[ORAL ARGUMENT NOT 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 Health and Human Services, *et al.*, Defendants-Appellees.	No. 13-5091

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY

Plaintiffs in this case brought suit in May 2012 to challenge the federal regulatory requirement that their group health plans include coverage of contraceptives ("the contraceptive-coverage requirement") among other preventive health care services for women. When the responsible federal agencies issued the regulations that were in place at that time, they also declared that they would not enforce the contraceptive-coverage requirement against certain non-profit entities, such as plaintiffs here, with religious objections to providing contraceptive coverage. The agencies explained that, in response to comments, they were considering possible means of accommodating the religious concerns of such organizations, and that they expected to

issue new final regulations by August 2013. *See generally Wheaton College* v. *Sebelius*, 703 F.3d 551, 552-53 (D.C. Cir. 2012).

In *Wheaton College*, this Court held that similar challenges brought by non-profit organizations were not ripe for review because the agencies had declared that the regulations then in effect would be supplanted by new regulations by August 2013 and would not be enforced against non-profit entities with religious objections to providing contraceptive coverage. *See id.* at 552-53. This Court held the appeals in abeyance pending the issuance of the new regulations. *See id.* at 553.

The district court in this case applied this Court's reasoning in *Wheaton College* and held that plaintiffs' challenge to the contraceptive-coverage requirement was unripe. *See* Add. 5-7.[1] Plaintiffs sought summary reversal on the ground that the district court erred by "dismissing [their] case on ripeness grounds rather than holding it in abeyance." Order (D.C. Cir. Jun. 21, 2013) (Add. 10). This Court denied plaintiffs' motion for summary reversal and held this appeal in abeyance, directing the parties to file motions to govern further proceedings within 30 days of this Court's final disposition of *Wheaton College*. *See ibid.*

The new regulations were issued on June 27 and published in the Federal Register on July 2. *See* 78 Fed. Reg. 39,870 (July 2, 2013). The parties in *Wheaton College* notified this Court accordingly. On the parties' joint motion to issue the mandate, this Court

[1] "Add." refers to the addendum to this opposition brief.

remanded the consolidated cases to the district courts "with instructions to vacate their judgments and to dismiss the complaints as moot." Order, *Wheaton College*, Nos. 12-5273, 12-5291 (D.C. Cir. Aug. 13, 2013) (Add. 11).

The same disposition is appropriate here. Plaintiffs do not identify any basis to treat this appeal differently than the appeals in *Wheaton College*. Nevertheless, they ask this Court to treat their case as presenting a live controversy, to address the new regulations, and to issue a "preliminary injunction." Even if, as plaintiffs assert, it were "impracticable" to challenge the new regulations in district court, Pl. Mot. 6, that would not transform their earlier challenge into a live case capable of adjudication by an Article III Court or a basis for issuing a preliminary injunction against the new regulatory scheme.

In any event, it is plainly "practicable" for plaintiffs to challenge the new regulatory scheme in district court. Indeed, the same law firm that represents plaintiffs in this case has already filed an amended complaint and preliminary injunction motion in another case challenging the new regulations. *See Roman Catholic Archdiocese of New York* v. *Sebelius*, No. 12-cv-2542 (E.D.N.Y.), ECF Nos. 69, 72, 73 (Aug. 14, 2013). Those filings were made pursuant to a scheduling order that was jointly proposed by the parties. *See* Joint Letter, ECF No. 66 (July 24, 2013) (Add. 12-14). The parties' joint letter explained that the proposed schedule would permit adjudication of the plaintiffs' claims in a time frame that would afford the plaintiffs adequate lead time to implement their group health plans before January 1, 2014. *See* Add. 13. Similar scheduling

orders have been issued in other cases challenging the new regulations.[2]

In sum, as in *Wheaton College*, this Court should remand this case with instructions to vacate the judgment and dismiss the complaint as moot.

BACKGROUND

A. Statutory and Regulatory Background

1. The vast majority of Americans with private health coverage obtain that coverage through an employment-based group health plan, as part of an employee compensation package. *See* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & Table 1-1 (2008). Congress has long regulated employment-based group health plans, and, in 2010, the Patient Protection and Affordable Care Act ("Affordable Care Act") established certain additional minimum standards for such plans. As relevant here, the Affordable Care Act provides that non-grandfathered plans must cover certain preventive health services without cost-sharing. *See* 42 U.S.C. § 300gg-13. These services include immunizations recommended by the Advisory Committee on Immunization Practices, *see id.* § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive

[2] *See* Add. 15-21 (scheduling orders in *Roman Catholic Archdiocese of Atlanta* v. *Sebelius*, No. 12-cv-3489 (N.D. Ga.); *Grace Schools* v. *Sebelius*, No. 12-cv-459 (N.D. Ind.); and *Diocese of Fort Wayne-South Bend* v. *Sebelius*, No. 12-cv-159 (N.D. Ind.)); *see also E. Tex. Baptist Univ.* v. *Sebelius*, No. 12-cv-3009 (S.D. Tex.), ECF No. 61 (amended complaint filed Aug. 6, 2013); *Colo. Christian Univ.* v. *Sebelius*, No. 13-cv-2105 (D. Colo.), ECF No. 1 (complaint filed Aug. 7, 2013). The same law firm that represents plaintiffs here also represents the plaintiffs in *Roman Catholic Archdiocese of Atlanta* and *Diocese of Fort Wayne*.

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 ("HRSA"), which is a component of the Department of Health and Human Services ("HHS"), *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).

When the Affordable Care Act was enacted, there were no existing HRSA guidelines relating to preventive care and screening for women. Accordingly, HHS asked the Institute of Medicine to develop recommendations to help HHS implement the women's preventive health services coverage requirement. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011). Consistent with the Institute's recommendations, the HRSA guidelines generally require that a plan cover (among other preventive health services for women) "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (quoting the guidelines).

The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as a "religious employer." The prior final regulations defined a religious employer as an organization that (1) has the inculcation of religious values as its purpose; (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

described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order. *See, e.g.,* 45 C.F.R. § 147.130(a)(1)(iv)(B).

When those regulations issued, the Departments "announced [their] intention to 'develop and propose changes to these final regulations" that would "provid[e] contraceptive coverage without cost-sharing to covered individuals and accommodat[e] the religious objections of [additional] non-profit organizations." *Wheaton College* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727). They accordingly "created a safe harbor from enforcement of the contraceptive coverage requirement" applicable to certain non-profit organizations with objections to providing contraceptive coverage. *Ibid.* (citing 77 Fed. Reg. at 8728).

2. On July 2, 2013, after notice and comment rulemaking, the Departments published new regulations relevant to religious employers and other eligible non-profit organizations with religious objections to providing contraceptive coverage. *See* 78 Fed. Reg. 39,870.

The new rules simplify the religious employer exemption by eliminating the first three requirements set out above. *See id.* at 39,870, 39,873-74. Accordingly, an entity qualifies as a religious employer if it is a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order.

The new regulations also establish accommodations that are available to non-profit organizations that hold themselves out as religious organizations and that, because of religious objections, are opposed to providing coverage for some or all contraceptive services. *See id.* at 39,874-39,886. To receive such an accommodation, an organization need only self-certify that it meets the criteria for an accommodation—*i.e.*, that it is a non-profit organization that holds itself out as a religious organization and is opposed to providing coverage for some or all contraceptive services—and present that self-certification to the company that issues its health insurance coverage or administers its plan. *See id.* at 39,874, 39,879. At that point, the accommodated religious organization is relieved of any responsibility for "having to contract, arrange, pay, or refer for [contraceptive] coverage." *Id.* at 39,871, 39, 872, 39,873.

If a woman who participates in a plan sponsored by an accommodated religious organization obtains contraceptive services, payment will be made directly by third parties. If coverage under the organization's plan is issued by a third-party insurer, the third-party insurer is assigned sole responsibility for providing separate payments for contraceptive services for plan participants and beneficiaries. *See id.* at 39,876. Issuers are prohibited from imposing any charge on the accommodated organization as a result of this responsibility, and they are required to segregate the premium revenue collected from the accommodated organization from the monies they use to make such payments. *See id.* at 39,877. If the accommodated organization has a self-insured

plan, the plan's third-party administrator must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan. *See id.* at 39,880. The costs associated with these separate payments are funded through reductions in the federal user fees that health insurance issuers pay to participate in federally facilitated health insurance exchanges. *See id.* at 39,880, 39,882-86.

These new, final regulations are applicable for plan years beginning on or after January 1, 2014, except that the amendments simplifying the religious employer exemption apply for plan years beginning on or after August 1, 2013. *See id.* at 39,889. The agencies extended the enforcement safe harbor to encompass plan years that begin between August 1 and December 31, 2013, in order to maintain the status quo with respect to organizations that qualify for the safe harbor until the new accommodations become available starting on January 1, 2014. *See ibid.*

B. Prior Proceedings

Plaintiffs filed this lawsuit on May 21, 2012—over three months after the Departments established the safe harbor and announced their plans to develop and issue new rules—seeking to challenge the requirement that their group health plans include coverage of contraceptives. On January 25, 2013, the district court held that the claims are unripe and dismissed the complaint. *See* Add. 2, 5-8. In making that ripeness determination, the district court relied on this Court's reasoning in *Wheaton College* v. *Sebelius*, 703 F.3d 551 (D.C. Cir. 2012), which found comparable claims to be unripe. *See* Add. 2, 5-7.

The district court rejected plaintiffs' contention that it was required to hold their suit in abeyance. *See* Add. 7-8. The court explained that, "[i]f 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." Add. 8. The court explained that its order did "not bar plaintiffs from filing a new and different action in the future." *Ibid.*

Plaintiffs appealed and moved for summary reversal. Plaintiffs did "not challenge the district court's determination that their claims are not ripe for decision[.]" Order, (D.C. Cir. Jun. 21, 2013) (Add. 10). Plaintiffs argued only that the district court erred by "dismissing [their] case on ripeness grounds rather than holding it in abeyance." *Ibid.* This Court denied plaintiffs' motion for summary reversal. *Ibid.* The Court held plaintiffs' appeal in abeyance and directed the parties to file motions to govern further proceedings within 30 days of this Court's final disposition of *Wheaton College*. *Ibid.*

On August 13, 2013, this Court issued its final disposition of *Wheaton College*. This Court remanded the cases to the district courts "with instructions to vacate their judgments and to dismiss the complaints as moot." Add. 11.

ARGUMENT

In this case and in *Wheaton College* v. *Sebelius*, 703 F.3d 551 (D.C. Cir. 2012), certain non-profit organizations sought to challenge the regulatory requirement that their group health plans cover contraceptive services, raising challenges to the then-existing

regulations under the First Amendment and Administrative Procedure Act, and asserting, under the Religious Freedom Restoration Act, that the regulatory scheme imposed a "substantial burden" on their religious exercise. Here, as in *Wheaton College*, the claims were unripe because the plaintiffs were protected by the enforcement safe harbor and the challenged regulations were the subject of a rulemaking. The new regulations were published in the Federal Register on July 2, 2013. Accordingly, in *Wheaton College*, this Court remanded the consolidated cases to the district courts with instructions to vacate their judgments and to dismiss the complaints as moot. Add. 11. The same disposition is appropriate here.

Given this Court's determination that the claims in *Wheaton College* are moot, it follows that the claims in this case are also moot. Nevertheless, plaintiffs ask this Court to review the new regulatory scheme in the first instance and to issue what they style as a "preliminary injunction." Plaintiffs do not contend that the new regulations are subject to direct review in this Court. Instead, they assert that it would be ""impracticable"" to file a new complaint and move for a preliminary injunction in district court. Pl. Mot. 6 (quoting Fed. R. App. P. 8(a)).

Even if there were authority to bypass the district court in this manner, there would be no basis to do so here. Although plaintiffs declare it "impracticable" to challenge the new regulatory scheme in district court, other litigants have done exactly that. Indeed, the same law firm that represents plaintiffs in this case already has filed such challenges on behalf of other non-profit organizations. Those plaintiffs filed an

amended complaint along with a motion for a preliminary injunction on August 14, under a schedule that the parties jointly proposed.[3] Under that joint proposal, briefing on the parties' cross-motions for summary judgment will close on October 30. Add. 12-13. The parties' joint letter explained that this schedule permits the district court to issue a merits ruling that will give the plaintiffs adequate lead time to implement their group health plans before the extended safe harbor expires and the new accommodations for religious organizations become available starting on January 1, 2014. *See* Add. 13; *see also supra* n.2 (listing similar scheduling orders that have been issued in other cases challenging the new regulatory scheme).

Plaintiffs here elected, instead, to bypass the district court and, after waiting six weeks, to proceed directly in this Court. Plaintiffs erroneously suggest that they had little choice but to file in this Court in the first instance because they were required to "await a remand" in order to proceed in district court. Pl. Mot. 19. This assertion does not survive even cursory scrutiny. The district court emphasized that its order did not bar plaintiffs from filing a new lawsuit after the new regulations issued. *See* Add. 8. If plaintiffs had any doubt on that issue, they could have dismissed their appeal voluntarily, as other non-profit organizations with pending appeals have done.[4] There

[3] *See Roman Catholic Archdiocese of New York* v. *Sebelius*, No. 12-cv-2542 (E.D.N.Y.), ECF Nos. 69, 72, 73.

[4] *See* Order Granting Voluntary Dismissal, *Zubik* v. *Sebelius*, No. 13-1228 (3d Cir. July 23, 2013); Order Granting Voluntary Dismissal, *Univ. of Notre Dame* v. *Sebelius*, No. 13-1479 (7th Cir. July 26, 2013); Order Granting Voluntary Dismissal, *Legatus* v. *Sebelius*, No. 13-1093 (6th Cir. Aug. 14, 2013); Order Granting Voluntary Dismissal, *Nebraska* v.

was no need to "await a remand."[5]

In any event, the provisions on which plaintiffs rely do not allow them to proceed directly in this Court. Rule 8 of the Federal Rules of Appellate Procedure (titled "Stay or Injunction Pending Appeal") allows an appellate court to issue interim relief while a party's appeal is under consideration (and even then, only in the appellate court if a district court has first denied relief or moving in the district court would be "impracticable"). The only issue raised by plaintiffs' appeal, however, is whether the district court properly dismissed their challenge to the prior regulations as unripe rather than holding the case in abeyance. And as this Court ordered in *Wheaton College*, plaintiffs' underlying claims are now moot. Plaintiffs' objection to the new regulations, and the asserted new burdens imposed on them by these regulations, cannot be a basis to issue a "preliminary injunction" in this appeal.

Plaintiffs similarly err in seeking to rely on 5 U.S.C. § 705, which states that a court, under specified circumstances, may postpone the effective date of agency action or otherwise preserve status or rights "pending conclusion of review proceedings." *See generally Sampson* v. *Murray*, 415 U.S. 61, 68 n.15, 73-74 (1974). To invoke this provision,

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HHS, No. 12-3238 (8th Cir. Aug. 21, 2013).

[5] Indeed, plaintiffs were by no means entitled to a remand. As we discussed in our opposition to their motion for summary reversal, the district court did not err in declining to hold plaintiffs' nonjusticiable suit in abeyance. *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"); *In re Aiken Cnty.*, 645 F.3d 428, 434–36, 438 (D.C. Cir. 2011) (dismissing unripe petition for review).

it would first be necessary for plaintiffs to file a complaint that initiates "review proceedings" with respect to the current regulatory scheme. The district court could then consider arguments on this score. We note, moreover, that reliance on section 705 would, in any event, be misplaced. Organizations like plaintiffs retain the protection of the enforcement safe harbor until the new accommodations for religious organizations become available starting on January 1. The scheduling order that was jointly proposed in the *Roman Catholic Archdiocese of New York* litigation and similar cases were designed to allow district courts to address the merits of comparable claims before that time.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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AUGUST 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, I electronically filed the foregoing document 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

ADDENDUM

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

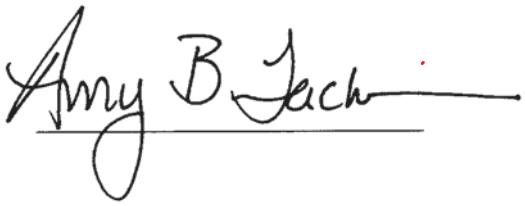
In its *Wheaton* Order, the D.C. Circuit reiterated that standing is assessed at the time of filing, and it held that the plaintiffs "clearly had standing when these suits were filed." *Wheaton* Order at *1. The government insists that this case can be distinguished from *Wheaton College*

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 Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5091 **September Term, 2012**

1:12-cv-00815-ABJ

Filed On: June 21, 2013

Roman Catholic Archbishop of Washington, et al.,

Appellants

v.

Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,

Appellees

BEFORE: Tatel, Brown, and Griffith, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. Appellants do not challenge the district court's determination that their claims are not ripe for decision, for the reasons stated in this court's order of December 18, 2012, in Wheaton College v. Sebelius, 703 F.3d 551 (D.C. Cir.). This appeal is limited to the question whether the district court erred in its Memorandum Opinion and Order filed January 25, 2013, by dismissing appellants' case on ripeness grounds rather than holding it in abeyance. Appellants have not demonstrated that the decision to dismiss the case should be summarily reversed based on the order governing appellate proceedings in Wheaton. It is

FURTHER ORDERED, on the court's own motion, that this appeal be held in abeyance pending further order of the court. The parties are directed to file motions to govern further proceedings within 30 days of this court's final disposition of Wheaton, Nos. 12-5273, et al.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5273 **September Term, 2012**

1:11-cv-01989-JEB
1:12-cv-01169-ESH

Filed On: August 13, 2013

Wheaton College,

Appellant

v.

Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, et al.,

Appellees

Consolidated with 12-5291

BEFORE: Garland, Chief Judge; Griffith, Circuit Judge; Randolph, Senior Circuit Judge

O R D E R

Upon consideration of the joint motion to issue mandate, and in light of the issuance of the final rules, as represented in the parties' motion, it is

ORDERED that these consolidated cases be remanded to the United States District Court for the District of Columbia with instructions to vacate their judgments and to dismiss the complaints as moot.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

JONES DAY

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July 24, 2013

BY ECF

The Honorable Brian M. Cogan
United States District Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Roman Catholic Archdiocese of New York et al v. Sebelius*, No. 1:12-cv-02542-BMC (E.D.N.Y.)

Dear Judge Cogan:

Further to the Court's Order of July 12, 2013, plaintiffs and defendants have conferred and jointly submit the following letter to advise the Court of the parties' agreement as to how they propose to proceed with this action.

First, defendants do not oppose plaintiffs amending their Complaint. Accordingly, pursuant to Fed. R. Civ. P. 15(a)(2) and the parties' agreement, plaintiffs will file an Amended Complaint on or before August 14, 2013.

Second, the parties have agreed to a briefing schedule pursuant to which a motion by plaintiffs for a preliminary injunction will be fully briefed and submitted to the Court by September 25, 2013, and dispositive motions by both parties will be fully briefed and submitted to the Court by October 30, 2013. The parties propose for the Court's approval the following schedule for submission of the papers in support of these motions:

August 14	Plaintiffs file a motion for a preliminary injunction and supporting papers (together with their Amended Complaint).
August 30	Defendants produce the administrative record in connection with the Final Rules.
September 11	Defendants file, with one memorandum of law in support, their (i) opposition to plaintiffs' motion for a preliminary injunction; and (ii) motion to dismiss and/or for summary judgment.

	(The parties agree that the time for defendants to serve a pleading in response to the Amended Complaint is deferred, pursuant to Fed. R. Civ. P. 12(a)(4)(A), until after the Court renders a decision on defendants' motion to dismiss and then an Answer would be filed only if necessary.)
September 25	Plaintiffs file, with one memorandum of law in support, their (i) reply brief in support of their motion for a preliminary injunction; (ii) opposition to defendants' motion to dismiss and/or for summary judgment; and (iii) cross motion for summary judgment.
October 16	Defendants file, with one memorandum of law in support, their (i) opposition to plaintiffs' cross motion for summary judgment; and (ii) reply in support of their motion to dismiss and/or for summary judgment.
October 30	Plaintiffs file their reply brief in further support of their cross motion for summary judgment.

This proposed schedule accommodates defendants' request that the administrative record be available in connection with their briefing. The schedule further reflects plaintiffs' intent, in light of the impending January 1, 2014 date by which the challenged regulations will apply to their insurance plans, that the Court have sufficient time to consider the preliminary injunction motion and to render a decision on it by early November 2013—to allow plaintiffs necessary lead time to prepare for implementation of their insurance plans prior to January 1, 2014.[1] If the Court does not believe that timing will work, the parties will confer and propose an alternative briefing schedule for the preliminary injunction motion.

Finally, the parties respectfully request that the Court waive the pre-motion conference requirement for all of the above-mentioned motions.

We are available to discuss these and any other issues in this action at the Court's convenience.

[1] Defendants also would welcome a single decision by the Court to dispose of all these proposed motions, if that is consistent with the Court's schedule.

Respectfully submitted,

/ s / Benjamin L. Berwick
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, *et al.*, ***Plaintiffs*,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,** ***Defendants.***	**CIVIL ACTION NO.: 1:12-CV-3489-WSD**

~~[PROPOSED]~~ SCHEDULING ORDER

In accordance with this Court's directive as announced during a July 15, 2013 Status Conference and by consent of the Parties to this matter, it is hereby ORDERED that Plaintiffs shall have leave to amend the Complaint in this matter in light of the July 2, 2013 Final Rules promulgated by Defendants. Plaintiffs shall also have leave to add additional Plaintiffs pursuant to Fed. R. Civ. P. 20(a)(1).

The following deadlines shall apply to service and filing of Plaintiffs' Second Amended and Recast Complaint and any accompanying preliminary filings and responses thereto:

August 19, 2013 -- Plaintiffs shall file and serve their Second Amended and Recast Complaint and their Motion for Preliminary Injunction;

August 30, 2013 -- Defendants shall file and serve the Administrative Record;

September 23, 2013 -- Defendants shall file and serve their response to Plaintiffs' Motion for Preliminary Injunction; Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment; and any other response they may wish to make to the Second Amended and Recast Complaint;

October 21, 2013 -- Plaintiffs shall file and serve their Reply Brief in support of their Motion for Preliminary Injunction, their response to the Defendants Motion to Dismiss/Summary Judgment Motion, and (at their option) their own Motion for Summary Judgment;

November 18, 2013 -- Defendants shall file and serve their Reply in Support of their Motion to Dismiss/Summary Judgment Motion and their Response to Plaintiffs' Motion for Summary Judgment;

December 6, 2013 -- Plaintiffs shall file and serve their Reply Brief in support of their Motion for Summary Judgment.

IT IS SO ORDERED, this 25th day of July, 2013.

William S. Duffey

HON. WILLIAM S. DUFFEY, JR.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GRACE SCHOOLS, et al., Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, et al., Defendants.	)	Case No. 3:12-CV-459 JD

ORDER

Having considered Plaintiffs' Notice of Intentions [DE 50] and Defendants' Response [DE 51], the Court LIFTS the stay and ADOPTS the following pretrial schedule:

Due Date	Action
Friday, September 6, 2013	Plaintiffs file any Amended Complaint and any Motion for Preliminary Injunction (leave granted to file 40 page brief[1])
Friday, September 27, 2013	Defendants file Response to Plaintiffs' Motion for Preliminary Injunction and Defendants' to file any Answer or Motion to Dismiss and/or for Summary Judgment (leave granted to file 50 page brief)
Friday, October 11, 2013	Plaintiffs file Preliminary Injunction Reply, Response to Defendants' Motion to Dismiss and/or for Summary Judgment, and any Cross-Motion for Summary Judgment (leave granted to file 60 page brief)
Friday, November 1, 2013	Defendants file Motion to Dismiss and/or for Summary Judgment Reply and Response to Plaintiffs' Cross-Motion for Summary Judgment (leave granted to file 50 page brief)
Friday, November 15, 2013	Plaintiffs file Cross-Motion for Summary Judgment Reply (leave granted to file 25 page brief)

[1]Where this order grants leave to file an oversized brief, the brief shall comply with N.D. Ind. L.R. 7-1(e).

Given the Plaintiffs' stated intention to file an Amended Complaint, the Defendants' representation that it has no objection to permitting Plaintiffs to file an Amended Complaint, and the Defendants' intention to withdraw its pending Motion to Dismiss, the Court DENIES WITH LEAVE TO RE-FILE the Defendants' Motion to Dismiss [DE 24]. Should no Amended Complaint be filed as represented, then the Court will consider whether reinstatement of the motion is appropriate.

SO ORDERED.

ENTERED: July 31, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-CV-159 JD
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,	)	
Defendants.	)	

ORDER

Having considered Plaintiffs and Defendants' Joint Report Concerning Case Status and Agreed-Upon Schedule [DE 69], the Court LIFTS the stay and ADOPTS the following pretrial schedule:

Due Date	Action
Friday, September 6, 2013	Plaintiffs file any Amended Complaint and any Motion for Preliminary Injunction (leave granted to file 40 page brief[1])
Friday, September 27, 2013	Defendants file Response to Plaintiffs' Motion for Preliminary Injunction and Defendants' to file any Answer or Motion to Dismiss and/or for Summary Judgment (leave granted to file 50 page brief)
Friday, October 11, 2013	Plaintiffs file Preliminary Injunction Reply, Response to Defendants' Motion to Dismiss and/or for Summary Judgment, and any Cross-Motion for Summary Judgment (leave granted to file 60 page brief)
Friday, November 1, 2013	Defendants file Motion to Dismiss and/or for Summary Judgment Reply and Response to Plaintiffs' Cross-Motion for Summary Judgment (leave granted to file 50 page brief)

[1]Where this order grants leave to file an oversized brief, the brief shall comply with N.D. Ind. L.R. 7-1(e).

Due Date	Action
Friday, November 15, 2013	Plaintiffs file Cross-Motion for Summary Judgment Reply (leave granted to file 25 page brief)

Given the Plaintiffs' stated intention to file an Amended Complaint and the parties' agreement to allow Plaintiffs to do so, the Court DENIES WITH LEAVE TO RE-FILE the Defendants' Motion to Dismiss [DE 26] and Motion for Oral Argument on the Motion to Dismiss [DE 37]. Should no Amended Complaint be filed as represented, then the Court will consider whether reinstatement of those motions is appropriate.

SO ORDERED.

ENTERED: July 31, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court