a ripe case or controversy."[3] *Id*. at 8.

7. The Government released its NPRM on February 1, 2013. *See* 78 Fed. Reg. 8456. As described in greater detail below, the NPRM's proposals, if adopted, would not ameliorate the burden that the Mandate imposes on religious exercise.

[3] In the court below, the Government also argued that Appellants lacked standing and, in this regard, attempted to distinguish *Wheaton*. *See* Supplemental Br. at 2–4. (Dist. Ct. Dkt. No. 38). The district court, however, expressly declined to resolve that issue. *See Archbishop*, slip op. at 8–9 (declaring that it would dismiss the case on ripeness grounds and "need not decide whether plaintiffs have proper standing"). Consequently, it disposed of this case on the very same ripeness ground that this Court relied upon in the *Wheaton* appeal. *See id.* at 6 ("This Court finds no reason why the Circuit Court's decision [in *Wheaton*] should not apply equally to the facts of this case.").

Quite to the contrary, in a significant respect, the NPRM's proposals are even more burdensome on Appellants' religious beliefs than existing law.

ARGUMENT

This Court "encourage[s]" parties to file motions for summary disposition "where a sound basis exists" for such treatment. *See* U.S. Court of Appeals for the District of Columbia Circuit, *Handbook of Practice and Internal Procedures* § VIII.G. Here, the sound basis for summary reversal could not be more plain: the district court ignored this Circuit's recent decision in a nearly identical case. Regardless of whether the district court agreed with this Court's holding in *Wheaton* that the appropriate disposition here was to hold the case in abeyance, the district court was obliged to adhere to that binding precedent. Indeed, abeyance is even more appropriate here than in *Wheaton* itself since, as explained below, the proposals set forth in the recently issued NPRM would limit religious liberty even more than the Mandate that they are intended to replace. Accordingly, this Court should summarily reverse the district court's decision to dismiss the case outright and remand with instructions that it should be held in abeyance in accordance with this Court's holding in *Wheaton*.[4]

[4] Appellants disagree with the district court's determination that their lawsuit is not ripe for review, but they are not now appealing the ripeness ruling. Instead,

I. The District Court Ignored Binding Circuit Precedent

This Court has held summary disposition of a case appropriate when an earlier decision is dispositive of the issues in the case. *See U.S. Dep't of Interior v. Fed. Labor Relations Auth.*, No. 90-1540, 1991 WL 80511 (D.C. Cir. May 2, 1991) (per curiam); *see also U.S. Dep't of Interior v. Fed. Labor Relations Auth.*, No. 91-1583, 1993 WL 71706 (D.C. Cir. Mar. 4, 1993) (per curiam) (granting summary reversal based on a recent decision). The mechanism of summary disposition allows the Court to dispose of a case efficiently when the merits of a party's position "are so clear [that] plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect" the Court's decision. *Sills v. Fed. Bureau of Prisons*, 761 F.2d 792, 793–94 (D.C. Cir. 1985).

Here, full briefing and oral argument are not necessary because this Court's decision in *Wheaton* resolves the only question presented in this appeal: whether the district court should have held Appellants' suit in abeyance rather than dismissing it. This Court has left no doubt that under circumstances like those presented here, abeyance, not dismissal, is the proper course.

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their appeal is limited to the district court's decision to dismiss this case rather than to hold it in abeyance.

In particular, in *Wheaton*, this Court held that the colleges' legal claims were not yet ripe given an ongoing rulemaking that the Government asserted would change the challenged rule. 703 F.3d at 552. This Court nonetheless held that "in reliance upon the Departments' binding representations, this court will hold these cases in abeyance, subject to regular status reports to be filed by the government with this court every 60 days from the date of this order." *Id.* at 553. Here, the underlying legal claims, the challenged rule, and the ongoing rulemaking are *exactly the same* as in *Wheaton*. Moreover, as in *Wheaton*, here, the district court held that Appellants' claim was not ripe for review. It necessarily follows that this Court's disposition of *Wheaton* governs this case.

The district court ignored this binding precedent and, instead, dismissed Appellants' complaint outright. The district court cited two bases for its decision, neither of which even remotely justified the district court's decision to ignore binding Circuit precedent. *See Archbishop,* slip op. at 7–8.

First, it invoked an out-of-circuit district court decision that *criticized* this Court's decision as insufficiently persuasive. *See id.* (citing *Colo. Christian*, 2013 WL 93188, at *8). In *Colorado Christian,* the district court addressed an identical challenge to the Mandate brought by a Christian college. There, as here, instead of holding the case in abeyance, the district court dismissed the case for lack of ripeness. And in so holding, the Colorado district court expressly *rejected* this

Court's decision in *Wheaton*, noting that "[a]lthough [in *Wheaton*] 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." *Colo. Christian*, 2013 WL 93188, at *8.

Needless to say, the fact that a federal district court in Colorado found this Court's reasoning in *Wheaton* to be insufficiently persuasive is entirely irrelevant. "[D]istrict judges . . . are obligated to follow controlling circuit precedent until either [this Court], sitting en banc, or the Supreme Court, overrule[s] it. That a district judge disagrees with circuit precedent does not relieve him of this obligation whether or not the precedent has been embraced by [other courts]." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (citation omitted). Consequently, the district court here was bound by this Circuit's holding in *Wheaton*; it had no authority to decline to follow that holding simply because a district court in another circuit was not persuaded.

Second, the district court noted that in other different cases, courts have "dismiss[ed] cases for the absence of a ripe case or controversy." *See Archbishop,* slip op. at 8. Again, however, this is irrelevant where, as here, this Court has made plain that the standard treatment of unripe cases is not appropriate under the circumstances of *this* case. *See Ellis v. Dist. of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996) (stating that a court must follow precedent that is "directly on

point"); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (internal quotation marks and citation omitted)); *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[C]aselaw on point *is* the law.").

In other words, whatever its reasoning, the fact is that this Court chose abeyance over dismissal under circumstances identical to those presented here. This Court's decision, moreover, reflects its considered judgment that in a case such as this, quick resolution is critically important to protect the religious liberties enshrined in the Constitution and statutory law. Abeyance, rather than dismissal, provides the flexibility for such speedy resolution. The district court was not free to disregard the considered judgment of this Circuit about the proper handling of these cases. *See Wheaton*, 703 F.3d at 552; *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 390 (D.C. Cir. 2012) (holding case in abeyance after determining it was unripe for review due to pending NPRM proposing to revise challenged rule).

For these reasons alone, summary reversal is warranted here.

II. Abeyance Is Particularly Warranted Since the NPRM Is Worse Than the Existing Mandate

The wisdom of the *Wheaton* panel's decision to hold that suit in abeyance during the ongoing rulemaking process is all the more obvious now, in the wake of

the NPRM. The NPRM has does not eliminate the burden on religious liberty. To the contrary, the NPRM proposes a "solution" that is, in one significant respect, even *worse* than existing law.

The NPRM has three basic components. *First,* it proposes a revised definition of "religious employer" that will be used to determine which entities are completely exempt from compliance with the Mandate. As noted, the existing definition exempts organizations that meet four 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) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B). The NPRM eliminates those first three prongs of this definition. Consequently, under the NPRM, an exempt "religious employer" is "a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."[5] *See* 78 Fed. Reg. at 8461.

[5] Section 6033 was never intended to distinguish among religious organizations for purposes of the provision of health care. Instead, it merely addresses whether and when nonprofit entities that are exempt from paying taxes under the Code must file an annual informational tax return, known as a Form 990.

The Government, however, has made clear that this change "would *not* expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." *See id.* (emphasis added). Instead, this proposed change would continue to "restrict[]the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* In this respect, the NPRM is little different from the existing "religious employer" exemption, which is intended to focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. Religious organizations that have a broader mission are still not, in the Government's view,

(continued…)

26 C.F.R. § 1.6033-2(a). As relevant here, organizations exempted from having to file this informational return include churches, their integrated auxiliaries, associations or conventions of churches, and entities created to conduct the exclusively religious activities of a religious order. To say the least, it is far from clear why the Government would adopt Section 6033 as the dividing line between organizations that are, or are not, deemed sufficiently "religious" to warrant to protections of RFRA and the First Amendment. Indeed, there are myriad provisions in the federal code that define religious organizations far more broadly, and, unlike Section 6033, these provisions *are* intended to protect the religious freedom of such organizations. *See, e.g.,* 42 U.S.C. § 300a-7; 29 U.S.C. § 1002(33). The Government's decision to adopt Section 6033, rather than these other provisions, seems to be based solely upon its desire to define "religious employers" as narrowly as possible. The NPRM, therefore, embodies an impermissibly narrow view of the purposes of religious ministries and an underlying hostility towards religious organizations, like Appellants here, who fundamentally disagree with the Government's prevailing view on issues of contraception, abortion, and related matters.

"religious employers." Consequently, the NPRM's change to the "religious employer" exemption is purely cosmetic—it does not, nor is it intended, to accomplish any substantive change to existing law.

Second, other parts of the NPRM make clear that the Government's proposal is, in fact, intended to *reduce* the number of religious entities that benefit from the "religious employer" exemption. Previously, the ANPRM stated that the existing religious employer exemption was "available to religious employers in a variety of arrangements." 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). It specifically stated that a nonexempt entity could thus "provide[] health coverage for its employees through" a plan offered by a separate, "affiliated" organization that is a "distinct common-law employer." *Id.* In that situation, if the "affiliated" organization was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." *Id.*

Here, for example, the Archdiocese of Washington operates a self-insurance plan that covers not only the Archdiocese itself, but other affiliated Catholic organizations—including Archbishop Carroll High School, the Consortium of Catholic Academies, and Catholic Charities. Under the existing religious employer exemption, if the Archdiocese is an exempt "religious employer," then Archbishop Carroll, the Consortium of Catholic Academies, and Catholic Charities

get the benefit of that exemption, regardless of whether they independently qualify as "religious employers," since they can continue to participate in the Archdiocese's exempt plan. These affiliated organizations, therefore, could benefit from the Archdiocese's exemption even if they, themselves, could not meet the Government's unprecedentedly narrow definition of "religious employer."

The NPRM would reverse this existing law. It now provides that "each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents." *See* 78 Fed. Reg. at 8467. It states that this "approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan." *Id.* Thus, if, as the NPRM suggests, Appellant Archdiocese of Washington is an exempt "religious employer," Appellants Catholic Charities, Archbishop Carroll High School, and the Consortium of Catholic Academies would effectively be kicked out of the Archdiocese' self-insurance plan. Instead, unless they independently qualify as "religious employers," under the NPRM, they will be forced to facilitate access to contraceptives, abortion-inducing drugs, sterilization, and related counseling,

contrary to their sincerely held religious beliefs, as described below. In this respect, the NPRM is significantly *worse* than existing law.

Finally, the NPRM proposes an illusory "accommodation" for nonexempt objecting religious entities. Per the proposal in the NPRM—which parrots the Government's prior and inadequate proposal in the ANPRM—a nonexempt, nonprofit religious entity that does not want to provide the mandated coverage plan must self-certify its objection to contraceptive coverage. The self-certification then "automatically" requires a third-party entity—either the nonprofit's insurance company or its third-party administrator—to provide or procure the objectionable coverage "at no additional cost." *See id.* at 8462–64.

In other words, for nonexempt religious entities that provide coverage through an insurance company, the situation is as follows: Under the regulation currently on the books, in exchange for the nonexempt religious entity's money, the insurance company provides the nonexempt religious entity with an insurance contract that covers contraception, abortion-inducing drugs, sterilization, and related counseling. In contrast, under the NPRM, in exchange for the nonexempt religious entity's money, the insurance company (a) provides the nonexempt religious entity with an insurance contract that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling, and (b) provides the

nonexempt religious entity's employees with another insurance contract that does cover contraception, abortion-inducing drugs, sterilization, and related counseling.[6]

This accounting gimmick does nothing to address Appellants' religious objections, as the Government well knows. Indeed, Appellants have maintained since the inception of this litigation that the "accommodation" first contained in the ANPRM and now reiterated in the NPRM "still require[s] religious organizations to provide, pay for, and/or facilitate access to the objectionable services." Compl. ¶ 129 (Dist. Ct. Dkt. No. 1); Duffy Aff. ¶¶ 38–39 (Dist. Ct. Dkt. No. 21, Ex. A) ("[T]he possibilities the Government has proposed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on the Archdiocese's religious beliefs."); Conley Aff. ¶ 20 (Dist. Ct. Dkt. No. 21, Ex. D) (same for the Consortium of Catholic Academies); Blaufuss Aff. ¶ 19 (Dist. Ct. Dkt. No. 21, Ex. E) (same for Archbishop Carroll); Enzler Aff. ¶ 18 (Dist. Ct. Dkt. No. 21, Ex. F) (same for Catholic Charities); Persico Aff. ¶ 17 (Dist. Ct. Dkt. No. 21, Ex. G) (same for Catholic University).[7]

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[6] The NPRM includes proposed regulations only for entities that provide coverage through an insurance company. For entities that are self-insured, the NPRM describes several "alternative approaches" under "consider[ation]," 78 Fed. Reg. at 8463, but provides no proposed regulatory language, *id.* at 8473.

[7] Notably, the Government explains that it drew a distinction between "religious employers" and "eligible organizations" that qualify for the "accommodation" based on its belief that "the participants and beneficiaries [of eligible organizations' plans] . . . may be less likely than participants and

In sum, the Government proposed a "solution" that it knew would not alleviate Appellants' core concerns. Indeed, it is actually worse than existing law. The highly-touted NPRM's failure to make any progress towards a genuine resolution of Appellants' religious-liberty concerns therefore reinforces that, as this Court held in *Wheaton,* abeyance of Appellants' suit is the proper disposition here.

CONCLUSION

Based on this Court's Order in *Wheaton*, a case that, for all relevant purposes, is identical to this one, Appellants ask the Court to summarily reverse the district court's dismissal of their suit and remand with instructions to hold it in abeyance.

Respectfully submitted, this the 4th day of April, 2013.

/s/ *Noel J. Francisco*

Noel J. Francisco
D.C. Bar No. 464752

(continued…)

beneficiaries in group health plans established or maintained by religious employers to share [the] religious objections of the eligible organizations." 78 Fed. Reg. at 8461–62. It cannot be, however, that an organization's religious freedom turns on the beliefs of its employees. It is, after all, the religious organization's beliefs that are protected by RFRA and the First Amendment; the organization's employees have no corollary right to force the religious organization to subsidize the employees' contrary beliefs. Nor can it be that the Government is permitted to parcel out the protections of RFRA and the First Amendment based on its speculation about whether an organization's employees are more or less likely to be devout believers.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 4, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Noel J. Francisco*

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,	)	
Plaintiff,	)	
v.	)	Civil Action No. 12-0815 (ABJ)
KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

This is one in a long line of cases challenging regulations issued by the Department of Health and Human Services ("HHS"; "Department") pursuant to provisions of the Patient Protection and Affordable Care Act ("Act"), 42 U.S.C. § 300gg-13(a)(4) (2010).[1] The regulations in question implement the requirement under the Act that group health plans and health insurance issuers offering group or individual health insurance provide coverage for "preventative care" for women. Defendants moved to dismiss the case for lack of jurisdiction on

1 Other cases involving similar challenges include: *Colorado Christian University v. Sebelius*, Civil Action No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *University of Notre Dame v. Sebelius*, Cause No. 312CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Biloxi, Inc. v. Sebelius*, 1:12CV158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012); *Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Roman Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC), -- F. Supp. 2d --, 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012); *Legatus v. Sebelius*, No. 12-12061, -- F. Supp. 2d --, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Nebraska ex rel. Bruning v. United States Department of Health & Human Services*, 877 F. Supp. 2d 777 (D. Neb. 2012).

August 6, 2012, arguing that plaintiffs lack standing and that the case is not ripe for decision. Defs.' Mot. to Dismiss [Dkt. # 19]. On November 2, 2012, this Court stayed the case pending an anticipated ruling by the D.C. Circuit in the consolidated appeal of two cases substantially similar to this one that had been dismissed by other courts in this district on standing and ripeness grounds. Minute Entry (Nov. 2, 2012), citing *Wheaton Coll. v. Sebelius*, Civ. Action No. 12-1169 (EHS), -- F. Supp. 2d --, 2012 WL 3637162 (D.D.C. Aug. 24, 2012); *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012). The D.C. Circuit has now ruled. *Wheaton Coll. v. Sebelius* ("*Wheaton* Order"), Nos. 12-5273, 12-5291, -- F.3d --, 2012 WL 6652505 (D.C. Cir. Dec. 18. 2012). In a three-page *per curiam* Order, the court found that the plaintiffs had proper standing to bring their claims, but that the controversy was not ripe for decision. *Id.* The court ordered the cases to be held in abeyance subject to regular status reports. *Id.* at *2. Plaintiffs and defendants in this case have each filed a five-page brief addressing the applicability of the circuit court's decision to this case. Upon consideration of the two briefs, as well as the motion to dismiss and the pleadings responsive to it, the Court will grant defendants' motion to dismiss because plaintiffs' claims are not ripe.

BACKGROUND

Plaintiffs are five Catholic non-profit organizations. Compl. [Dkt. # 1] ¶ 2. According to the complaint filed in this case, plaintiffs each provide services to residents of the greater Washington, D.C. community, without regard to the residents' religious affiliations. *Id.* Plaintiffs oppose the use of abortion, sterilization, and contraceptives on religious grounds. *Id.* ¶ 4. Accordingly, although all of the plaintiffs offer health insurance plans to their employees, none of the plans cover those types of preventative services for women. *Id.* ¶¶ 44–46, 56, 64, 74, 86, 90.

As explained in the D.C. Circuit's Order in *Wheaton College*, the government defendants issued a set of interim final rules on July 2010 under the Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4), which required group health plans and health insurance issuers to cover "preventative care and screening[s]" for women in accordance with guidelines that were to be issued by HHS at a later date, unless the issuers were grandfathered or otherwise exempt. 75 Fed. Reg. 41,726, 41,726 (July 19, 2010); *see* Compl. ¶¶ 106–107; *see also Wheaton* Order, at *1. On August 1, 2011, HHS issued guidelines requiring coverage of all "FDA approved contraceptive[s]." HRSA, Women's Preventative Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Jan. 24, 2013). A later Amended Interim Final Rule issued by HHS authorized an exemption for certain religious organizations with religious objections to contraception. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). In February 2012, the government adopted in final regulations the definition of religious employer contained in the amended interim final rules, but it also created a temporary enforcement safe harbor for plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage that do not qualify for the religious employer exemption. 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012). The safe harbor will be in effect until the first plan year that begins on or after August 1, 2013. HHS, Guidance on the Temporary Enforcement Safe Harbor, at 3 (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf. The supplemental information published in the Federal Register accompanying the final regulations stated that during the effective period of the safe harbor, HHS planned to develop and propose changes to the final regulations "that would meet two goals – providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted

non-profit organizations' religious objections to covering contraceptive services[.]" *Id.* There is no dispute that all of the plaintiffs in this case are covered by the safe harbor, if not by the religious employer exemption. *See* Compl. ¶ 130. Since the plan years for all plaintiffs begin on January 1, Compl. ¶¶ 48, 87, they will be protected by the safe harbor until January 1, 2014.

Plaintiffs filed a nine-count complaint in this Court on May 21, 2012, challenging the requirement that they provide coverage for abortion, sterilization, and contraceptive services.[2] Defendants moved to dismiss the case on ripeness and standing grounds.

STANDARD OF REVIEW

The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibly Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with examination of our jurisdiction."). Because "subject-matter jurisdiction is an 'Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

2 One of plaintiffs' claims challenges the governmental investigation that is involved in determining whether entities are "religious employers," citing some uncertainty over whether plaintiff Archdiocese of Washington falls under the exemption. Compl. ¶¶ 6, 213–222. This uncertainty does not change the Court's analysis, since no party will be required to make this determination until after the expiration of the safe harbor.

In evaluating a motion to dismiss under Rule 12(b)(1), the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979) (citations omitted). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). When considering a motion to dismiss for lack of jurisdiction, unlike when deciding a motion to dismiss under Rule 12(b)(6), the court "is not limited to the allegations of the complaint." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, a court "may consider such materials outside the pleadings as it deems appropriate to resolve the question of whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1993); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

ANALYSIS

I. Ripeness

Prudential ripeness is a two prong inquiry: first, courts consider "the 'fitness of the issues for judicial decision,'" and second, they consider "the extent to which withholding a decision will cause 'hardship to the parties.'" *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012), quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

In *Wheaton College*, the D.C. Circuit found that the cases were not fit for decision because of the likelihood that the government would change the contraceptive coverage

requirement as it applied to the plaintiffs before it would ever enforce the requirement against them. It found that the government's safe harbor provision constituted a commitment by the government not to enforce the contraception coverage requirement until the first plan year that begins on or after August 1, 2013. *Wheaton* Order at *1–2.[3] As to its determination that the contraception coverage requirement as enacted would never be enforced against the plaintiffs, the court cited representations made by the government at oral argument that "it would *never* enforce 45 C.F.R. § 147.130(a)(1)(iv) in its current form against the appellants or those similarly situated as regards contraceptive services" and that "there will . . . be a different rule for entities like the appellees," which the court construed as a "binding commitment." *Id.* It also pointed to language from an Advance Notice of Proposed Rulemaking ("ANPRM"), which discusses alternatives to the contraception coverage requirement for certain self-certifying organizations, that the government "intend[s] to propose." *Id.*

This Court finds no reason why the Circuit Court's decision should not apply equally to the facts of this case. Plaintiffs do not dispute that they are just the type of "similarly situated" entities to which the government referred in their representations to the circuit court. Moreover, the government's supplemental brief in this case clarifies 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." Defs.' Supp. Br. Addressing the D.C. Circuit's Order in *Wheaton College v. Sebelius* ("Defs.' Supp. Br.") [Dkt. # 38] at 4. Just as the

3 As here, the plan years of the plaintiffs in those cases begin January 2014. *Wheaton* Order at 2.

Circuit Court did in *Wheaton College*, this Court "take[s] the government at its word and will hold it to it." *Wheaton* Order, at *2, citing *EPA v. Brown*, 431 U.S. 99 (1977).

Plaintiffs instead rely on the second prong of the prudential ripeness inquiry: the hardship to the parties. They argue that they have established hardship that exceeds what was demonstrated in *Wheaton College* and *Belmont Abbey College* and that the hardship independently justifies the conclusion that this case is ripe for review. This argument is unconvincing. Plaintiffs have, at most, demonstrated that they will suffer some hardship during the period of regulatory uncertainty before the final regulations are issued because they must begin planning for the possibility that they will be forced to change their health insurance plans in advance of the date that the insurance plans take effect. Pls.' Mem. Regarding the D.C. Circuit's Decision in *Wheaton College* ("Pls.' Supp. Br.") [Dkt. # 37] at 2–5. The plaintiffs in both *Wheaton College* and *Belmont Abbey College* made similar arguments. *See Wheaton Coll.*, 2012 WL 3637162, at *8; *Belmont Abbey Coll.*, 878 F. Supp. 2d at 37–38. Although the D.C. Circuit did not expressly address those arguments in its Order, it is clear that they were unavailing to the court. *See Wheaton* Order at *1–2; *see also Am. Petroleum Inst.*, 683 F.3d at 389, quoting *Pub. Citizen Health Research Grp.*, 740 F.2d at 21, 31 (D.C. Cir. 1984) ("Considerations of hardship that might result from delaying review 'will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions.'").

The final question before the Court is whether the ripeness defect requires dismissal of the case or whether the Court should hold the case in abeyance pending the issuance of the new regulations that the government has promised. Although the Circuit Court decided to hold the *Wheaton College* and *Belmont Abbey College* appeals in abeyance, nothing in the Order suggests that this Court is required to do the same. *See Colo. Christian Univ.*, 2013 WL 93188, at *8

("Although 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."). Courts in this circuit regularly dismiss cases for the absence of a ripe case or controversy. *See, e.g.*, *In re Aiken Cnty.*, 645 F.3d 428, 434–36, 438 (D.C. Cir. 2011) (dismissing claims that were not ripe for judicial review); *Maalouf v. Wiemann*, No. 1:08-cv-02177-RJL, 2010 WL 4156654, at *1 (D.C. Cir. May 17, 2010) (affirming district court's dismissal of the case because it was not ripe for judicial review); *AstraZeneca Pharm. LP v. FDA*, 850 F. Supp. 2d 230, 250 (D.D.C. 2012) (dismissing case "without prejudice to [the plaintiff's] right to commence a new and different action if and when its claim ever ripens into a justiciable case or controversy"). If after the new regulations are issued, plaintiffs are still not satisfied, any challenges that they choose to bring will be substantially different from the challenges in the current complaint. And in the unlikely event that the government does not keep its word, plaintiffs can bring a new challenge to the regulations along with a motion for emergency relief, if necessary.[4] Accordingly, the Court will decline to hold this case in abeyance and will instead dismiss the case. This would not bar plaintiffs from filing a new and different action in the future. *See Colo. Christian Univ.*, 2013 WL 93188, at *8, citing 15 James WM. Moore et al., *Moore's Federal Practice* § 108.81 (3d ed. 2011) (dismissing a similar challenge to the contraception coverage requirement, in adherence with "the customary practice of dismissing an unripe case in its entirety").

II. Standing

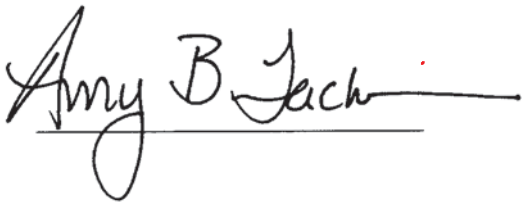
In its *Wheaton* Order, the D.C. Circuit reiterated that standing is assessed at the time of filing, and it held that the plaintiffs "clearly had standing when these suits were filed." *Wheaton* Order at *1. The government insists that this case can be distinguished from *Wheaton College*

4 The Court notes that it has construed the government's representations as a binding commitment and it would not look favorably upon the government's failure to comply.

and *Belmont Abbey College* because the plaintiffs here were undisputedly covered by the safe harbor provision at the time the complaint was filed. Defs.' Supp. Br. at 3–4. While this argument has some force, it appears that the Circuit Court's holding in *Wheaton College* was predicated simply on the fact that the contraceptive coverage requirement existed at the time the cases were filed, without regard to the defendants' intent to enforce it. *Wheaton* Order at *1. In fact, the Order does not even mention the safe harbor from enforcement until after the discussion of standing, when it reaches the ripeness analysis. *Id.* But since this Court has already found that the case is not ripe for decision, and it will dismiss the case on that jurisdictional ground, it need not decide whether plaintiffs have proper standing. *See Moms Against Mercury v. FDA*, 483 F.3d 824, 826 (D.C. Cir. 2007), citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("Where both standing and subject matter jurisdiction are at issue, however, a court may inquire into either and, finding it lacking, dismiss the matter without reaching the other.")

CONCLUSION

For the above-stated reasons, the Court will dismiss this action.



AMY BERMAN JACKSON
United States District Judge

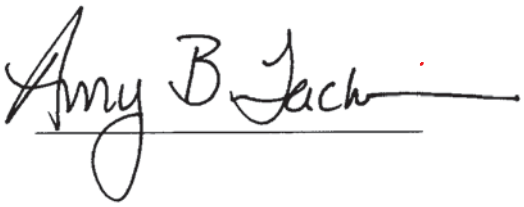
DATE: January 25, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,	
Plaintiff,	
v.	Civil Action No. 12-0815 (ABJ)
KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*,	
Defendants.	

ORDER

Pursuant to Fed. R. Civ. P. 58 and for the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that defendants' motion to dismiss [# 19] is GRANTED and the above-captioned case is DISMISSED.



AMY BERMAN JACKSON
United States District Judge

DATE: January 25, 2013

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, et al.,	:	Case No. 12-CV-815
	:	November 2, 2012
	:	Friday
Plaintiffs,	:	
	:	10:05 - 10:47 a.m.
v.	:	
	:	
KATHLEEN SEBELIUS, et al.,	:	
	:	
Defendants.	:	

TRANSCRIPT OF MOTION BEFORE THE HONORABLE AMY BERMAN JACKSON, UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter: Kellie M. Humiston, RMR, CRR
Room 6720, U.S. Courthouse
Washington, DC 20001
(202) 354-3187

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE CLERK: Your Honor, calling Civil Case Number 12-815, Roman Catholic Archbishop of Washington, et al., v. Kathleen Sebelius, et al.

Counsel, please approach the podium and identify yourselves for the record and the parties that you represent.

MR. PRUSKI: Good morning, Your Honor. Jacek Pruski for the defendants.

THE COURT: Good morning.

MR. FRANCISCO: Morning, Your Honor. Noel Francisco for the plaintiffs, Archdiocese of Washington, Catholic Charities, the Consortium of Catholic Academies, Archbishop Carroll High School and Catholic University. I tried to write it down so I don't forget anybody.

THE COURT: All right. Good morning. No one else is going to introduce themselves. That's fine. If you're not going to be speaking, you don't have to, but I just want to make sure.

MR. MCSORLEY: Your Honor, Jeff McSorley on behalf of the plaintiffs.

THE COURT: All right. Good morning. Okay. We're here on the defendants' motion to stay this case. And I don't have to tell you, it raises very complex and constitutional and public policy issues, and it sits right at the intersection of religious freedom and individual access to healthcare.

The Government has moved to dismiss the complaint on jurisdictional grounds. And not one, but two judges of this court have already ruled in similar cases that the court lacks jurisdiction. They've ruled that the matter's not ripe for decision, because the agency is still in the process of revising its regulations to account for the very objections lodged by organizations such as the plaintiffs, and also that the plaintiffs in those cases don't face the imminent injury necessary to give rise to standing to bring the action, because the safe harbor provisions guarantee that the rules will not be enforced against them while that rule making proceeds, and those are the same issues raised in the motion to dismiss in this case.

The rulings are on appeal and the appeal has been expedited. Oral arguments are set for December 14th, which is only six weeks from today, and the plaintiffs here are actually participating in that appeal as amici.

So under those circumstances, the defendants have asked me to stay this action, and in particular, my consideration of the pending motion to dismiss on jurisdictional grounds.

Since this is the defendants' motion, I'm going to hear briefly from the defendants first.

MR. PRUSKI: Thank you, Your Honor. As Your Honor points out, the defendants have briefly -- have moved to briefly stay this case pending the DC Circuit's expedited review of two cases, *Wheaton College* and *Belmont Abbey College*. And as Your Honor also

pointed out, those cases involve similar plaintiffs, very similar claims and very similar factual allegations with respect to the standing and ripeness issues. And indeed, as Your Honor pointed out, plaintiffs here are participating as amici in those cases.

In light of the similarity in the cases, the expeditious review that the DC Circuit has granted, defendants here have respectfully moved for a brief stay of these proceedings. It's defendants' position that staying this case now would preserve this Court's resources and the parties' resources and that the stay would be relatively brief.

Plaintiffs in opposing this stay have made a couple of arguments. The first is that plaintiffs seem to suggest that this delay would somehow be substantial. In particular, they raise the concern, it seems, that were the Court to stay the case, await the DC Circuit's decision, deny defendants' motion to dismiss, allow five months of discovery and then rule on summary judgment, it might take until August 2013, which plaintiffs say would be when the safe harbor, the enforcement of safe harbor that Your Honor referenced would expire.

THE COURT: Well, what kind of discovery is going to go on in an APA case anyway? You're going to have to produce the administrative record, and even if we stay this case, I may order you to go ahead and do that anyway, but what other discovery would even take place in this case?

MR. PRUSKI: Well, that's a good question, Your Honor.

It's defendants' position that there should be little discovery, if any, especially with regard to the constitutional claims and the APA claims. So, again, I was simply summarizing plaintiffs' position --

THE COURT: Right. I understand that.

MR. PRUSKI: -- as to how long this would take. Yes. But the other point I wanted to make is that even in plaintiffs' scenario, if it takes until August 2013, it's not clear whether that's a particularly relevant end point. The safe harbor here protects entities through the first -- until the first plan year that begins on or after August 1st, 2013. In the complaint, plaintiffs allege that all their plan years begin on January 1. What that means for safe harbor purposes is that the Government won't enforce the regulations against them until January 1st, 2014, in other words, four months after August 2013. That was the point I was trying to get at.

THE COURT: Right. Was there any chance, is there anything about this case that takes it outside the decisions in *Belmont Abbey* and *Wheaton*? Is there something different about this case such that even if the court upheld the decisions that have already been issued, that there's still going to be something left for me to decide?

MR. PRUSKI: Your Honor, it's our position that if the cases are affirmed, there would be very little for the Court to decide. What plaintiffs point out in opposing the defendants'

motion is that they have compiled a more extensive factual record with regard to the injury for standing purposes and the harms or the hardship for ripeness purposes, but the kind of injury and the kind of harms that they allege are virtually the same as those alleged by Wheaton College and Belmont Abbey College. Both of those cases were dismissed at the motion to dismiss stage when their allegations would have been taken as true. And similarly here, as Your Honor pointed out, defendants have moved to dismiss.

And so at this stage in the proceedings, the fact that plaintiffs have provided additional affidavits in addition to the allegations that they make in their complaint wouldn't distinguish them from the two cases on appeal.

THE COURT: Well, and what would the harm issue have to do with ripeness anyway? I mean, the courts ruled that it wasn't ripe because essentially it wasn't final, but we don't even know what the decision is, and that's -- that's a decision based on what's going on at the defendants' side of the equation, not -- it doesn't matter who the plaintiff is.

MR. PRUSKI: Yes, Your Honor. That's correct. And, in fact, in this circuit, hardship concerns rarely, if ever, overcome finality or fitness problems. So it would be defendants' position that the hardship is largely relevant if the DC Circuit agrees with the two district courts, with Judges Huvelle and Boasberg, that these issues aren't fit for judicial review.

THE COURT: Well, what's your response to their argument

that the safe harbor's very nice, and maybe it's January 1, but we don't plan for our budget for January 1 on January 1. This process starts well before that, and we need to know well before that what the regime is that we're going to be facing?

MR. PRUSKI: Well, the regime that these plaintiffs will be facing won't be known by anyone, it won't be announced by the agencies until August 2013. Plaintiffs understandably want to know and want to be able to plan and want to, for instance, be able to set a budget in May or June that accounts perfectly for any regulation that could apply to them the following year, but in that regard, they're not any different from most regulated parties. The timing of statutory requirements and regulatory requirements does not always track with an organization's preferred budgeting timeline.

THE COURT: All right. Well, I think -- what's your response to their request to begin discovery at this point?

MR. PRUSKI: Your Honor, defendants' position is that this case should be stayed entirely. Furthermore, defendants' position is that even were the DC Circuit -- once the DC Circuit decides this case, that discovery should be stayed at least through the Court's decision on the motion to dismiss, which raises serious jurisdictional questions, and furthermore that, as I said, little, if any, discovery's appropriate to begin with.

THE COURT: All right. Is there anything else that you think you need to tell me that isn't laid out in your papers?

MR. PRUSKI: No, Your Honor.
THE COURT: All right.
MR. PRUSKI: Thank you so much.
THE COURT: Let me hear from the plaintiffs.
MR. FRANCISCO: Good morning, Your Honor.
THE COURT: Good morning.
MR. FRANCISCO: The contraceptive mandate is currently burdening the plaintiffs right now and will continue to do so unless and until invalidated by a court. The Government's argument effectively ignores this harm and asks for an extended delay in these proceedings for, as far as we can tell, to save itself of the ordinary costs of litigating a case. Those --
THE COURT: Well, let's not talk about "it." Let's talk about me.
MR. FRANCISCO: Sure.
THE COURT: We've got two judges who've already ruled on this case, and they obviously reject the first sentence that you just said. And so on those grounds, they've said you don't have standing, so they reject the idea of imminent injury, which means they don't believe it's currently burdening you, and they say even if it is, we don't even know what the "it" is that is being challenged. Let me finish. How -- how does it promote judicial economy --
MR. FRANCISCO: Sure.
THE COURT: -- to have a third judge weigh in on this

issue when the DC Circuit's going to be hearing it and its opinion's going to be binding on me.

MR. FRANCISCO: Sure.

THE COURT: If I got to do what I wanted to do, I'd go ahead and do it.

MR. FRANCISCO: Sure. Well, first of all, Your Honor, the other two courts have not addressed the issue before you right now. We're here on the Government's motion to stay. And under the Supreme Court's standard in the *Landis* case that applies to a motion to stay, it's not the same as ripeness and -- and standing.

THE COURT: No. I understand that.

MR. FRANCISCO: They agree that -- they don't contest the various harms that we laid out in our seven affidavits. They argued that under ripeness and standing, those harms aren't relevant.

We fundamentally disagree, but for purposes of today, that's not the standard that applies. The standard that applies is the *Landis* standard, which governs when the Government is entitled to a motion to stay proceedings while another court involving other parties resolves a arguably similar issue.

THE COURT: All right. How -- arguably similar?

MR. FRANCISCO: Your Honor --

THE COURT: What's not similar?

MR. FRANCISCO: I will readily concede that the legal issues overlap, but ripeness and standing involve the application

of law at a very concrete sets of facts. I think we've got a different set of facts, but even if you disagreed with that, what the *Landis* court says is that even if the cases are completely identical, completely identical, the Court still shouldn't stay proceedings in one case while another is decided unless the following standard is met.

If I could focus on that a minute, I think it really frames the issue before the Court today. What the court in *Landis* said was, and I'm quoting: The suppliant for the stay, and here that's the Government, the applicant for the stay, must make out a clear case of hardship or inequity in being required to go forward. And then it continues: If there is even a fair possibility that the stay for which it prays will work damage to someone else.

And if we look at that standard, let's start with the first half, the clear case of hardship or inequity on the Government. What hardship or inequity have they put forward in being required to go forward here? It's simply the ordinary cost of litigating a case. And what the District court held in the *Painters Pension Trust* case, the District Court here in DC in 1988, I think, is directly applicable. It said, quote, the simple and well-settled answer to this argument is that the usual costs attendant to litigation, however great and duplicative, did not warrant a stay. So the Government side of the *Landis* balancing test is zero.

THE COURT: Well, wait a minute. I mean, the *Landis*

gives me broad authority to manage my docket to promote judicial economy. And I've asked you, and you haven't answered, how does it begin to promote judicial economy to have me consider a motion that raises issues that two judges have already ruled on that at this very moment the Court of Appeals is considering in an opinion that -- do you agree that in some ways the opinion could govern your case even if you're different on standing --

MR. FRANCISCO: Yes, Your Honor. I agree that it is a rel- -- it will be a relevant decision.

THE COURT: It could be completely binding.

MR. FRANCISCO: Without a doubt, it would be a relevant decision. Depending on how they rule, it could be binding, but while the *Landis* standard does give the Court discretion to govern its own docket to be sure, it also sets forth the legal standard that guides that discretion, and that's the legal standard I just laid out, which --

THE COURT: But that case -- the Court of Appeals case is expedited. Our case isn't expedited. So given that posture of the case, where we're only at the motions to dismiss stage, how does this impose such oppressive burdens on the plaintiffs?

MR. FRANCISCO: Because under the Government's proposed schedule, even if the DC Circuit acts very quickly, we're looking at probably a decision, at the earliest, in February 2013. That means it's not until February 2013 that this Court takes the very first step in this case, that is the step in which it assures

itself that it has or does not have jurisdiction over the matter.

THE COURT: Well, right. Well, let's say --

MR. FRANCISCO: The mandate is harming us right now today. And I --

THE COURT: Right. But I can't take a step -- the first step I have to take is to decide if I have jurisdiction.

MR. FRANCISCO: Yes, Your Honor.

THE COURT: Two judges have already told me on very similar facts, we don't think you do. So if I take the time to consider that fully and fairly and give you a hearing and write an opinion, I'm not likely to finish that process before the DC Circuit rules. And if I do, and it rules differently than I do, I'm going to have to immediately change my opinion, or if I'm in the middle of writing my opinion, I may have to completely revise my opinion. So why isn't it prudent to wait for what they have to say, because then at that point if there's a -- then we can dispense with the motion to dismiss and move straight to the merits. It seems that you might get heard faster that way and not slower.

MR. FRANCISCO: That may be the case, Your Honor, if the Government weren't here asking for the entire case to be put on ice pending the decision of the DC Circuit and the motion to dismiss. Under their schedule, we don't even get to begin doing anything. We can't get a single item of discovery.

THE COURT: Well, what discovery do you get in an APA

case?

MR. FRANCISCO: Well, Your Honor, this is not just an APA case. It's also a RFRA case and a First Amendment case. The Government concedes that discovery will be needed under the RFRA claim, and we agree with that.

THE COURT: What discovery are you seeking?

MR. FRANCISCO: Well, for us, we've laid it out in the 26-F report, but to give you an example, one of the counts that we allege here is that the mandate constitutes discrimination against entities that hold a certain set of religious beliefs. If you look at the First Amendment case law, what it says is that generally a law of general and neutral applicability that incidentally burdens religion does not violate the First Amendment unless, unless there is evidence that that rule was adopted for a discriminatory purpose.

We fully intend to seek discovery on whether or not our belief that there is a discriminatory purpose here is backed up by whatever evidence we can get in discovery. We fully intend -- they intend to seek discovery presumably on the nature, on the extent to which this mandate actually burdens our religious beliefs, so there will be some discovery in this case. They don't deny that. They agree there's going to be some discovery.

Their position puts everything on ice until December -- until at the earliest, I would say, February 2014. From our perspective -- I mean, I certainly don't know Your Honor's beliefs

on the underlying issues, but from our perspective, we believe we're going to win the motion to dismiss, and so we want to get on to the merits.

THE COURT: I don't have beliefs on the underlying issue --

MR. FRANCISCO: Of course. I --

THE COURT: -- because I have not studied the underlying issues. The only thing I've studied is the motion to stay and the relationship between the two decisions --

MR. FRANCISCO: Sure.

THE COURT: -- that have already come down and the motion to dismiss in this case.

MR. FRANCISCO: And on the assumption, then, that we are going to win the motion to dismiss both here and in the DC Circuit, under our view, we go forward. And I understand Your Honor has many different competing things to -- many different litigants and cases before that you have to juggle, but we would proceed -- prefer to move as quickly as possible forward on our motion to dismiss, and if we win, then we're off to the races. If, as we fully expect, the DC Circuit agrees that the motion to dismiss is not well founded, then we will already be many months into the process. Under their view --

THE COURT: But in order for you to win your motion to dismiss, you have to essentially persuade me that both Judge Huvelle and Judge Boasberg were wrong at the very same time that

you're persuading the DC Circuit that Judge Boasberg and Judge Huvelle were wrong. And essentially it -- you're asking me, I feel, to waste my time on that exercise, because the DC Circuit's going to tell me within two months whether they were right or whether they were wrong.

MR. FRANCISCO: But I --

THE COURT: How do you differentiate your case from those cases? I understand your standing.

MR. FRANCISCO: Sure.

THE COURT: You -- but how -- how is your ripeness any different than theirs?

MR. FRANCISCO: Well, ripeness has two elements: fitness and burden. And, again, you know, we're moving on to the motion to dismiss, which I would prefer to be arguing here instead of the motion to stay. But to move on to the motion to dismiss --

THE COURT: I'm just asking what's different about the final issue for you than for them?

MR. FRANCISCO: Yeah. What is primarily different is the burden issue. And that's where Mr. Pruski and I would disagree. I do believe that where there is a substantial burden, as we have, and we believe far more substantial than either the *Wheaton* or *Belmont Abbey* cases, that can overcome finality.

On the final -- on the fitness issue, they're very similar. We happen to believe that Judge Huvelle and Judge Boasberg got it wrong, and would very much like the opportunity to

convince Your Honor of the same. If we do, then we can get this case moving right now. Under their view, we don't even get to that first step until, I would say, at the earliest, around February 2013. And in the meantime, we suffer harm that is compounded every single day as a result of living with this -- this sword hanging above us ready to drop down of the mandate.

And if I could explain briefly what the harms are that we are suffering under right now -- I think Your Honor understands them, based on Mr. Pruski's questions -- we need to plan right now for the programming cuts, potential layoffs and everything else that will be required of us if we need to face millions of dollars of fines under the mandate. And those have to take place as part of our July 2013 to July 2014 budgeting process, because that's our fiscal year. And that's also the first fiscal year in which we will be responsible for the payment of fines under the mandate. So that budget needs to be concluded by July 1st, 2013.

Obviously organizations as large as these, the Archdiocese of Washington, Catholic Charities, Catholic University, can't wait until July 2013 to begin that process. It's got to begin now and in the near future.

We are also -- so that's the first harm. We're also engaged in a competitive labor market. We compete every day to retain our current employees and to persuade prospective employees to join us. Unlike our competitors, who don't labor under the threat of the mandate because their religious beliefs are different

from ours, we are not in a position to affirm definitively to current employees or new employees what their healthcare benefits will be in the next fiscal year, because we've got this mandate looming over us. That's the second harm.

And there's a third harm that's specific to Catholic University of America. The Government has pointed out the safe harbor. What the safe harbor does not do is it does not suspend the effective date of the contraceptive mandate. That mandate is in place and it is the law today for everybody.

What the safe harbor does is suspend Government enforcement actions of the mandate. So it basically says, even though you're violating the mandate, you're violating the law, we're not going to bring an enforcement action against you for violating the law until August 1st, 2013, or the first plan year that begins thereafter, which, as Mr. Pruski points out, is January 1st, 2014 --

THE COURT: Right. And two courts have held --

MR. FRANCISCO: -- for these plaintiffs.

THE COURT: -- that that means that you're not suffering an imminent injury.

MR. FRANCISCO: But, again, Your Honor, on a motion to stay, the question is, is there a fair possibility that the stay for which the Government prays here will work damage to us, a fair possibility. And I would -- and that's a completely different standard than applies in the ripeness and standing context.

THE COURT: Well, *Landis* says --

MR. FRANCISCO: And I would submit that here we meet that.

THE COURT: *Landis* says, a party may be required to submit to delay not immoderate in expense and not oppressive in its consequences if the stay will promote judicial economy. That's what the Supreme Court said in *Landis*.

You're -- you're complaining about the extent of the delay, but given the expedition of the appeal, it really looks like if I scheduled a hearing right now on the motion to dismiss, it would probably be around the same time as the Court of Appeals hearing, and it may or may not take me more or less time to write my opinion than it takes them. I don't know how long it's going to take me to write my opinion. It varies wildly and it never meets my expectations.

MR. FRANCISCO: That's the case for all of us.

THE COURT: So I don't see that there's a reasonable basis to predict that you'd get your ruling from me faster than we're going to get it from the Court of Appeals. They're really -- this case is unusual, because you have this expedited appellate hearing and we actually know when the oral argument is. And obviously they -- they -- I find it fascinating that anyone is even willing to stand up and tell me when the opinion is likely to come down, because I don't see how you know. You don't know.

MR. FRANCISCO: Oh, I don't know. I'm -- I am

estimating.

THE COURT: If the three of them agree after the hearing, it could come down that afternoon. I've had cases of mine that were argued on a Friday and I heard from them on Monday and then, you know, I've had cases that it took quite some time to hear from them. So I think the assumption that they're going to hold us up, we just don't -- we just don't know.

MR. FRANCISCO: Well, Your Honor, I agree that we don't know.

THE COURT: So I think that we're talking about a moderate delay.

MR. FRANCISCO: And I think what the *Landis* court was addressing was -- remember, in *Landis*, some lower courts had held that a District Court doesn't even have the discretion to grant the type of stay that the Government's requesting. What the Supreme Court was saying in *Landis* was, no, that's not right; a District Court has discretion to manage its own docket, but then it set out the legal standard for doing so. And the legal standard, in our view, is the one that I've just recited, which, in our view, they can't meet and we believe warrants denial of the stay. And that's our position, Your Honor. I --

THE COURT: All right.

MR. FRANCISCO: I understand your concerns. I'm happy to answer --

THE COURT: Well, I hear you.

MR. FRANCISCO: -- any additional questions you have.

THE COURT: Let me ask you this. Let's assume I believe a stay is appropriate in this situation, but I'm not unsympathetic to your desire, if this case survives the DC Circuit ruling, to not delay the ability to proceed with the case. Wouldn't the first step in discovery, even to get at the intent behind the rule, be the administrative record? I mean, you're going to go take Kathleen Sebelius's deposition. She'd be in here with, I would think, a protective order five minutes later.

MR. FRANCISCO: She may well be, but the administrative record is certainly one thing that we would want, amongst others.

THE COURT: And then you would have to demonstrate some reason why you're entitled to evidence beyond the administrative record.

MR. FRANCISCO: No, not -- not in a RFRA case.

THE COURT: Not under the --

MR. FRANCISCO: Not under the First Amendment, Your Honor. Not under a RFRA case and not under the First Amendment. They agreed that there needs to be some amount of discovery on RFRA. They disagree on the First Amendment and we disagree on the APA.

THE COURT: Well, what evidence beyond the administrative record illuminates the, quote unquote, intent of an agency when it issued a rule?

MR. FRANCISCO: Well, Your Honor, the intent of an

agency -- here we had a highly politicized process. It's altogether possible that what was motivating various Government officials were their firm beliefs about the importance of the thing that they were requiring and their firm belief that the religious values on the other side were either not important or ill-founded.

Many people disagree with the Catholic church's position on these issues, including many people who are in the Government and many people who are out of the Government. We fully believe that it's possible that people in the Government, it's at least possible, that they were being motivated, in part at least, by their fundamental disagreement with our views on these highly controversial issues. And if that's the case, that gets us out of the Smith rule under the First Amendment. It also helps demonstrate how the Government did not have a compelling interest here under RFRA and how -- how what they adopted was not narrowly tailored, so we think --

THE COURT: Who's the "they"? You're going to -- you're going to try to inquire into the personal subjective motivations of every decision-maker in the Department of Health and Human Services?

MR. FRANCISCO: Not very decision-maker, but we may well look for discovery on the key decision-makers, absolutely, Your Honor.

THE COURT: Well, I think it's fair to assume that the breadth of the discovery you're seeking is likely to produce some

litigation just related to the discovery itself?

MR. FRANCISCO: And that's why we'd just as soon get this thing moving as quickly as possible.

THE COURT: But is it --

MR. FRANCISCO: Because those are disputes that are going to take time, and we would like this case to get resolved as expeditiously as possible, given the ongoing harm that the mandate is imposing upon us on a daily basis.

THE COURT: But if the flaw here is jurisdictional, I'm an Article III court, I don't -- why would I go down the road of trying to resolve discovery disputes if I don't have any jurisdiction to hear you at all?

MR. FRANCISCO: Well, there are several courts in these cases that have said that discovery may go forward while the court is considering these motions to dismiss. For example, the court in New York has held precisely that. It rejected the Government's motion to stay discovery basically on the understanding that every case involved a lot of complex issues and it --

THE COURT: What kind of discovery have they let it? Paper discovery?

MR. FRANCISCO: Well, they -- I -- may I?

THE COURT: Yes.

(Pause in proceedings)

MR. FRANCISCO: It's not been served yet. It will be served soon, and then I imagine that the Government is going to

oppose it and will litigate. But by getting this case moving forward --

THE COURT: I just don't -- that's the problem to me. If there's discovery that isn't going to prompt litigation, that would be one thing, and therefore, if I do stay the matter, I am going to require them to compile and produce the administrative record so you can start going through it and start deciding what other documents you think you have the right to request and who the decision-makers might be that you think you're going to need to depose and those sorts of things, but I don't see how I have the authority to even start litigating -- I'm supposedly -- supposed to jealously guard my juris- -- if I don't have jurisdiction, it seems to me not to be a good use of resources and not to be an appropriate use of judicial resources to start litigating discovery disputes.

MR. FRANCISCO: Well, I think courts have wide discretion to allow discovery to go forward while they are resolving other potentially dispositive issues, including jurisdictional ones. I think that's pretty well established. Whether it's the best use of Your Honor's resources, obviously, you know, you're --

THE COURT: Well --

MR. FRANCISCO: -- you're to say that.

THE COURT: Have you drafted discovery requests? Do you have an idea about what you would do first?

MR. FRANCISCO: Your Honor, we have drafted document

discovery requests. We've drafted, I believe, some requests for production, yes.

THE COURT: And what do those consist of besides what would be in the administrative record?

MR. FRANCISCO: I have to say I'm not -- I don't know -- as I stand here today, I have not reviewed those recently, but they ask for potential e-mail correspondence between the Department of Health and Human Services and non-governmental entities that may have been involved in helping shape from the outside what the contents of this mandate might be, that type of thing. And they also ask for, you know, requests for admission that don't involve documents, just either answer yes, no or object; your standard type of discovery that you would normally see in most civil litigation, but the point is, they are fully entitled to --

THE COURT: But this doesn't bear a resemblance to normal civil -- I mean, those kinds of issues just don't come up.

MR. FRANCISCO: No.

THE COURT: Usually when you have a federal agency, it's the APA only, and if you have civil litigation, you're not trying to inquire into the intent, so it's -- I wouldn't call it normal.

MR. FRANCISCO: Yeah. But again here, though, they agree that some discovery is needed. We'll fight over the scope of discovery. I'd like to get that fight going soon rather than -- and -- rather than putting everything on ice until whenever the DC Circuit is able to rule on the appeals in *Belmont Abbey* and

Wheaton, because in the interim, we're being harmed. And that's what the *Landis* case tells us, that if we're being harmed by the delay, even if the case is identical, if we're being harmed and they're really not, you shouldn't make one litigant stand aside while another court involving other parties addresses a similar or even an identical question.

THE COURT: And what's your answer -- I understand that they are different inquiries, but if two courts have held that -- that there is no harm for standing purposes, how do I find that there's such harm that we can't even tolerate a stay?

MR. FRANCISCO: Because the harm for a stay is much, much slighter. Here, even for standing and ripeness, they don't disagree that the --

THE COURT: The harm for a stay is -- I mean, you don't really have to have a lot of harm for standing.

MR. FRANCISCO: No, because here they don't disagree that we are being harmed under -- for purposes of standing and ripeness. They don't dispute the content of our affidavits. The court assumes that they're true for now. So those facts are assumed as true. Their argument on the motion to dismiss is that under standing doctrine and ripeness doctrine, that's not the type of cognizable harm that gives rise to standing or that gives rise to a ripe claim. That's not the inquiry under the stay. The inquiry under the stay is, is it somehow burdening us to put our case on ice. And here the evidence, we believe, establishes that it is.

THE COURT: All right. All right. Thank you. I want to hear from the Government again.

MR. FRANCISCO: Thank you, Your Honor.

THE COURT: Assuming, as we have to at this point, that there is some harm to the plaintiffs of delaying this litigation, and I'm not sure how delayed it would be, given the timing of the Court of Appeals action, but assuming there's some delay inherent, because we don't know how long it will take the DC Circuit to rule, what is the objection to permitting paper discovery to proceed?

MR. PRUSKI: In that scenario, the objections would be a few, Your Honor. First of all, every court to consider the Government's jurisdictional arguments, such as in *Wheaton* and *Belmont Abbey* and now in two other cases, have sided with the Government, so there are serious jurisdictional issues here.

And Mr. Francisco referenced cases in New York, but in the DDC, in this court, courts routinely stay discovery pending resolution of motions such as the one the Government has filed here. So we think that before -- that Your Honor needs to determine that the Court has jurisdiction before subjecting the Government to any discovery.

Furthermore, I'd clarify, the Government doesn't agree or concede that discovery in this case is going to be appropriate. We understand that --

THE COURT: I sort of guessed that.

MR. PRUSKI: Okay. Okay.

THE COURT: But you can tell me why.

MR. PRUSKI: Well, the Government understands that a RFRA claim for purposes of discovery is sometimes analyzed differently than an APA claim or a constitutional claim. We wouldn't necessarily concede that it is necessary in this case or appropriate in this case, for some of the reasons Your Honor referenced.

We'd also agree with Your Honor that merely asserting the fact that there is discrimination, religious discrimination here isn't enough to entitle a plaintiff to discovery on their First Amendment claims.

THE COURT: All right. When do you think that the Government would be able to produce the administrative record in this case? I mean, I recognize that some of the opinions talk about 200,000 responses in the notice and comment period. It's obviously a substantial record, but this isn't the first lawsuit to be filed, so presumably some effort is already underway to compile it. So where is that?

MR. PRUSKI: Your Honor, we've -- we've estimated that the administrative record as produced thus far could be compiled and produced within 30 to 45 days.

THE COURT: All right.

MR. PRUSKI: One moment, Your Honor.

THE COURT: Go ahead.

(Pause in proceedings)

MR. PRUSKI: And we'd also point out, Your Honor, again, that our position is that before the Court determines that it has jurisdiction, that discovery of any kind wouldn't be appropriate, including administrative review.

THE COURT: I understand that, but are we still standing by our 30 to 45 days? You can confer.

(Pause in proceedings)

MR. PRUSKI: Your Honor, I'll have to retract my prior commitment. I don't know that we can commit to 30 to 45 days. I'd have to consult with my clients.

THE COURT: All right. Thank you.

MR. PRUSKI: Thank you.

THE COURT: Under the *Landis* case, this Court has broad authority to stay cases pending the resolution of independent proceedings, and this authority is incident to the Court's inherent power to control its own docket to promote judicial economy. A party may be required, quote, to submit to delay, not immoderate in extent and not oppressive in its consequences if the stay will promote judicial economy. The Court may grant a stay even if the decision in the independent proceeding will not settle every question of fact in law in the instant case.

Here I do not believe that the stay is going to impose substantial delay. Given the expedited schedule the DC Circuit has adopted in the *Belmont Abbey*, *Wheaton* appeal with oral arguments scheduled for December 14, it is very likely that the DC Circuit

will be issuing its opinion around the same time that this Court would rule on the motion to dismiss if it scheduled a hearing and worked on the opinion in the ordinary course of business.

Moreover, it's likely that there would still be a delay even if I were to go ahead and rule or begin to rule on the motion to dismiss before the Circuit rules, because as soon as the Circuit does rule, I'm going to have to revisit my decision.

It also seems very likely that the appeal before the DC Circuit will either control or at least substantially affect how I would rule in this case. The relevant facts in this case are nearly identical to those in *Belmont Abbey* and *Wheaton*. The plaintiffs are religious non-profit organizations raising similar claims, the coverage regulations they challenge are subject to the same safe harbor provisions, and all of the plaintiffs fall within the types of organizations that the Government is committed to addressing in its forthcoming rule making.

And although plaintiffs claim they have provided a more extensive factual record than the plaintiffs in *Belmont Abbey* and *Wheaton* and that may bear on standing, I understand the ripeness argument, but I don't believe it changes the calculus much for ripeness purposes, because the Government's either finished its decision-making process or it's not finished its decision-making process, and I have to have a thing that is reviewable before me to review.

And the fact that the plaintiffs in this case have

actually participated as amici and what they've alleged in -- in the briefs on appeal, to me underscore the notion that a stay is appropriate in this case.

I don't think that there's a fair possibility that the stay would expose the plaintiffs to any burden beyond what the current schedule in this case already exposes them to. Even if I were to deny both the motion to stay and the motion to dismiss, it would still take significant time for the parties to brief this case on the merits, to undertake the discovery that the plaintiffs are asking to undertake, and for the Court to have a hearing and issue an opinion. During that time, the plaintiffs would be exposed to the same burdens that they point to as the very reasons not to stay this case pending the Circuit Court decision. And just given the particular schedule that we're facing in this case with the Court of Appeals, I don't see that there's a marked difference in -- in the burdens that would be imposed on the plaintiffs in that case.

I'm also not convinced that the burdens the plaintiffs identify, the risks that the budget they adopt will not reflect the changing regulatory atmosphere, and the speculative risks that individuals might bring private lawsuits against them make this stay, quote, oppressive in consequences for purposes of *Landis*. And I do think it's instructive, if it's not binding, that both Judge Huvelle and Judge Boasberg found those harms insufficient to confer standing or satisfy the hardship requirement for ripeness.

The stay, I believe, is in the interests of judicial economy. And it's not that I don't want to devote the time and effort to this case. I would rather devote the time and effort to this case than a lot of other cases that I have sitting around, but litigating the same issue in two forums is not really in the interests of judicial economy or even in the parties' best interests, because inevitably, my ruling is going to have to be shaped by what the DC Circuit is already thinking about.

So I'm going to grant the defendants' motion to stay this case pending the DC Circuit's decision in the *Belmont Abbey*, *Wheaton* appeal.

I'm going to order the parties to file a joint status report within ten days after the DC Circuit issues its opinion addressing the question of what, if anything, is left to our pending motion.

With respect to discovery, I am going to order the Government to compile and deliver the administrative record in this case. I believe that that is a necessary first step before we get to further discovery, because until you see what's in the administrative record, I don't think you can say there's other information out there that you have to have to probe the intent of the Government agency for First Amendment purposes and for purposes of your other claims. So I think that's the first step regardless.

And I understand the Government's point of view that it shouldn't be burdened by this, but I don't see that it's oppressive

to the Government to have to do -- take that step. I'm going to order you to produce it on December 14. And if that turns out to be something the Government cannot do, you need to let me know that, file any motion for any extension of that date by December 7 so I actually have a fair opportunity to consider it and the plaintiffs have an opportunity to respond.

Is there anything further that I need to take up on behalf of the Government?

MR. PRUSKI: No, Your Honor.

THE COURT: Anything further on behalf of the plaintiffs?

MR. FRANCISCO: No, Your Honor. Thank you very much.

THE COURT: All right. Thank you very much.

(Proceedings adjourned at 10:48 a.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Kellie M. Humiston, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

March 4, 2013

_____ _____

Kellie M. Humiston Dated

Exhibit C

ARCHDIOCESE OF WASHINGTON

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Submitted Electronically

Centers for Medicare & Medicaid Services
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Hubert H. Humphrey Building
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Washington, DC 20201

April 4, 2013

Re: Notice of Proposed Rulemaking on Preventive Services
File Code No. CMS-9968-P

Dear Sir or Madam:

The Archdiocese of Washington (the "Archdiocese") respectfully submits the following comments on the Notice of Proposed Rulemaking ("NPRM") on preventive services. 78 Fed. Reg. 8456 (Feb. 6, 2013). The Archdiocese is the local arm of the Roman Catholic Church in Washington, D.C., and five counties in Maryland: Montgomery, Prince George's, Calvert, Charles, and St. Mary's. The Archdiocese serves a religious community of Roman Catholics under the leadership of Cardinal Donald Wuerl and provides a wide range of spiritual, educational, and social services to residents in the greater Washington, D.C., community, Catholic and non-Catholic alike. The Archdiocese not only provides pastoral care and spiritual guidance for nearly 600,000 Catholics, but also serves individuals throughout the D.C. area through its schools and multiple charitable programs.

The Archdiocese has long expressed its concern that the regulations at issue here (the "Mandate"), which require the provision of insurance coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling, force faithful Catholics to choose between facilitating services and speech that violate their religious beliefs or exposing their organizations to devastating penalties. Indeed, the Archdiocese itself has filed a lawsuit challenging the Mandate, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815, 2013 WL 285599 (D.D.C. Jan. 25, 2013), and has previously commented on prior iterations of that regulation, *see, e.g.*, Comments of Archdiocese of Washington (Sept. 30, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB44a-14694.pdf.

Regrettably, the proposals contained in the NPRM fail to resolve the serious religious liberty issues presented by the Mandate. The NPRM does not expand the scope of the "religious employer" exemption in any meaningful way. The so-called "accommodation" for nonexempt

religious organizations is an accounting maneuver that likewise effects no substantive change to existing law. And the NPRM actually removes an existing, important protection that allows a "religious employer" to include within its insurance plan affiliated religious organizations with which the employer "shares common religious bonds and convictions." Consequently, the proposals in the NPRM are, in fact, demonstrably worse than the regulations that they are intended to replace. Moreover, as a practical matter, the NPRM creates insurmountable administrative and logistical difficulties for organizations, such as the Archdiocese and its affiliates, that operate or participate in large self-insured plans that provide coverage for multiple affiliated employers.

Accordingly, the Archdiocese continues to strenuously oppose the Mandate, including the proposed changes set forth in the NPRM. Instead, the Archdiocese urges the Government to (1) adopt a definition of "religious employer" that recognizes that religious organizations do far more than operate "houses of worship"; and (2) abandon its proposal to rescind the ability of "religious employers" to include affiliated religious organizations in their insurance plans and thereby shield them from the Mandate.

I. THE NPRM INCREASES THE BURDEN THAT THE MANDATE IMPOSES ON RELIGIOUS LIBERTY

The NPRM does not offer any meaningful relief to religious organizations, like the Archdiocese's affiliates, that are morally opposed to providing, paying for, and/or facilitating access to abortion-inducing drugs, contraception, sterilization, and related education and counseling. First, the NPRM fails to expand, in any meaningful way, the scope of the "religious employer" exemption. Second, the so-called "accommodation" likewise offers no relief of substance; it still requires religious organizations to provide, pay for, and/or facilitate access to objectionable products and services. Third, the NPRM proposes to reverse existing law in a way that substantially *narrows* the number of religious entities who may seek shelter under the already impermissibly cramped definition of "religious employer," and, therefore, is significantly *worse* than existing law. Each of these issues is explained in greater detail below.

A. The changes to the "religious employer" exemption provide little, if any, substantive relief to Catholic social service organizations.

The NPRM first proposes a revised definition of "religious employer" that would be used to determine which entities would be completely exempt from compliance with the Mandate. Currently, the religious employer definition exempts organizations that meet four 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) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B). The NPRM would eliminate the first three prongs of this definition. Consequently, under the NPRM, an exempt "religious employer" would be "a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." *See* 78 Fed. Reg. at 8461.

This proposed modification does not, nor is it intended to, accomplish any significant change to the scope of existing law. Indeed, the NPRM candidly admits as much, conceding that this change "would *not* expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." *See id.* (emphasis added). Instead, this proposal would continue to "restrict[]the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* In this respect, the NPRM is little different from the existing "religious employer" exemption, which was intended to focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Religious organizations that have a broader mission are still not, in the Government's view, "religious employers."

Practically speaking, this cramped definition of religious employer would continue to exclude numerous organizations, such as Catholic hospitals, charitable organizations, universities, and elementary and secondary schools that are indisputably religious. While these revisions may ensure that the Archdiocese itself would be exempt from the Mandate, the NPRM offers no such guarantee to many of the distinct diocesan corporations the Archdiocese has established to carry out its ministries. Indeed, the decision to exempt the Archdiocese, but not all of its ministries, flows from a fundamentally misguided view of religious liberty. Freedom of religion means far more than the freedom to worship, and religious exercise is not confined within the four walls of a parish church. As Pope Benedict explained, "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, Deus Caritas Est ¶ 22 (2006). Ignoring this reality, the NPRM persists in separating the Archdiocese from the ministries it has established to care for the "widows[,] orphans, prisoners, and the sick and needy of every kind," awarding an exemption to the former, but not to the latter. The Catholic organizations that carry out the Church's charitable mission, however, are no less "religious" than the Archdiocese itself.

Finally, it makes no sense for the NPRM to adopt Section 6033 as the dividing line between organizations that are, or are not, deemed sufficiently "religious" to warrant exemption from the Mandate. Section 6033 was never intended to distinguish among religious organizations for purposes of the provision of health care. Instead, it merely addresses whether and when nonprofit entities that are exempt from paying taxes under the Code must file an annual informational tax return, known as a Form 990. 26 C.F.R. § 1.6033-2(a). The choice of this provision is all the more puzzling since there are myriad provisions in federal law that, unlike Section 6033, *are* intended to protect religious freedom. *See, e.g.*, 42 U.S.C. § 300a-7 (protecting hospitals and individuals that receive federal funds in various health programs from participating in abortion and sterilization procedures if such participation is "contrary to [their] religious beliefs or moral convictions"); 29 U.S.C. § 1002(33) (defining "church plans"). The decision to adopt Section 6033, rather than these other provisions, seems to be based solely upon a desire to define a "religious employer" as narrowly as possible and thereby force objecting religious organizations to abandon sincerely held religious beliefs with which the Government disagrees. This would be unconscionable in almost any context. It is particularly so where, as here, the regulations target religious organizations precisely because their religious mission includes charitable outreach that extends beyond the four walls of their "houses of worship."

B. The proposed "accommodation" is an accounting maneuver that still requires religious organizations to provide, pay for, and/or facilitate access to contraception, abortion-inducing drugs, sterilization, and related education and counseling.

The NPRM also proposes an "accommodation" for nonexempt objecting religious nonprofit organizations that do not qualify as "religious employers." Under that proposal—which largely parrots the prior and inadequate proposal contained in the Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16,501 (Mar. 21, 2012)—a nonexempt, nonprofit religious entity (deemed an "eligible organization") that objects to providing the mandated coverage as part of its group health plan must self-certify its objection to contraceptive coverage. The self-certification then "automatically" requires a third-party entity—either the nonprofit's insurance company or its third-party administrator ("TPA")—to provide or procure the objectionable coverage "at no additional cost." *See* 78 Fed. Reg. at 8462–64. Coverage is automatic; female employees and employees with female dependents do not have the option to reject it.

This so-called "accommodation" is an accounting maneuver that, like the cosmetic changes to the "religious employer" definition, offers no meaningful relief to religious organizations opposed to the Mandate. Like existing law, the "accommodation" still requires Catholic organizations to provide, pay for, and/or facilitate access to the objectionable services. The following example illustrates this point:

- Under the Mandate as it now exists, a Catholic organization contracts with an insurance company, and the insurance company must provide the Catholic organization's employees with an insurance policy that covers contraception, abortion-inducing drugs, sterilization, and related counseling.

- Under the NPRM, a Catholic organization contracts with an insurance company, and the insurance company must provide the Catholic organization's employees with two different insurance policies, simultaneously: one that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling, and one that does.

There is no material difference between these two scenarios. In both instances, the Catholic organization's contract with the insurance company automatically results in insurance coverage for the objectionable services. The fact that, as an accounting matter, the coverage comes in two policies rather than one does not solve the moral problem.

Thus, the Government's assurances that the objecting employer's premiums will not flow to the payment of contraceptives are irrelevant; either way, the Catholic organization's contract with the insurance company triggers the provision of objectionable insurance coverage. These assurances are, in any event, implausible in at least two respects.

First, according to the NPRM, the provision of contraceptive coverage will be "at least cost neutral" for insurance companies, because insurers will "experience lower costs from improvements in women's health and fewer childbirths." 78 Fed. Reg. at 8463. This, the NPRM claims, will allow insurance companies to offer contraceptive coverage at "no *additional* cost" to

employers. *Id.* (emphasis added).[1] In other words, insurance companies will not have to charge employers *more* to provide contraceptive coverage. Presumably, their premiums will remain the same. But this means that even granting the NPRM's assumptions about contraceptive coverage being cost neutral—which, as discussed immediately below, are themselves implausible—the "accommodation" is nothing more than a shell game. Premiums previously paid by the objecting employers to cover, for example, "childbirths," will now be redirected to pay for contraceptive coverage.[2] Thus, not only would an objecting employer *trigger* the coverage of contraceptive services by providing a health plan, but the employer would also actually be *paying* for such services.

Second, industry experts have expressed deep "skeptic[ism]" that it will be "cost neutral for insured plans to bear the cost of contraceptive coverage."[3] Creating "'individual policies for contraceptive coverage would be a significant undertaking,'" involving "administrative hassles such as setting up and getting state approval for new individual insurance products" and potentially "'significant'" costs in providing notice to eligible employees.[4] In some cases, the creation of these "individual polic[ies] covering only one service" would conflict with state law.[5] Simply put, "insurers aren't going to give away such coverage for free," and may well "raise the premium for the religious employer opting out of coverage" without including a "separate line item on the bill."[6] Consequently, the assumption that the addition of contraceptive coverage will be cost-neutral is implausible.

The proposal for self-insured entities, while more opaque, appears to be similarly troubling. It is, of course, difficult to comment meaningfully on this proposal, since the NPRM has not articulated any specific regulatory language; instead, it has merely describes several "alternative approaches" under "consider[ation]." 78 Fed. Reg. at 8463. "[U]nder all approaches," however, employers would be required to self-certify their religious objection to their third party administrator, who would then "automatically arrange separate individual health insurance policies for contraceptive coverage from an [insurance company] providing such polices." *Id.* All related costs would allegedly be offset by fee adjustments from Federally

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[1] The source cited by the NPRM contains similar language. *See* John Bertko et al., *The Cost of Covering Contraceptives Through Health Insurance* (February 9, 2012) ("[A]vailable data indicate that providing contraceptive coverage as part of a health insurance benefit *does not add* to the cost of providing insurance coverage." (emphasis added)), *available* at http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml; *id.* (stating that in one instance, "there was no need to adjust premium levels because *there was no cost increase* as a result of providing coverage of contraceptive services" (emphasis added)); *id.* (indicating that in another instance a "mandate did not appear to *increase* insurance costs" (emphasis added)).

[2] The NPRM also suggests that providing contraceptive coverage "may result in cost-savings." 78 Fed. Reg. at 8463. But there is certainly no guarantee that will take place, nor does there appear to be any requirement that insurance companies lower premiums for religious objectors should such savings be realized.

[3] *Insurers May Incur Significant Costs from Proposal on Contraceptive Benefit Opt-Out*, AIS's Health Reform Week, Feb. 11, 2013, at 1.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 2.

Facilitated Exchanges. *Id.*[7] It is doubtful that the administrative "offsets" would, in fact, fully compensate the TPAs, in which case it is likely that the costs would be passed back to the employer. In addition, it is again the employer's provision of health insurance in the first place that triggers the TPA's obligation to procure the objectionable coverage.[8] Finally, the NPRM does not address how it would work if the TPA is, itself, a religious organization that objects to providing the mandated coverage.

In short, the NPRM's division between "religious employers," who are exempt from the Mandate, and other equally religious organizations, who are subject to the so-called "accommodation," is no solution at all to the Mandate's infringement on religious liberty. The Government's attempt to drive a wedge between these religious organizations, moreover, is all the more objectionable given the Government's stated purpose for doing so. According to the NPRM, the Government drew a distinction between "religious employers" and organizations that are eligible for the "accommodation" based on a belief that "the participants and beneficiaries [of eligible organizations' plans] . . . may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers to share [the] religious objections of the eligible organizations." 78 Fed. Reg. at 8461–62. It cannot be, however, that an organization's religious freedom turns on the beliefs of its employees. It is, after all, the religious organization's beliefs that are protected by the Religious Freedom Restoration Act ("RFRA") and the First Amendment; the organization's employees have no corollary right to force the religious organization to subsidize the employees' contrary beliefs. Nor can it be that the Government is permitted to parcel out the protections of RFRA and the First Amendment based on its speculation about whether an organization's employees are more or less likely to be devout believers. Consequently, the so-called "accommodation" does not alleviate the burden that the Mandate imposes on religious freedom.

Finally, it is unclear whether the agencies even have the statutory authority to promulgate the accommodation. The statute states that "group health plan[s]" must provide coverage for "preventive care." 42 U.S.C. § 300gg-13(a)(4). It is, therefore, unclear whether, once "preventive care" is defined to include contraception, the so-called "accommodation" can require that contraception be provided separate and apart from the group plans in which plan participants are enrolled. In addition, it is unclear how the statute could be construed as authorizing the

[7] "Under the first approach [described in the NPRM], a third party administrator receiving the copy of the self-certification would have *an economic incentive to voluntarily* arrange for the separate individual health insurance policies for contraceptive coverage for plan participants and beneficiaries because it would be compensated for a reasonable charge for automatically arranging for the contraceptive coverage through payment by the issuer of the contraceptive coverage." 78 Fed. Reg. at 8463–64 (emphasis added). This language seems to suggest that a TPA would "voluntarily" arrange contraceptive coverage because it would have an "economic incentive" to do so. *Id.* This appears to be in tension with other portions of the NPRM that states that "under all approaches" a TPA would "automatically" arrange separate coverage. *Id.* at 8463. It is therefore unclear what, exactly, the Government's "first approach" entails.

[8] *See* Comments of the U.S. Conference of Catholic Bishops at 22 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf ("The moral dilemma for the plan sponsor with a religious or moral objection to such coverage lies in being forced to trigger the objectionable coverage even if the funds paying for the group plan are not also used to pay for the contraceptive coverage.").

agencies to force group-plan insurers to provide contraception completely free of charge. The statute provides that preventive-care coverage must be provided without "cost sharing requirements," *id.*, but the accommodation goes much further, requiring contraception to be provided "without cost sharing, *premium, fee, or other charge* to plan participants and beneficiaries." 78 Fed. Reg. at 8462 (emphasis added). The authority for this sweeping prohibition on *all* premiums, fees, or other charges is not apparent.

C. The NPRM actually makes the problem worse by eliminating an important protection that Catholic organizations previously had under existing law.

Not only does the NPRM propose a "solution" that does not alleviate religious objectors' core concerns, but in at least one significant respect, it would actually make their situation even worse than existing law. In the ANPRM, the Government acknowledged that the religious employer exemption was "available to religious employers in a variety of arrangements." 77 Fed. Reg. at 16,502. It specifically stated that a nonexempt entity could thus "provide[] health coverage for its employees through" a plan offered by a separate, "affiliated" organization that is a "distinct common-law employer." *Id.* And in that situation, if the "affiliated" organization was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." *Id.*

For example, the Archdiocese operates a self-insurance plan that covers not only the Archdiocese itself, but numerous other affiliated Catholic organizations—including Archbishop Carroll High School, Inc., the Consortium of Catholic Academies of the Archdiocese of Washington, Inc. (the "Consortium"), Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"), and dozens of additional Catholic organizations. Under the existing religious employer exemption, if the Archdiocese is an exempt "religious employer," then these other Catholic organizations get the benefit of that exemption, regardless of whether they independently qualify as "religious employers," so long as they continue to participate in the Archdiocese's exempt plan. These affiliated religious organizations, therefore, could benefit from the Archdiocese's exemption even if they, themselves, could not meet the NPRM's unprecedentedly narrow definition of "religious employer."

The NPRM proposes to *eliminate* this protection. It provides that "each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents." *See* 78 Fed. Reg. at 8467. Thus, if, as the NPRM suggests, the Archdiocese is an exempt "religious employer," Catholic Charities, Archbishop Carroll High School, and the Consortium of Catholic Academies would be unable to obtain the benefit of the exemption simply by participating in the archdiocesan plan. Instead, unless they independently qualify as "religious employers," under the NPRM, they would be forced to facilitate access to contraceptives, abortion-inducing drugs, sterilization, and related education and counseling, contrary to their sincerely held religious beliefs. In this respect, the NPRM is significantly *worse* than existing law. Moreover, as explained further below, this proposal drives a wedge between the various entities that comprise the Catholic Church and, in so doing, poses insurmountable administrative challenges for the Archdiocese's self-insured church health plan. *See infra* Part III.

D. Catholic private employers and business owners do not even get the benefit of the illusory "accommodation."

The NPRM also fails to address the concern that the Mandate includes no conscience protection at all for individuals seeking to live in accordance with their faith. Private employers continue to be denied their right to make decisions that reflect their religious beliefs. Numerous courts have correctly recognized that this infringes on the religious freedom of these individuals. Indeed, many have awarded preliminary relief to private employers challenging the Mandate. *See, e.g.*, *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. # 24) (granting injunction pending appeal); *Annex Med., Inc. v. Sebelius,* No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (same); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (same); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs*., No: 12-3357 (8th Cir. Nov. 28, 2012) (granting stay pending appeal); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12) (granting preliminary injunction); *Bick Holdings Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21) (same); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-1210 (N.D. Ill. Mar. 20, 2013) (same); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013) (same); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (same); *Triune Health Group v. U.S. Dep't of Health & Human Servs*., No. 12 C 6756 (N.D. Ill. Jan. 3, 2013) (same); *Sharpe Holdings v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92-DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs*., No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (same).

II. THE MANDATE, INCLUDING THE NPRM, CONSTITUTES AN UNCONSTITUTIONAL AND ILLEGAL INFRINGEMENT ON RELIGIOUS FREEDOM

As the proposals contained in the NPRM do not resolve the religious liberty issues presented by the Mandate, implementation of the NPRM is unlikely to resolve the lawsuits that Catholic and other organizations have filed across the country. As these lawsuits allege, the Mandate violates RFRA, the First Amendment, the Administrative Procedure Act ("APA"), and other federal statutes.[9] To date, numerous courts have held that the current form of the Mandate likely violates RFRA in challenges brought by for-profit companies. *See supra* p. 8 (citing

[9] *See, e.g.,* Compl., *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815 (D.D.C. May 21, 2012) (Dkt. # 1), attached as Exhibit A. The arguments set out in the Complaint are incorporated herein by reference. The proposals in the NPRM are illegal for many of the same grounds asserted therein, including but not limited to the fact that these proposals: (1) violate the Free Exercise Clause, *id.* ¶¶ 194–232; (2) violate the Establishment Clause, *id.* ¶¶ 213–32; (3) violate RFRA, *id.* ¶¶ 177–93; (4) impermissibly interfere with internal church governance, *id.* ¶¶ 233–47; (5) violate the Speech Clause, *id.* ¶¶ 248–61; (4) violate the APA, *id.* ¶¶ 262–305; and (5) violate the Weldon Amendment, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011), as well as the Affordable Care Act itself, 42 U.S.C. § 18118(c); *see also* Compl. ¶¶ 291–305.

cases). For the reasons discussed below, the same reasoning applies to the Mandate even if revised as proposed in the NPRM.

RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). In order to determine whether a substantial burden exists, courts must (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). In identifying the relevant exercise of religion, a court must accept the "line" drawn by plaintiffs as to the nature and scope of their religious beliefs. *Id.* at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs.

Significantly, RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). It is therefore irrelevant whether the religious objection is to the direct funding of contraceptive services under current law or to the funding and facilitation of those services as contemplated by the NPRM. The refusal to take either action is a protected exercise of religion for purposes of RFRA. *See supra* p. 8 (citing cases).

Thus, if the NPRM were implemented, there would be little, if any, change in the RFRA calculus. If an organization's religious beliefs forbid it from compliance with the Mandate as modified by the NPRM, the question for a federal court would simply be whether the Mandate places substantial pressure on that organization to violate its religious beliefs. As numerous courts have found, putting organizations to the choice of breaching their faith or paying the substantial penalties imposed by the Mandate is the epitome of a substantial burden. Moreover, these courts have likewise concluded that this burden cannot be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends. *See supra* p. 8 (citing cases).

Therefore, unless the NPRM is changed significantly before implementation, it, like the current Mandate, would violate RFRA (as well as the First Amendment, the APA, and other federal statutes).

III. THE NPRM'S PROPOSALS FOR SELF-INSURED ENTITIES ARE UNWORKABLE

As discussed above, in at least one significant respect, the NPRM actually makes the problem worse for entities, such as the Archdiocese and its affiliates, that operate or participate in large self-insured plans that provide coverage for multiple affiliated religious employers. *See supra* Part I.C. Previously, affiliated religious organizations that did not independently qualify as "religious employers" could nonetheless obtain the benefit of the exemption through their participation in a plan sponsored by an exempt "religious employer." The NPRM, however, would rescind this protection, proposing instead that "each employer [participating in the group plan] would have to independently meet the definition of . . . religious employer in order to take advantage of . . . the religious employer exemption with respect to its employees and their

covered dependents." 78 Fed. Reg. at 8467. Thus, although the Catholic organizations currently participating in the Archdiocese's self-insured health plan all share common religious bonds and convictions with the Archdiocese, the NPRM would require each of them to separately qualify for the "religious employer" exemption.

This requirement, however, is completely unworkable. Perhaps more importantly, it is based on a fundamentally flawed understanding of religious liberty that fails to acknowledge the varied means by which the Catholic Church carries out its mission. In practical effect, it would deny the benefits of the religious employer organization and self-insurance to indisputably religious entities and prevent the Archdiocese from ensuring that all of its affiliated religious corporations remain faithful to Catholic teaching.

A. The NPRM is administratively unworkable.

The NPRM's proposals are completely unworkable for self-insured entities like the Archdiocese. Indeed, in all likelihood, the Archdiocese's self-insured group health plan will not be able to exist and operate as it does today under the changes that would be required by the NPRM. Thus, contrary to President Obama's repeated assurances that "if you like your plan, you can keep it,"[10] if the Mandate remains unchanged, many participants in the Archdiocese's self-insurance plan will *not* be able to retain their existing insurance plan.

The Archdiocese maintains a Catholic self-insured health plan for its own and for other Catholic organizations' eligible employees. The Archdiocese chooses to self-insure so that it can customize its plan to meet the healthcare needs of its employees consistent with the teachings of the Catholic faith. In addition, since it operates in two jurisdictions, self-insuring allows the Archdiocese to avoid the conflicting state health insurance regulations and mandates of D.C. and Maryland. The Archdiocese sponsors the group health plan, effectively making the Archdiocese the insurer for its employees and those of its affiliated organizations. The Archdiocese is solely liable for payment of all benefits provided to its participants under the plan. For practical purposes of administering the plan and handling claims, the Archdiocese contracts with National Capital Administrative Services, LLC ("NCAS"). NCAS is a third party administrator that administers participating employees' claims and provides access to the CareFirst BlueCross BlueShield provider network of doctors.

Among the associated Church entities that participate in the Archdiocese's health plan are archdiocesan parishes and schools, as well as Catholic organizations that are associated with the Archdiocese. Included among these entities are separately incorporated educational, health care, and social service ministries of the Archdiocese.

All of the entities in the Archdiocese's health plan share common Catholic religious bonds and convictions that are central to their operating principles. Their Catholic identity and communion with the Church are established in their governing documents and in their listing in the Official Catholic Directory. Recognizing the ecclesial authority of the Church, archdiocesan

[10] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html.

affiliated corporations reserve certain powers in their corporate members, which in all cases include the Archbishop, the Moderator of the Curia (a canonical position reserved for clergy), and the Chancellor (a canonical position that may be filled by either clergy or a layperson). Those reserved powers include the oversight and authentication of the corporation's mission, the adoption or amendment of a mission statement, and the amendment of articles of incorporation and bylaws. In addition, all of these affiliates are bound by the Archdiocese's *Policies for Archdiocesan Corporations,* which provide:

> Every Catholic and each agency, entity, or program that claims to carry on the work of the Church must maintain communion with the Church through communion with the bishops . . . . The touchstone for the unity of the local Church is the bishop . . . . In [some] cases, the bishop's responsibility for oversight is carried out through the several separately incorporated affiliated agencies [that] participate in the Church's mission through education and the corporal works of mercy.

Policies for Archdiocesan Corporations at 1. Consequently, each of these affiliated archdiocesan corporations participates in, and is integral to, the Archdiocese's overall religious mission.

Nevertheless, under the NPRM, each of these religious entities that are separately incorporated would have to independently assess at the beginning of each plan year whether they qualify for the "religious employer" exemption. The NPRM, moreover, suggests that if they do not independently qualify as a "religious employer," they would be unable to participate in the archdiocesan health plan, since that plan will not offer coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling. In that case, these indisputably religious organizations would be forced to find replacement group health insurance. But without the benefit of pooled financial resources, many of these religious entities would likely be unable to secure the benefits of self-insurance. Instead, they would have to turn to commercial plans, and would then be exposed not only to the demands of the Mandate that conflict with their religious beliefs, but also to state insurance regulations and mandates from which self-insured plans are currently exempt.

Without the option of a self-insured plan, Catholic organizations with less than fifty employees in the District of Columbia would be required to purchase insurance through the D.C. Exchange.[11] This, in turn, would subject them to the numerous mandates imposed under D.C. law.[12] In addition, it has been reported that this will restrict the ability of these employers to select plans tailored to their needs and may increase costs and premiums to a degree that employers may be forced to choose between dropping their health plans altogether or paying the

[11] *See* Ben Fischer, *D.C. Health Insurance Board Moves to Phase in Exchange Mandate*, Wash. Bus. J., Mar. 13, 2013, *available at* http://www.bizjournals.com/washington/blog/2013/03/dc-health-insurance-board-moves-to-delay.html?page=all.

[12] Victoria Craig Bunce & J.P. Wieske, *Health Insurance Mandates in the States* 3 (2010) (citing twenty-seven health mandates under D.C. law and sixty-seven health mandates under Maryland law).

exorbitant costs of providing coverage.[13] Consequently, employees of these organizations would not only be losing their affordable coverage under the Archdiocese's plan, but they would also face the possibility of losing coverage altogether and being forced to procure individual insurance policies on the D.C., or in some cases, Maryland Exchanges. (This is also why, unless the Mandate is changed, affiliated religious organizations will need a substantial period of time to procure new insurance policies.)

Even if the final rule were to ultimately permit nonexempt religious organizations to participate in an exempt employers' plan, the logistical hurdles to such participation still appear insurmountable. These nonexempt entities would have to ensure that their employees receive access to contraceptive services through the NPRM's proposed "accommodation." But it is unclear how such services could be provided if the nonexempt entity was part of the archdiocesan plan. These nonexempt organizations have no contractual relationship with the plan's TPA, whose contract is with the Archdiocese. And the TPA's contract with the Archdiocese does not, and would not, authorize the TPA to procure insurance for the objectionable services. Certainly, the Archdiocese, as an exempt "religious employer," would not and could not be forced to participate in the process of providing objectionable insurance coverage to the employees of the Archdiocese's religiously affiliated corporations.

Thus, regardless of whether nonexempt entities could remain on the archdiocesan health plan, it is evident that under the NPRM, the Archdiocese's health plan could not be maintained in a manner consistent with its prior practices and religious beliefs.

B. The NPRM reflects a flawed and arbitrary understanding of religious liberty.

The proposal contained in the NPRM also draws arbitrary distinctions between identically situated employees based solely on the corporate structure of their respective employers. As noted above, the NPRM purports to draw these distinctions based on a belief that employees of a nonexempt entity "may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers" to share their employers religious beliefs. 78 Fed. Reg. at 8461–62. This assertion is baseless. Compare, for instance, a religion teacher at St. Augustine's School, an archdiocesan Catholic school that is not separately incorporated, to a religion teacher at St. Francis Xavier Academy, an archdiocesan Catholic school that is part of the Consortium of Catholic Academies, a separate civil corporation. These two Catholic school teachers each teach the same religion curriculum and are equally devoted to the task of teaching the Catholic faith through word and example. The corporate structure of the two archdiocesan Catholic schools that employ these teachers is not a reliable proxy for

[13] *See* Dennis Bass, *The Bad News for Small Business in D.C.'s Obamacare Plan*, Wash. Post, Oct. 12, 2012, *available at* http://articles.washingtonpost.com/2012-10-12/opinions/35499292_1_small-employers-higher-costs-aca; Philip Klein, *A Talk with D.C.'s Health Exchange Board*, Wash. Examiner, Nov. 18, 2012, *available at* http://washingtonexaminer.com/a-talk-with-d.c.s-health-exchange-board/article/2513796; Mercer Consulting, *District of Columbia Health Insurance Exchange Marketplace Report* (2011), *available at* http://www.naifanet.com/100000/Mercer%20Report%20D13%20and%20D16%20Market%20Report%20and%20Summary%20Plan.pdf?CFID=1910208&CFTOKEN=68781248; Letter to Dr. Mohammad Akhter, Chair, D.C. Health Benefit Exchange Authority Executive Board (Sept. 13, 2012), *available at* http://www.naifanet.com/100000/Small%20Employer%20Letter%20FINAL%20with%20addendum%2010-3-2012.pdf?CFID=1910208&CFTOKEN=68781248.

answering the question of "how Catholic" their jobs' duties are or "how devout" they as individuals are likely to be.

The Archdiocese has created separately incorporated organizations to carry out certain aspects of its ministry, not because those particular ministries are any less central to the Catholic faith, but rather for many of the same practical and legal reasons that ordinary civil corporations assume multi-tiered structures. The Consortium of Catholic Academies, for instance, was separately incorporated in part so that it could more thoroughly and effectively devote itself to the challenges of educating the often underserved children of inner city Washington. Surely it is not the Government's contention that employees of schools that serve disadvantaged youth are less likely to be faithful Catholics than teachers at schools in more affluent communities. That, however, is the precise implication of the arbitrary rule the NPRM seeks to establish.

Moreover, the Archdiocese has a special responsibility to ensure that these entities, whatever the corporate structure, remain faithful to the teachings of the Catholic Church. As noted above, the Archbishop, the Moderator of the Curia, and the Chancellor are the corporate members of each of these affiliated entities. In order to ensure each affiliate's Catholic identity and communion with the Church, the affiliated entities reserve certain powers in their corporate members, including oversight and authentication of the corporation's mission, the adoption or amendment of a mission statement, and the amendment of articles of incorporation and bylaws. In addition, all of these entities remain subject to canon law requirements regarding their Catholic identity, mission and fidelity to Catholic doctrine, as well as the Archdiocese's *Policies for Archdiocesan Corporations.* In short, each separately incorporated affiliate's communion with the archbishop originates in the prescriptions of canon law and is reflected in their civil organizational documents.

The Mandate as revised by the NPRM would destroy this communion and would prevent the Archdiocese from ensuring that each of its affiliated entities acts in accordance with Catholic teachings. It would create division where canon law commands unity, and would undermine the Archdiocese's duty before God to protect the integrity of the Catholic faith as believed and practiced within the local Church, most especially in its affiliated religious corporations. The Government has provided no plausible basis for so deeply (and unconstitutionally) intruding into the religious structure and beliefs of the Archdiocese and other similarly-situated Catholic entities.

IV. PROPOSED ALTERNATIVES TO THE NPRM

For the reasons explained above, the Mandate, including the proposals in the NPRM, would deeply intrude into the religious freedom and religious autonomy of the Archdiocese, its affiliated religious entities, and other similar organizations. Set forth below are two proposals that, if adopted, would mitigate these infringements on religious liberty.

First, the portion of the NPRM that requires each employer participating in a group health plan to independently qualify for the religious employer exemption should be rescinded. Instead, the Archdiocese's affiliated religious corporations should continue to be free to participate in the Archdiocese's insurance plan in the same way that they did prior to the NPRM. There is simply no reason to deny affiliated Catholic organizations the benefits conferred on entities like the

Archdiocese merely due to the fact that they are independently incorporated. As discussed above, such a distinction rests on a flawed view of religious liberty and would significantly impair the Church's ability to carry out its mission.

Second, and perhaps even more importantly, the scope of the "religious employer" exemption must be expanded. The following are several alternatives to that end—not all perfect, but all far better than the proposal contained in the NPRM.

1. Conscience Clause: Federal law is replete with conscience clauses that prevent individuals and entities from being forced to violate their religious beliefs. For example, the "Church Amendment," 42 U.S.C. § 300a-7, protects hospitals and individuals that receive federal funds in various health programs from participating in abortion and sterilization procedures if such participation is "contrary to [their] religious beliefs or moral convictions." *Id.* Indeed, even the Federal Employees Health Benefit Program, while mandating contraception coverage, nevertheless provides a conscience clause that exempts objecting plans and carriers. *See, e.g.*, Consolidated Appropriations Act, Pub. L. No. 112-74, div. C, tit. VII, § 727, 125 Stat. 786, 936 (2011); *see also* Consolidated Appropriations Act, Pub. L. No. 108-199, div. C, tit. IV, § 424, 118 Stat 3 (2004) ("[I]t is the intent of Congress that any legislation enacted on such issue [of contraceptive coverage by health insurance plans within the District of Columbia] should include a 'conscience clause' which provides exceptions for religious beliefs and moral convictions.").

   Accordingly, the Government should adopt the following conscience clause, modeled after the Church Amendment: "Nothing in these regulations shall require the coverage of contraceptive services if the employer objects to such coverage on the basis of religious beliefs." As the U.S. Conference of Catholic Bishops has noted, this is the only alternative that will completely alleviate the religious liberty concerns raised by the Mandate.[14]

2. State Law Analogue: Several states define "religious employer" more broadly than the Mandate. For example, West Virginia defines a "religious employer" as "an entity whose sincerely held religious beliefs or sincerely held moral convictions are central to the employer's operating principles, and the entity is an organization listed under 26 U.S.C. 501(c)(3), 26 U.S.C. 3121, or listed in the Official Catholic Directory published by P. J. Kennedy and Sons." W. Va. Code § 33-16E-2. Arizona defines a "religious employer" as "[a]n entity whose articles of incorporation clearly state that it is a religiously motivated organization and whose religious beliefs are central to the organization's operating principles." Ariz. Rev. Stat. § 20-1057.08(G)(2).

   A definition modeled along these lines would be a substantial improvement over that contained in the NPRM.

[14] Comments of the U.S. Conference of Catholic Bishops, *supra* note 8, at 11.

For example, the following proposed definition draws on federal conscience clause language and the language found in the Arizona and West Virginia statutes:

> Section 1. "Religious Employer" is an entity that is exempt from tax under section 501 of title 26 and whose articles of incorporation clearly state that the entity's sincerely held religious beliefs or sincerely held moral convictions are part of the employer's operating principles.
>
> Section 2. Nothing in these regulations shall require the coverage of contraceptive methods, sterilization procedures, and related patient education and counseling if a "Religious Employer" objects to such coverage on the basis of religious beliefs.

3. ERISA "Church Plans": Finally, "religious employers" could be defined to include employers that maintain health insurance plans that would qualify as "church plans" under ERISA. A "church plan" is a pension or welfare plan established and maintained "for its employees (or their beneficiaries) by a church or by a convention or association of churches." 29 U.S.C. § 1002(33)(A). Significantly, "church plans" also include those maintained by organizations that are "controlled by or associated with" churches. *Id.* § 1002(33)(C).

   Some federal courts, however, have adopted unduly narrow constructions of ERISA's "church plan" provisions, making this a less than optimal solution. *See Chronister v. Baptist Health*, 442 F.3d 648, 653 (8th Cir. 2006); *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 548 (4th Cir. 2001). Accordingly, if the Government adopts this proposal, a statement should be included in the preamble to any final rule indicating that the Government intends for this definition to apply to all religious organizations that are affiliated with a church, notwithstanding the narrow standards applied by the Eighth and Fourth Circuits, cited above. While this option is less preferable than the preceding alternatives, it too, would be a substantial improvement over the NPRM.

V. CONCLUSION

Ultimately, the NPRM does not address the problems created by the Mandate; indeed, it makes them worse. The result is a proposal that, if implemented, would continue to violate the rights of religious organizations under the First Amendment, RFRA, and numerous other federal statutes. Accordingly, the Archdiocese strongly urges the Government to reconsider its course and, instead, adopt the proposals outlined above.

Sincerely,

Jane G. Belford
Chancellor