IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*,

Defendants.

Case No. 1:12-cv-2542-BMC

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) PERMITTING IMMEDIATE APPEAL

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Defendants respectfully ask this Court to reconsider that portion of its December 5, 2012 Memorandum Decision and Order ("Order"), ECF No. 37, that denied defendants' Motion to Dismiss as to the Roman Catholic Archdiocese of New York (the "Archdiocese"), Catholic Health Care System and its affiliates ("ArchCare"), and Catholic Health Services of Long Island ("CHSLI"). In the alternative, if the Court denies defendants' motion for reconsideration, defendants ask the Court to certify the Order for immediate appeal to the Second Circuit pursuant to 28 U.S.C. § 1292(b).

Since the Court issued its December 5 Order, four additional district courts and one court of appeals have held that claims indistinguishable from those in this case are not fit for review. *See* Order, *Wheaton Coll. v. Sebelius*, No. 12-5273 (D.C. Cir. filed Dec. 18, 2012) (attached as Exhibit 1) (affirming in part and holding in abeyance appeals in *Wheaton College v. Sebelius*, __ F. Supp. 2d __, 2012 WL 3637162 (D.D.C. Aug. 24, 2012), and *Belmont Abbey College v. Sebelius*, __ F. Supp. 2d __, 2012 WL 2914417 (D.D.C. July 18, 2012)); *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12CV158-HSO-RHW (S.D. Miss. Dec. 20, 2012) (attached as Exhibit 2); *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-0523-RLM-CAN, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-01276-JES-BGC, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Colo. Christian Univ. v. Sebelius*, No. 1:11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 8, 2013). Of the dozen courts to have considered these jurisdictional issues, this Court remains the only court to allow such claims to proceed. *See Zubik v. Sebelius*, __ F. Supp. 2d __, 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), *appeal docketed*, No. 12-6590 (6th Cir. Dec. 19, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Nebraska v. U.S. Dep't of Health &*

Human Servs., No. 4:12-cv-3035, 2012 WL 2913402 (D. Neb. July 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012).

All of the district courts to have addressed the jurisdictional arguments advanced by defendants have relied on defendants' consistent representations that the challenged regulations, in their current form, will never be enforced against plaintiffs like those in this case. The D.C. Circuit did so as well, following oral argument in *Wheaton College* in which, in response to a direct question by the court, defendants stated unequivocally that the regulations are certain to change before the expiration of the safe harbor period, and that the current regulations would never be enforced against plaintiffs. The D.C. Circuit accepted these representations as commitments, and this Court should do the same.

For this reason and those articulated below, the Court should reconsider its Order or, at the very least, certify an interlocutory appeal to the Second Circuit.

I. RECONSIDERATION IS WARRANTED BECAUSE THE COURT'S DECISION RESTS ON THE ERRONEOUS CONCLUSION THAT THE CHALLENGED REGULATIONS, IN THEIR CURRENT FORM, MIGHT BE ENFORCED BY DEFENDANTS AGAINST PLAINTIFFS

"Reconsideration of a previous order by the court lies squarely within the court's sound discretion." *Anwar v. Fairfield Greenwich Ltd.*, 745 F. Supp. 2d 379, 382 (S.D.N.Y. 2010) (citing *Devlin v. Transp. Comm'ns Int'l Union*, 175 F.3d 121, 132 (2d Cir. 1999)). Reconsideration is warranted where the moving party shows "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotations and citation omitted). As this Court has explained, "[a] motion for reconsideration under Local Rule 6.3 is ordinarily granted only when the moving party has shown that the Court overlooked controlling law or facts that were put before it, which, had they

been considered, would have altered the disposition of the underlying motion." *Nisanov v. Black & Decker (U.S.), Inc.*, No. 05-cv-5911-BMC-SMG, 2008 WL 2185910, at *1 (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255 (2d Cir.1995)).

Defendants believe that reconsideration is warranted because the Court erred both factually and legally when it concluded that there is a "substantial possibility" that the challenged regulations, in their current form, will be enforced by defendants against plaintiffs, Order at 28, despite defendants' clear and repeated written and oral commitments – in the Federal Register, in this and other district courts, and in oral argument before the D.C. Circuit – to the contrary. The Court failed to properly credit defendants' consistent assurances that the challenged regulations will never be enforced by defendants against plaintiffs in their current form. Although the Court stated that it would "assume that the Departments issued the [advance notice of proposed rulemaking (ANPRM)] in good faith and not as litigation posturing," Order at 27, defendants respectfully suggest that the Court's ruling is based entirely on the contrary view that the current version of the regulations may in fact be enforced against plaintiffs. *See id.* at 28 ("[T]he Departments have created a substantial possibility of enforcement and . . . the ANPRM does nothing to eliminate it.").[1] These positions cannot be reconciled. Defendants have stated on numerous occasions – in the context of this litigation and elsewhere – that the regulations in their

[1] *See also, e.g.*, Order at 26 (characterizing defendants' position as "that the regulation *may* be amended" (emphasis added)); *id.* at 27 ("[T]he fact is that the ANPRM does not prevent the Coverage Mandate, as it currently exists, from going into effect."); *id.* at 27-28 ("The Departments may alter the Coverage Mandate before that time, but the possibility of a change in the law does not mean that a requirement that will become effective by operation of law is not certainly impending."); *id.* at 28 ("The possibility of a future amendment to the Coverage Mandate that relieves plaintiffs from their obligation to cover contraceptive services and renders this action moot is speculative and is not sufficient to make plaintiffs' claims non-justiciable."); *id.* at 32 ("Even though the ANPRM makes it uncertain that the Coverage Mandate will ultimately apply to them, plaintiffs persuasively argue that if they assume that the Coverage Mandate will be modified and guess wrong, given the timelines at issue, they will be unprepared for the onerous fines or other eventualities that occur when the Coverage Mandate goes into effect."); *id.* at 33 (describing the current regulations as a "speeding train that is coming towards plaintiffs"); *id.* at 39 ("[I]t is still possible that the Coverage Mandate as it is currently structured will become effective at the expiration of the safe harbor.").

current form will *never* be enforced against entities like plaintiffs, their group health plans, or any associated group health insurance coverage.[2]

[2] *See, e.g.*, 77 Fed. Reg. 16501, 16503-06 (Mar. 21, 2012) ("At the same time [on February 10, 2012, when the final regulations concerning the exemption were posted], the Departments announced plans to expeditiously develop and propose changes to the final regulations . . . . The Departments intend to finalize these amendments to the final regulations such that they are effective by the end of the temporary enforcement safe harbor; that is, the amended final regulations would apply to plan years starting on or after August 1, 2013. This advance notice of proposed rulemaking (ANPRM) is the first step toward promulgating these amended final regulations. Following the receipt of public comment, a notice of proposed rulemaking (NPRM) will be published, which will permit additional public comment, followed by amended final regulations."); 77 Fed. Reg. 16453, 16457 (Mar. 21, 2012) (same for student health plans); 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012) ("During the temporary enforcement safe harbor, the Departments plan to develop and propose changes to these final regulations . . . . Before the end of the temporary enforcement safe harbor, the Departments will work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage. Specifically, the Departments plan to initiate a rulemaking to require issuers to offer insurance without contraception coverage to such an employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it, with no cost-sharing."); Press Release, HHS, Health Care Law Gives Women Control Over Their Care, Offers Free Preventive Services to 47 Million Women (July 31, 2012), *available at* http://www.hhs.gov/news/press/2012pres/07/20120731a.html; The White House, Office of the Press Secretary, Remarks by the President on Preventive Care (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care ("Let me repeat: These employers will not have to pay for, or provide, contraceptive services. But women who work at these institutions will have access to free contraceptive services, just like other women, and they'll no longer have to pay hundreds of dollars a year that could go towards paying the rent or buying groceries."); The White House, Office of the Press Secretary, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions; Letter from Kathleen Sebelius, Secretary of Health and Human Services, to Sen. Susan Collins (Feb. 29, 2012) ("In his recent announcement related to these issues, the President committed to rulemaking to ensure access to these important preventive services in fully insured and self-insured group health plans while further accommodating religious organizations' beliefs."); Letter from Kathleen Sebelius, Secretary of Health and Human Services, to Rep. Dean Heller (Aug. 26, 2012) (same); Letter from Kathleen Sebelius, Secretary of Health and Human Services, to Sen. John D. Rockefeller IV (June 5, 2012) ("We are committed to rulemaking during this one-year enforcement safe-harbor to ensure women have access to these important preventive services in fully insured and self-insured group health plans while accommodating the religious beliefs of additional religious organizations that do not qualify for the [religious employer] exemption."); Defs.' Mem. in Support of Mot. to Dismiss at 3, ECF No. 16-1 ("[D]efendants' initiation of a rulemaking that *commits* to amending the preventive services coverage regulations well before January 2014 to accommodate the religious objections of organizations like plaintiffs further demonstrates the absence of any imminent harm to them." (emphasis added)); Defs.' Reply in Support of Mot. to Dismiss at 1, ECF No. 30 (stating that "the regulations will change before defendants could ever enforce them against plaintiffs"); *id.* ("[T]he regulations will have changed by the earliest time defendants could enforce them against plaintiffs."); *id.* ("[T]he challenged regulations will inevitably change before defendants could enforce them against plaintiffs."); *id.* at 6 ("Plaintiffs' present-injury allegations are predicated upon the possibility that defendants will enforce the regulations against plaintiffs in their current form after the safe harbor expires. But it is impossible to square any assertion that this scenario is 'certainly impending' (or even at all likely), with the fact that defendants have publicly committed themselves to the development of amended regulations – and have indeed initiated the development of such regulations – aimed at addressing the concerns of the very type that plaintiffs have raised before the expiration of the safe harbor."); *id.* at 7 ("In sum, this case involves not only a time delay before defendants will enforce the challenged regulations against plaintiffs, but also a *commitment* by defendants to amend the regulations as they relate to organizations like plaintiffs, initiation of the amendment process, and opportunities for plaintiffs to participate in that process."); *see also, e.g.*, Defs.' Mem. in Support of Mot. to Dismiss at 2-3, 11, 14, 15 n.10, 16, 19, 24-25, *Grace Schools v. Sebelius*, No. 3:12-cv-459-RLM (N.D. Ind. Nov. 9, 2012), ECF No. 25; Defs.' Notice of

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Sept. 24, 2012), ECF No. 42; Defs.' Resp. to Pl.'s Notice of Supp. Auth. at 5 n.2, *Diocese of Fort Wayne-South Bend, Inc. v. Sebelius*, No. 1:12-cv-159 (N.D. Ind. Nov. 28, 2012), ECF No. 51; Defs.' Mem. in Support of Mot. to Dismiss at 2, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-253 (N.D. Ind. Aug. 6, 2012), ECF No. 17; Defs.' Reply in Support of Mot. to Dismiss at 1, 6, 7, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-253 (N.D. Ind. Sept. 24, 2012), ECF No. 25; Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj. at 1, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-253 (N.D. Ind. Nov. 7, 2012), ECF No. 33; Defs.' Resp. to Pl.'s Notice of Supp. Auth. at 1, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-253 (N.D. Ind. Nov. 20, 2012), ECF No. 36; Defs.' Mem. in Support of Mot. to Dismiss at 11, 12, 18, 19, *EWTN v. Sebelius*, No. 2:12-cv-501-SLB (N.D. Ala. May 5, 2012), ECF No. 29; Defs.' Reply in Support of Mot. to Dismiss at 2, 3, 4, *EWTN v. Sebelius*, No. 2:12-cv-501-SLB (N.D. Ala. 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Sept. 24, 2012), ECF No. 27; Defs.' Mem. in Support of Mot. to Dismiss at 2, 8, 9, 12, 15, *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924-JAR (E.D. Mo. Aug. 6, 2012), ECF No. 17; Defs.' Reply in Support of Mot. to Dismiss at 1, 3, 5, 8, *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924-JAR (E.D. Mo. Sept. 24, 2012), ECF No. 28; Defs.' Mem. in Support of Mot. to Dismiss at 2, 11-12, 15, 19, *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-1276-JES-BGC (C.D. Ill. Oct. 19, 2012), ECF No. 10; Defs.' Reply in Support of Mot. to Dismiss at 1, 2, 6, 7, *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-1276-JES-BGC (C.D. Ill. Nov. 13, 2012), ECF No. 15; Defs.' Reply in Support of Mot. to Postpone Init. Pretrial & Sched. Conf. at 2, *East Texas Baptist Univ. v. Sebelius*, No. 4:12-cv-3009 (S.D. Tex. Dec. 6, 2012), ECF No. 21; Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 2, 12, *Legatus v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich. Aug, 29, 2012), ECF No. 14; Oral Arg. Tr. at 73, 74, *Legatus v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich. Sept. 28, 2012); Mem. in Supp. of Defs.' Mot. to Dismiss at 2, 11, 15, *Franciscan University of Steubenville v. Sebelius*, No. 2:12-cv-00440 (S.D. Ohio Aug. 6, 2012), ECF No. 23-1; Defs.' Reply in Supp. of Their Mot. to Dismiss at 1, 12, 13 n.10, *Franciscan University of Steubenville v. Sebelius*, No. 2:12-cv-00440 (S.D. Ohio Sept. 24, 2012), ECF No. 35; Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the First Am. Compl. at 19, 21, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989 (D.D.C. Apr. 5, 2012), ECF No. 23-1; Defs.' Reply in Supp. of Their Mot. to Dismiss the First Am. Compl. at 4 n.3, 5, 9, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989 (D.D.C. May 3, 2012), ECF No. 25; Defs.' Mem. in Opp'n to Pl.'s Mot. for Reconsideration at 6-7, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989 (D.D.C. August 9, 2012), ECF No. 32; Defs.' Mot. to Dismiss the First Am. 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Sebelius*, No. 1:12-cv-00463 (W.D. La. July 9, 2012), ECF No. 35-1; Defs.' Reply in Supp. of Mot. to Dismiss at 3, *Louisiana Coll. v. Sebelius*, No. 1:12-cv-00463 (W.D. La. Aug. 24, 2012), ECF No. 50; Defs.' Mem in Supp. of Mot. to Dismiss at 16, *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa. Aug. 2, 2012), ECF No. 40; Defs.' Reply in Supp. of Mot. to

These commitments have been consistent and unequivocal, and they have continued since the Court issued its Order. During oral argument before the D.C. Circuit in *Wheaton College*, defendants represented in open court and in no uncertain terms that they would never enforce the current regulations against entities like plaintiffs. *See* Order at 2. Defendants also promised to promulgate a Notice of Proposed Rulemaking (NPRM) concerning the amendments to the regulations in the first quarter of this year. *See id.* Defendants have restated these guarantees in the attached Declaration of Gary M. Cohen. *See* Decl. of Gary M. Cohen ¶¶ 4-5. The D.C. Circuit, in concluding that a challenge to the regulations is not ripe, took "the government at its word" and considered these statements to be "binding commitments." *Id.*[3] And all of the other courts to have considered defendants' jurisdictional arguments found such assurances – along with the ANPRM, the safe harbor, and the government's other public statements – to be sufficiently definitive to conclude that the regulations in their current form will never be enforced against entities like plaintiffs. *See, e.g.*, *Zubik*, 2012 WL 5932977, at *8-*9 ("'[Defendants] have published their plan to amend the rule to address the exact concerns

Dismiss at 4, *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa. Oct. 4, 2012), ECF No. 54; Defs.' Mem. in Supp. of Mot. to Dismiss at 16, 21, *Persico v. Sebelius*, No 1:12-cv-00123 (W.D. Pa. Aug. 6, 2012), ECF No. 18; Defs.' Reply in Supp. of Mot. to Dismiss at 1, 8, 9, 12, 16, *Persico v. Sebelius*, No. 1:12-cv-00123 (W.D. Pa. Sept. 24, 2012), ECF No. 37; Defs.' Mem in Supp. of Mot. to Dismiss at 16, 20, *Zubik v. Sebelius*, No. 2:12-cv-00676 (W.D. Pa. Aug. 6, 2012), ECF No. 18; Defs.' Reply in Supp. of Mot. to Dismiss at 1, 7, 8, 10, *Zubik v. Sebelius*, No. 2:12-cv-00676 (W.D. Pa. Sept. 24, 2012), ECF No. 40; Defs.' Mem. in Supp. of Mot. to Dismiss at 12, 14, 17, 21, *Catholic Diocese of Nashville v. Sebelius*, No. 3:12-cv-00934 (M.D. Tenn. Oct. 9, 2012), ECF No. 29; Defs.' Reply in Supp. of Mot. to Dismiss at 1, 7, 9, 11, *Catholic Diocese of Nashville v. Sebelius*, No. 3:12-cv-00934 (M.D. Tenn. Nov. 5, 2012), ECF No. 41; Tr. of Oral Arg. on Defs.' Mot. to Dismiss at 3, *Catholic Diocese of Nashville v. Sebelius*, No. 3:12-cv-00934 (M.D. Tenn. Nov. 15, 2012), ECF No. 45.

[3] While the D.C. Circuit held that dismissal of the *Wheaton College* and *Belmont Abbey College* complaints for lack of standing was in error, the court's analysis is inapplicable to this case. Because standing is "assessed at the time of filing," *Wheaton Coll.*, Order at 1, and because the plaintiffs in *Wheaton* and *Belmont Abbey* filed suit *before* defendants established or clarified the enforcement safe harbor, the court held those plaintiffs had standing at the time their suits were filed. *Id.* at 1-2. Here, by contrast, plaintiffs filed their suit after defendants established the enforcement safe harbor, for which it was obvious that plaintiffs qualified before defendants issued the August 15, 2012 clarification. Assessing their standing at the time of filing thus leads to the opposite conclusion. For the reasons set out in this brief and defendants' briefs in support of their motion to dismiss, the existence of the enforcement safe harbor coupled with the ongoing regulatory amendment process to establish additional religious accommodations means that plaintiffs lacked injury in fact for purposes of standing at the time they filed suit, and that they continue to lack such injury now. *See Zubik*, 2012 WL 5932977, at *11; *Catholic Diocese of Nashville*, 2012 WL 5879796, at *3-4; *Legatus*, 2012 WL 5359630, at *5; *Notre Dame*, 2012 WL 6756332, at *4.

Plaintiff raises in this action and have stated clearly and repeatedly in the Federal Register that they intend to finalize the changes before the enforcement safe harbor ends. Not only that, but Defendants have already initiated the amendment process by issuing an ANPRM. The government, moreover, has done nothing to suggest that it might abandon its efforts to modify the rule – indeed, it has steadily pursued that course – and it is entitled to a presumption that it acts in good faith.'" (quoting *Belmont Abbey*, 2012 WL 2914417, at *9)); *Colo. Christian Univ*, 2013 WL 93188, at *5 ("In the instant case, Defendants have not only committed to further amend the interim final rule but, in fact, have initiated a rulemaking process to do so. Interpreted in a pragmatic way, Defendants' actions render tentative, as opposed to final, the regulation at issue and Defendants' position on the issues raised by CCU. . . . Had Defendants failed to take affirmative steps to follow through with their commitment, the Court may well have sided with CCU on the issue of ripeness. But by issuing the ANPRM and beginning the rulemaking process, Defendants have moved beyond the theoretical in considering how to accommodate organizations like CCU. They have also substantiated the good-faith presumption applicable to their consistent statements that the interim final rule will be further amended and will not be enforced in its current form against organizations like CCU." (internal citations omitted)); *see also, e.g.*, *Wheaton*, 2012 WL 3637162, at *8; *Notre Dame*, 2012 WL 6756332, at *3-*4; *Catholic Diocese of Peoria*, 2013 WL 74240, at *5.

This Court should do the same. If the Court truly understands the government to be acting in good faith, as it should, *see, e.g.*, *Colo. Christian Univ.*, 2013 WL 93188, at *5 (recognizing the "good-faith presumption" to which defendants' representations are entitled); *Notre Dame*, 2012 WL 6756332, at *3 ("The government is entitled to a presumption of good faith in such promises."); *Zubik*, 2012 WL 5932977, at *9, it cannot conclude that there is any

harm to plaintiffs – current or future – stemming from the challenged regulations in their current form. First, because defendants will never enforce the regulations in their current form against plaintiffs – and it is not yet certain what form the amended regulations will take – there is nothing for such plaintiffs to plan for and no costs for them to reasonably incur at this stage. Thus, this case does not involve the kind of "present effects" from "uncertain future harm" that were present in *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005), or *Clinton v. City of New York*, 524 U.S. 417 (1998) – cases relied on by this Court, *see* Order at 30-31. The policies causing the harm in those cases were not certain to change, but the regulations in this case are undergoing change right now. The same is true with respect to the hardship prong of the ripeness inquiry. *See id.* at 39-41 (relying on "the reasons discussed in the standing context"). All of the alleged hardships stem from the mistaken assumption that defendants will enforce the regulations in their present form against plaintiffs.[4]

[4] The Court's statement that "the ANPRM is not a 'formally announced change[] to official government policy,'" Order at 27, fails to appreciate the significance of the ANPRM within the context of defendants' total actions to date. As the Court noted in its opinion, the ANPRM was published in the Federal Register. *See id.* at 6; 77 Fed. Reg. 16,501 (Mar. 21, 2012). While the ANPRM does not technically bind defendants to a change in policy, defendants represented to the D.C. Circuit that the regulations will in fact change – a commitment that the D.C. Circuit considered binding. *See Wheaton Coll.*, Order at 2 ("There will, the government said, be a *different* rule for entities like the appellants, . . . and we take that as a binding commitment." (emphasis added). Furthermore, the Court's observation that the ANPRM, standing alone, is not technically binding does not distinguish it from any proposed regulation, including, for example, the proposed rule at issue in *American Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012).

The Court also erred in distinguishing *American Petroleum* simply because it involved a proposed rule that could have amounted to a "substantive policy reversal," Order at 39. The linchpin of the D.C. Circuit's conclusion in that case that the matter was not ripe for review was not the magnitude of the proposed change, but the existence of a proposal that could alleviate the plaintiffs' objections or, at least, "narrow the legal issues involved in this dispute and provide a more final and concrete setting for deciding any issues left on the table." *American Petroleum*, 683 F.3d at 388. The formal, published ANPRM here is no different. Finally, as with the proposed rule in *American Petroleum*, there is a "definite end date" for finalizing the amendments to the challenged regulations. *Id.* at 389.

Finally, the Court's statement that "the Departments have had ample opportunity to enact a meaningful change to the Coverage Mandate," Order at 29, is puzzling given the ordinary pace of rulemaking and the fact that defendants have always stated that the amendments would be finalized by August 1, 2013. 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) ("The Departments intend to finalize these amendments to the final regulations such that they are effective by the end of the temporary enforcement safe harbor; that is, the amended final regulations would apply to plan years starting on or after August 1, 2013."). That has not changed. Defendants are currently considering the comments received in response to the ANPRM and developing an NPRM, and will finalize the amendments to the challenged regulations prior to the end of the safe harbor period.

Second, because the regulations in their current form will never be enforced by defendants against plaintiffs, the Court's concern that plaintiffs might lack sufficient time to prepare for the amended regulations once the safe harbor expires, *see id.* at 32-33, is misplaced. Even if the *amended* regulations ultimately do not satisfy plaintiffs' concerns or, in plaintiffs' view, do not provide them with sufficient time to implement necessary changes, nothing the Court does now – even if it were to permanently enjoin the application of the current regulations to plaintiffs – can alleviate any such concerns about the future amended regulations. *See, e.g.*, *Colo. Christian Univ.*, 2013 WL 93188, at *6-*7; *Zubik*, 2012 WL 5932977, at *9; *Notre Dame*, 2012 WL 6756332, at *4. In other words, even if plaintiffs were to obtain all of the relief they seek in this case, none of their alleged injuries would be redressed and they would still have to bring an action challenging those regulations once they are issued (if they do not alleviate plaintiffs' concerns). Money spent planning for implementation of the current regulations is money wasted, and planning for an as yet unknown future regulation is impossible. Thus, any opinion on the merits with respect to the current regulations would be purely advisory. While the government of course agrees that "[t]here is no, 'Trust us, changes are coming' clause in the Constitution," Order at 34, there is a Cases or Controversies Clause, which, in the view of defendants and every other court that has addressed this issue, requires dismissal for lack of jurisdiction under the circumstances present here.

Finally, the Court's analysis of the fitness prong of the ripeness inquiry suffers from the same problem. The Court stated that it "is of the opinion that the [challenged regulations are] 'quite clearly definitive,'" Order at 38 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967)), but that conclusion, once again, cannot be squared with the government's public commitment to amend the regulations with respect to non-profit organizations with religious

objections such as plaintiffs before the expiration of the safe harbor. Reliance on the mere fact that the regulations were issued as "a final rule," *id.*, elevates form over substance, and ignores the reality of the regulatory and enforcement landscape as it relates to plaintiffs. *See, e.g., Notre Dame*, 2012 WL 6756332, at *3; *Catholic Diocese of Biloxi*, slip op. at 13-14. Furthermore, as the court in *Colorado Christian University* recently noted, the only element of the regulations that has been "finalized" is the religious employer exemption. *See* 2013 WL 93188, at *7 & n.9. The current regulations are not now, and will never be, enforced in their present form by defendants against plaintiffs. Because the amendment process in progress right now will "alter the very regulations" at issue in this case, *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989), and has "not yet resulted in an order requiring compliance by the [plaintiffs]," *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 161 (7th Cir. 1976), plaintiffs' challenge is not fit for review at this time.

In short, because this Court claimed to credit defendants' assertions that the current regulations will never be enforced by defendants against plaintiffs, but nonetheless based its ruling on the "substantial possibility" that those same regulations will be enforced by defendants against plaintiffs, we respectfully suggest that the Court's reasoning in the Order is internally inconsistent. By contrast, other district courts and the D.C. Circuit have properly accepted the government's public and repeated commitments to amending the challenged regulations before defendants will ever enforce them against plaintiffs like those in this case, and have drawn the conclusion compelled by the Constitution and the case law. Because of the ongoing rulemaking process and the temporary enforcement safe harbor, during which that process will be completed, plaintiffs suffer no hardship from delayed review, and present a challenge that is premature and

not fit for judicial review at this time, and have no current, non-speculative injury for standing purposes.

II. IF THE COURT DENIES DEFENDANTS' MOTION FOR RECONSIDERATION, IT SHOULD CERTIFY ITS ORDER FOR INTERLOCUTORY APPEAL

In the event that the Court denies defendants' motion for reconsideration, defendants ask the Court to certify the Order for immediate appeal to the Second Circuit pursuant to 28 U.S.C. § 1292(b). As this Court recently explained:

> Section 1292(b) allows a litigant to take an interlocutory appeal from a district court's order when: 1.) the order "involves a controlling question of law"; 2.) "there is substantial ground for difference of opinion" on this question of law; and 3.) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In re Vitamin C Antitrust Litig., No. 06-MD-1738-BMC-JO, 2012 WL 425234, at *1 (E.D.N.Y. Feb. 9, 2012) (quoting 28 U.S.C. § 1292(b)). While the decision whether to certify an order for interlocutory appeal is firmly within the district court's discretion, *see id.*, all of the factors are easily satisfied in this case.

First, there is no doubt that the question of law at issue in this case is "controlling," as "reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990); *see also In re Trace Int'l Holdings, Inc.*, No. 04-CV-1295-KMW, 2009 WL 3398515, at *1 (S.D.N.Y. Oct. 21, 2009). Indeed, the Second Circuit has recognized subject matter jurisdiction as an appropriate issue for certification of an interlocutory appeal. *See Klinghoffer*, 921 F.2d at 24. Nor would the "resolution of the question require[] a 'heavily fact-based analysis.'" *Vitamin C*, 2012 WL 425234, at *1 (quoting *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv.*, No. 11-MC-285, 2011 WL 6057927, at *5 (S.D.N.Y. Dec. 6, 2011)). To the contrary, at this stage of the litigation there is little factual dispute, *see* Order at 17, and any relevant facts are straightforward. Defendants' jurisdictional arguments turn

exclusively on the law and basic facts about the statutory and regulatory background of the challenged regulations, such as the existence of the safe harbor and the ANPRM. Furthermore, plaintiffs' allegations of injury and hardship are largely irrelevant to the resolution of the operative legal questions, as defendants' arguments are not based on a rejection of such allegations, but instead on the fact that any injury or hardship cannot stem from the current regulations because those regulations will never be enforced by defendants against plaintiffs. In any event, even if such additional facts were relevant, they are easily understood and would not require the Second Circuit to "study the record," *id.* (internal quotations and citation omitted), and thus fall well short of the sort of fact-intensive analyses with which courts are typically concerned. *See Morris v. Flaig*, 511 F. Supp. 2d 282, 315 (E.D.N.Y. 2007) (concluding that "the questions presented for interlocutory appeal by plaintiffs would require the Second Circuit to review this Court's application of the law to the facts presented at trial with regard to" several fact-intensive issues); *In re Poseidon Pool & Spa Recreational, Inc.*, 443 B.R. 271, 276-77 (E.D.N.Y. 2010) (noting that an interlocutory appeal would require an "in-depth evidentiary analysis of the testimony and documentary evidence").

Second, it is abundantly clear that "there is substantial ground for difference of opinion" on the jurisdictional questions at issue in this case. As previously noted, this Court's Order is in conflict with the rulings of eleven other courts, including a court of appeals – that alone is easily sufficient to satisfy this prerequisite for certification. *See, e.g.*, *In re Trace*, 2009 WL 3398515, at *3 (explaining that this requirement is satisfied where "there is conflicting authority on the issue"); *see also Morris*, 511 F. Supp. 2d at 317-18; *Madoff*, 2011 WL 6058927, at *5. This is so even if this Court believes that it is unlikely that the Second Circuit will reverse its Order. *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, No. 11-cv-5994-CM, 2012 WL

2952929, at *8 (S.D.N.Y. July 18, 2012) ("[I]f a district court had to believe that her decision was likely to be reversed before certifying a question under 28 U.S.C. § 1292(b), there would be no such certifications. Probability of reversal is not the standard. The standard is whether there is 'substantial ground for disagreement.'").

Finally, certification "may materially advance the ultimate termination of the litigation." Quite simply, a reversal of this Court's Order would "bring the adversary proceedings to a conclusion." *In re Trace*, 2009 WL 3398515, at *3; *see also In re Oxford Health Plans, Inc.*, 182 F.R.D. 51, 53 n.2 (S.D.N.Y. 1998) (citing cases). Furthermore, "an intermediate appeal may avoid protracted litigation," *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996); *see also Dev. Specialists*, 2012 WL 2952929, at *3 (S.D.N.Y. July 18, 2012) ("[A]n interlocutory appeal is most appropriate where it will save the parties (and the court) from unnecessary, expensive, and protracted litigation."); *Madoff*, 2011 WL 6058927, at *5 ("[S]ection 1292(b) certification is limited to cases where review might avoid 'protracted and expensive litigation.'" (quoting *German v. Fed. Home Loan Mortg. Corp.*, 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995))). As this Court is well aware, defendants are facing very broad and burdensome discovery in this case that will take many months to complete, and will require detailed review of potentially millions of pages of documents and significant expenditure of agency and counsel's time and resources.[5] It is also likely that the discovery will engender motions practice as to the scope of permissible discovery, privilege issues, and the like, necessitating further expenditure of the Court's and the parties' time and resources. A ruling in defendants' favor would obviate the

[5] Indeed, as the Court is aware from discussion during the January 7, 2013 Discovery Conference, searches of defendants' files conducted thus far have yielded hundreds of thousands of potentially responsive documents totaling more than two million pages – numbers which are likely to grow substantially. These documents will require significant further review to determine whether they are actually responsive, contain privileged communications, and other issues. This process alone is expected to involve dozens of government attorneys and thousands of man-hours. And the time and resources that will need to be dedicated for this purpose is in addition to any non-document discovery, such as depositions or interrogatories.

need for any further discovery and end this case. *See, e.g.*, *In re Trace*, 2009 WL 3398515, at *3; *Fed. Hous. Fin. Agency v. UBS Ams., Inc.*, 858 F. Supp. 2d 306, 338 (S.D.N.Y. 2012); *Pearson Educ., Inc. v. Liu*, No. 1:08-cv-06152-RJH, 2010 WL 623470, at *2 (S.D.N.Y. Feb. 22, 2010) ("Further motion practice, discovery, or trial in this matter would likely be rendered moot should the Circuit find that it disagrees with this Court's answer to the . . . question. Proceeding without appellate review, then, would be inefficient, and immediate appeal would materially advance the ultimate termination of the litigation."); *In re Dynex Capital, Inc. Sec. Litig.*, No. 05-cv-1897-HB, 2006 WL 1517580, at *3 (certifying for interlocutory appeal where "substantial resources may be expended in vain both by the parties and this Court if my initial conclusion proves incorrect"). Of course, once the amended regulations are issued, plaintiffs will be free to challenge them if they believe that their concerns have not been adequately addressed – but that case, and any attendant discovery, will be different.

In sum, the Court's Order is an ideal candidate for certification pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted this 11th day of January, 2013,

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