[ORAL ARGUMENT NOT YET SCHEDULED]

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

Roman Catholic Archbishop of Washington, *et al.*, Plaintiffs-Appellants, v. Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*, Defendants-Appellees.	No. 13-5091

OPPOSITION TO MOTION FOR SUMMARY REVERSAL

This is one of several cases in which plaintiffs challenge regulations that require certain group health plans to include as part of their coverage FDA-approved contraception, as prescribed by a health care provider. Like the plaintiffs in other actions, plaintiffs here assert religious-based objections under the Religious Freedom Restoration Act and First Amendment, and claims under the Administrative Procedure Act.

In February 2012, several months before plaintiffs filed this suit, the government established an enforcement safe harbor that applies to a variety of non-profit organizations, including these plaintiffs. The government also announced its intention to engage in rulemaking in an effort to accommodate religious objections raised by such entities. *See* 77 Fed. Reg. 8725, 8726-28 (Feb. 15, 2012). In February

2013, the responsible government agencies issued proposed rules and reaffirmed their commitment to issue final rules by August 2013 that will supersede the existing rules. *See* 78 Fed. Reg. 8456 (Feb. 6, 2013).

It is therefore uncontroverted that the government will never enforce the rules challenged in this suit against these plaintiffs. The district court accordingly held that plaintiffs' suit is not ripe and, applying settled principles, dismissed their action.

Plaintiffs do not contend that their suit is ripe and capable of adjudication. They nevertheless contend that the district court was required as a matter of law to hold their unripe suit in abeyance. No principle or precedent compels that result. This Court's decision in *Wheaton College* v. *Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (per curiam) to hold appeals in related challenges in abeyance does not suggest explicitly or implicitly that district courts lack discretion to dismiss unripe challenges in accordance with established doctrine.

Plaintiffs devote much of their motion to articulating their concerns with the proposed rules published by the agencies for notice and comment. Plaintiffs are participating in that process. If they are dissatisfied with the final rules, they can of course file suit challenging those rules and seeking such relief as they believe appropriate. The district court was not, however, required to retain a nonjusticiable suit because plaintiffs may later bring a challenge to regulations that have not yet issued.

BACKGROUND

A. The Patient Protection and Affordable Care Act and its implementing regulations establish minimum standards for certain group health plans. A non-grandfathered plan must cover certain preventive health services without cost-sharing. These preventive health services include immunizations recommended by the Advisory Committee on Immunization Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id.* § 300gg-13(a)(1); preventive care and screenings for infants, children, and adolescents as provided in guidelines of the Health Resources and Services Administration ("HSRA"), *see id.* § 300gg-13(a)(3); and certain preventive care and services for women as provided in HRSA guidelines, *see id.* § 300gg-13(a)(4). Collectively, these preventive health services coverage provisions require that non-grandfathered plans cover without cost-sharing an array of preventive health services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[1]

In addition, and as relevant here, these provisions require that non-grandfathered plans cover "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling

[1] *See, e.g.*, U.S. Preventive Services Task Force "A" and "B" Recommendations, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

for all women with reproductive capacity,' as prescribed by a provider." 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The Departments charged with enforcing the contraceptive-coverage requirement (Health and Human Services ("HHS"), Labor, and the Treasury), issued regulations implementing this requirement and in February 2012 finalized a religious employer exemption. *See ibid.* At the same time, however, they "announced [their] intention to 'develop and propose changes to these final regulations that would meet two goals' — providing contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of non-profit organizations like appellants." *Wheaton College* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727).

The Departments accordingly "created a safe harbor from enforcement of the contraceptive coverage requirement[.]" *Ibid.* (citing 77 Fed. Reg. at 8728). The safe harbor applies to the group health plans of non-profit organizations that, consistent with applicable state law, have not provided some or all required contraceptive coverage since February 10, 2012, because of religious objections; that have given notice to plan participants that the plan will not provide such contraceptive coverage during the first plan year starting on or after August 1, 2012 when the contraceptive-coverage requirement becomes effective; and that have certified that they meet the safe-harbor criteria. 77 Fed. Reg. at 8727-29; HHS, Guidance on the Temporary

Enforcement Safe Harbor (Feb. 10, 2012)[2]; *see also* 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). The Departments subsequently clarified that the safe harbor is available to any non-profit institution of higher education and the issuer of its student health insurance plan if the institution and its student health insurance plan satisfy these criteria, *see* 77 Fed. Reg. 16,452-01, 16,456-57 (Mar. 21, 2012), and announced that it is available to entities that took some action to try to exclude or limit contraceptive coverage without success prior to February 10, 2012, *see* HHS, Guidance on the Temporary Enforcement Safe Harbor 3 (Aug. 15, 2012) ("August 2012 HHS Guidance").[3] It is not disputed that the safe harbor applies to plaintiffs in this case.

On March 21, 2012, the Departments issued an Advance Notice of Proposed Rulemaking ("ANPRM"), requesting comments "on the potential means of accommodating" the concerns of certain non-exempt religious organizations "while ensuring contraceptive coverage for plan participants and beneficiaries covered under their plans (or, in the case of student health insurance plans, student enrollees and their dependents) without cost sharing." 77 Fed. Reg. at 16,501.

On February 6, 2013, the Departments issued a Notice of Proposed Rulemaking, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013), and reaffirmed that they are on track to issue a new rule by August 2013, as the government had previously advised this

[2] *Available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf.

[3] *Available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

Court in *Wheaton*. *See also Wheaton College*, 703 F.3d at 552 (describing this as a "binding commitment").

B. Plaintiffs are five Catholic, non-profit organizations that offer health insurance to their employees but do not cover FDA-approved contraception. *See* DCt. 2; Compl. ¶¶ 2, 44–46, 56, 64, 74, 86, 90. On May 21, 2012—more than three months after the Departments instituted a safe harbor applicable to plaintiffs and announced plans to create new rules to accommodate organizations like them, and two months after the issuance of the ANPRM—plaintiffs filed suit, urging primarily that the present rules would infringe their religious liberties.

The government moved to dismiss, explaining that plaintiffs had not met the Article III requirement of having a certainly impending injury and that plaintiffs' claims were not prudentially ripe because the rules were being amended to address concerns like theirs and the government would not enforce the existing rules against plaintiffs during the pendency of the new rulemaking process.

Following supplemental briefing about the effect of this Court's decision in *Wheaton College* v. *Sebelius*, 703 F.3d 551, the district court dismissed the case as unripe. The court explained that plaintiffs face no threat of enforcement, and rejected plaintiffs' contention that "uncertainty" while the new rules take shape warrant judicial review. *See* DCt 6-7. The court noted that the panel in *Wheaton* "decided to hold the *Wheaton College* and *Belmont Abbey College* appeals in abeyance," but explained that "nothing in the Order suggests that [the district court] is required to do the

same." DCt. 7. The district court noted that this Court "regularly dismiss[es]" or affirms dismissal of unripe cases. DCt 8. The district court further explained that "[i]f after the new regulations are issued, plaintiffs are still not satisfied," their challenges will be different, and they may bring a new suit. *Ibid.* "And in the unlikely event that the government does not keep its word, plaintiffs can bring a new challenge . . . along with a motion for emergency relief, if necessary." *Ibid.* Because the court dismissed the case as unripe, it was not necessary to pass upon the question of Article III standing. DCt. 9.

ARGUMENT

Plaintiffs do not dispute that their case is unripe. Applying settled legal principles, the district court properly dismissed their challenge. Plaintiffs mistakenly infer from *Wheaton College* v. *Sebelius*, 703 F.3d 551, that a district court is required to hold in abeyance a nonjusticiable controversy. Nothing in the Court's decision warrants that conclusion, and plaintiffs have not and cannot meet "the heavy burden of establishing" that their case for abeyance rather than dismissal is "so clear that expedited action is justified," *Taxpayers Watchdog, Inc.* v. *Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987); *see also United States* v. *Glover,* 731 F.2d 41, 44 (D.C. Cir. 1984) (summary reversal).

A. If a case is unripe, the ordinary disposition is to dismiss without prejudice. *See* 15 Moore et al., *Moore's Federal Practice* § 101.81 (3d ed. 2011); *see, e.g.*, *Nat'l Park Hospitality Ass'n* v. *Dep't of Interior,* 538 U.S. 803, 812 (2003) (holding that case was

unripe and remanding "with instructions to *dismiss*") (emphasis added); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 739 (1998) (same); *In re Aiken Cnty.*, 645 F.3d 428, 434–36, 438 (D.C. Cir. 2011) (dismissing unripe petition for review); *AT&T Corp.* v. *FCC*, 369 F.3d 554, 563 (D.C. Cir. 2004) (per curiam) (same); *Natural Res. Defense Council* v. *FAA*, 292 F.3d 875, 883 (D.C. Cir. 2002) (same). Thus, of the 21 district courts, in addition to this one, that have held that similar challenges to the contraceptive-coverage requirement are not justiciable, all have dismissed.[4]

[4] *See Priests for Life* v. *Sebelius*, No. 12-cv-753 (E.D.N.Y. Apr. 12, 2013); *Criswell College* v. *Sebelius*, No. 12-cv-4409 (N.D. Tex. Apr. 9, 2013); *Ave Maria Univ.* v. *Sebelius*, No. 12-cv-88 (M.D. Fla. Mar. 29, 2013); *Eternal World Television Network, Inc.* v. *Sebelius*, No. 12-cv-501 (N.D. Ala. Mar. 25, 2013); *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 12-cv-440 (S.D. Ohio Mar. 22, 2013); *Geneva Coll.* v. *Sebelius*, No. 12-cv-207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Wenski* v. *Sebelius*, No. 12-cv-23820 (S.D. Fla. Mar. 5, 2013); *Roman Catholic Diocese of Dallas* v. *Sebelius*, No. 12-cv-1589 (N.D. Tex. Feb. 26, 2013); *Conlon* v. *Sebelius*, No. 12-cv-3932 (E.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis* v. *Sebelius*, No. 12-cv-924, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *Persico* v. *Sebelius*, No. 12-cv-123 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ.* v. *Sebelius*, No. 11-cv-03350, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria* v. *Sebelius*, No. 12-cv-1276, 2013 WL 74240 (C.D. Ill. Jan. 3, 2013); *Univ. of Notre Dame* v. *Sebelius*, No. 12-cv-253, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Biloxi* v. *Sebelius*, No. 12-cv-00158, Mem. Op. and Order (S.D. Miss. Dec. 20, 2012); *Zubik* v. *Sebelius*, No. 12-cv-676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012), appeal docketed, No. 13-1228 (3d Cir.); *Catholic Diocese of Nashville* v. *Sebelius*, No. 12-cv-934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012), appeal docketed, No. 12-6590 (6th Cir.); *Legatus* v. *Sebelius*, No. 12-cv-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), appeals docketed, Nos. 13-1092, 13-1093 (6th Cir.); *Wheaton College* v. *Sebelius*, No. 12-cv-1169, 2012 WL 3637162 (D.D.C. Aug. 24, 2012); *Nebraska ex rel. Bruning* v. *Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777 (D. Neb. July 17, 2012), appeal docketed, No. 12-3238 (8th Cir.); *Belmont Abbey College* v. *Sebelius*, No. 11-cv-1989, 2012 WL 2914417 (D.D.C. July 18, 2012).

The ripeness doctrine does not contemplate that plaintiffs may lodge complaints and wait for their controversy to ripen. And dismissal creates no particular hardship, because plaintiffs may refile when and if they have a ripe case. *See generally Semtek Int'l, Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim."); *see also* DCt. 8 ("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.").

In rare circumstances, this Court has held cases in abeyance. As in *Wheaton,* these cases usually involve a prudential ripeness problem created by occurrences that transpired while the case was pending and, as in *Wheaton,* the appeal is often held in abeyance with the consent of the parties. *See Wheaton College*, 703 F.3d at 552-53 (applicable safe harbor announced after suits filed, and defendants did not object to abeyance at argument); *Am. Petroleum Inst.* v. *EPA*, 683 F.3d 382, 384, 386, 389, 390 (D.C. Cir. 2012) (after briefing complete, proposed rulemaking created prudential ripeness problem); *Devia* v. *NRC*, 492 F.3d 421, 423, 426-27 (D.C. Cir. 2007) ("post-petition" developments rendered case unripe and neither party objected to abeyance); *Town of Stratford* v. *FAA*, 285 F.3d 84 (D.C. Cir. 2002), *reh'g denied*, 292 F.3d 251, 252

(D.C. Cir. 2002) (facts discovered at argument raised "considerations of prudential ripeness"). Although this Court has explained that "to protect against the unlikely and the unpredictable, [the Court] can hold [a] case in abeyance pending resolution of the proposed rulemaking," *Am. Petroleum Inst.*, 683 F.3d at 389, we are not aware of any decision requiring that certain unripe cases be held in abeyance or holding that a district court erred by dismissing rather than holding in abeyance a case that was unripe.

B. Plaintiffs are thus mistaken in asserting that "*Wheaton* resolves . . . whether the district court should have held [their] suit in abeyance." Mot. 10.

1. *Wheaton* did not even order the disposition that plaintiffs now posit is "[b]inding [c]ircuit [p]recedent." Mot. 10. *Wheaton* did not hold that the district courts, which heard the two cases consolidated on appeal, erred in dismissing the suits and that the district courts were, instead, required to hold the cases in abeyance. Nor did this Court remand to the district courts to do so. Nor did this Court suggest that *it* was required to hold the appeals in abeyance or that its decision was creating new law about abeyance being a necessary disposition. *See* 703 F.3d at 553. Plaintiffs' motion for summary reversal imputes to the *Wheaton* decision reasoning and conclusions that formed no part of the ruling. *See, e.g.*, Mot. 1 (positing that *Wheaton* "recognized" abeyance is necessary when cases involve "principles of religious freedom").

2. In any event, the circumstances of this case are materially distinguishable from those in *Wheaton*. One of the plaintiffs in *Wheaton* filed suit before the Departments announced a safe harbor and the intention to engage in new rulemaking. And the other plaintiff filed suit before it was clear that it would fall within the scope of the safe harbor. *See* August 2012 HHS Guidance 3 (announcing that safe harbor applies to certain plans that had previously provided contraception under certain circumstances). The Court held that the plaintiffs in the two consolidated cases had Article III standing "because standing is assessed at the time of filing" and "the colleges clearly had standing when these suits were filed." *Wheaton College*, 703 F.3d at 552.

Plaintiffs' action, in contrast, was filed several months after the Departments instituted a clearly applicable enforcement safe harbor. Plaintiffs therefore lack standing, and their suit implicates the Article III component of the ripeness doctrine as well as its prudential concerns. *See Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1151 (2013) ("threatened injury must be certainly impending to constitute injury in fact," and plaintiffs cannot "establish standing by asserting that they suffer present costs and burdens" by responding to a future condition that "is not certainly impending"); *Am. Petroleum Institute*, 683 F.3d at 386 (part of the doctrine of ripeness "is subsumed into the Article III requirement of standing, which requires a petitioner to allege *inter alia* an injury-in-fact that is 'imminent' or 'certainly impending.'").

3. Plaintiffs' motion underscores the extent to which any future controversy will arise from the future rules, not from the current rules. Plaintiffs devote much of their motion to stating objections to the proposed rules. *See* Mot. 13-20. Plaintiffs can voice their comments in the rulemaking. If plaintiffs are dissatisfied with the new rules that issue and the agencies' reasoning and record, they can file a challenge to the new rules and seek such relief as they believe is appropriate. The district court did not err, however, in declining to hold a nonjusticiable suit in abeyance because plaintiffs may challenge rules that have not yet issued.

CONCLUSION

The motion for summary reversal should be denied.

Respectfully submitted,

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APRIL 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2013, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Adam Jed
Adam C. Jed