[ORAL ARGUMENT NOT SCHEDULED]

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

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.

Case No. 13-5091

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The Government's filing is the latest installment in its long-running effort to postpone a ruling on the merits of a series of regulations that require Appellants to violate their religious beliefs by facilitating access to abortion-inducing products, contraceptives, sterilization, and related education and counseling (the "Mandate"). Since these regulations were promulgated in July 2010, Appellants have operated under the looming threat of devastating fines should they refuse to bow to the Government's demand that they forsake their sincerely held beliefs. At every step, the Government has opposed Appellants' efforts to remove this specter, most notably with promised amendments purportedly designed to "accommodate religious organizations with religious objections to contraceptive coverage." Defs.' Supp. Br. at 4, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:12-cv-00815 (D.D.C. May 21, 2012) (Dkt. # 38). Those amendments have now been implemented, and as Appellants have (repeatedly) informed the Government, they do not address the religious liberty concerns that prompted this litigation. *See* Mot. for Prelim. Inj. at 5 n.4 (citing comments filed by the Archdiocese and the U.S. Conference of Catholic Bishops). Appellants thus request preliminary relief from this Court to safeguard their religious exercise.

The Government does not dispute Appellants' core contention that compliance with the Mandate would require them to violate their religious beliefs in "the same fundamental way" as the original iteration of the Mandate. *See Ne.*

Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993); *see also* Mot. for Prelim. Inj. at 3, 10 (stating that under both versions of the Mandate, "the end result is the same" and that the revised Mandate "continues" to substantially burden Appellants' religious exercise). Nor does the Government claim that this substantial burden on Appellants' religious exercise is justified by a compelling governmental interest, or that it is the least restrictive means to further such an interest. Instead, the Government argues that the promulgation of the revised regulations renders this case moot and, therefore, that Appellants must return to the district court for another round of litigation before seeking relief here. This is wrong. Under established law, Appellants' case is not moot and this Court has full authority to render the relief requested. Moreover, given that the Mandate takes effect in a few short months, this Court should grant the requested preliminary relief now to allow the district court and this Court time to resolve this vitally important question in a reasoned and deliberate way.

1. The Government's primary argument is that its amendments to the Mandate have mooted the case. This assertion, however, runs afoul of the "general rule" that "a [regulatory] change will not moot a dispute unless it cures the problems that led to the suit." *Cent. Ky. Production Credit Ass'n v. United States*, 846 F.2d 1460, 1464 (D.C. Cir. 1988); *see also Pub. Serv. Co. of Colo. v. Shoshone–Bannock Tribes*, 30 F.3d 1203, 1205 (9th Cir. 1994) ("[A] controversy

does not cease to exist by mere virtue of a change in the applicable law."). To the contrary, when a new regulation is substantially similar to the old and operates in "the same fundamental way," a case will not be deemed moot unless the regulatory revisions "sufficiently alter[the circumstances] so as to present a substantially different controversy." *Associated Gen. Contractors*, 508 U.S. at 662 & n. 3.[1]

[1] Cases to this effect are legion. *See, e.g.*, *ADT Sec. Servs. v. Lisle-Woodridge Fire Prot. Dist.*, No. 12-2925, 2013 WL 3927716, at *7–9 (7th Cir. July 31, 2013) (repeal and replacement of an ordinance did not moot a suit where there "is a reasonable expectation" that the plaintiffs' "complaints will not be satisfied by the new ordinance" and "the new ordinance still exceeds the scope of the [government's] legal authority"); *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) ("[T]he appeal in the instant case is not moot [because the] new preference program is substantially similar to the prior program and is alleged to disadvantage [appellant's] members 'in the same fundamental way' as the previous program." (quoting *Associated Gen. Contractors*, 508 U.S. at 662)); *Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008) ("amendments" "do not moot" appellant's "challenges to the original ordinances" where the "requirements in the new ordinances are 'sufficiently similar' to the equivalent provisions in the original ordinances 'that it is permissible to say that the challenged conduct continues'" (quoting *Associated Gen. Contractors*, 508 U.S. at 662 & n.3)); *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002) ("A claim is not mooted by [an] amendment if the gravamen of petitioner's complaint remains because, although the new ordinance may disadvantage plaintiffs to a lesser degree than the old one, still it disadvantages them in the same fundamental way." (internal quotation marks and citation omitted)); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1313–15 (11th Cir. 2000) (case was not moot because the challenged provisions of the old ordinance "have not been sufficiently altered [by the new ordinance] so as to eliminate the issues raised"); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996) (where an "amended statute still impairs the Appellants in the very same way that they claimed the prior section did," "the fundamental nature of the challenged statute continues unchanged" and the case is not moot); *Rodway v. U.S. Dep't of Agric.*, 482 F.2d 722, 726 (D.C. Cir. 1973)

In *Associated General Contractors*, for example, the Supreme Court concluded that a petitioner's challenge to a minority set-aside program was not moot, even though the city had repealed and replaced the relevant ordinance with a different, albeit similar program. The Court applied the "'well settled'" rule that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,'" "because [a] defendant's 'repeal of [an] objectionable [ordinance]'" does "'not preclude it from reenacting precisely the same provision'" at a later date. *Id.* at 662 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Replacement of an objectionable ordinance with one that is substantially similar, the Court explained, presents an "*a fortiori*" application of this rule. *Id.* In such circumstances, "[t]here is no mere risk that [the locality] will repeat its allegedly wrongful conduct; it has already done so." *Id.* "[I]t [does not] matter that the new ordinance differs in certain respects from the old one," or that "[t]he new ordinance may disadvantage [petitioner] to a lesser degree than the old one." *Id.*[2] So long as the "gravamen of

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(revisions to challenged regulations did not "alter or render moot" the "gravamen" of plaintiffs' complaint).

[2] *See id.* ("[I]t is [not] only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.").

petitioner's complaint" remains and the new rule "disadvantages them in the same fundamental way," the controversy is not moot. *Id.*

This case is materially indistinguishable from *Associated General Contractors*. Though the Government has pledged never to enforce the original version of the Mandate against Appellants, the Government has "already" repeated its wrongful conduct by imposing a new scheme that violates Appellants' religious beliefs "in the same fundamental way." *Id.*; *cf. Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (stating that for voluntary cessation to moot a case, "the party urging mootness" must demonstrate, inter alia, that "there is no reasonable expectation that the alleged violation will recur" (internal quotation marks and citation omitted)). The "gravamen" of Appellants' complaint has always been their objection to facilitating access to the mandated coverage, and under both the original and revised version of the Mandate, Appellants' decision to provide a group health plan triggers the provision of "free" contraceptive coverage. *See* Mot. for Prelim. Inj. at 1. The amended Mandate is thus "sufficiently similar to the [original] ordinance that it is permissible to say that the challenged conduct continues." *Associated Gen. Contractors*, 508 U.S. at 662 n.3. This would be true even if the revised Mandate "disadvantage[d Appellants] to a lesser degree than the old one." *Id.* at 662. Here, of course, the amended Mandate *increases* the burden on Appellants by expanding the number of organizations that must provide access

to the mandated coverage,[3] making the "case for mootness" "even weaker." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012).

The Government does not raise, much less attempt to distinguish, this developed body of case law. Instead, it rests its mootness argument entirely on this Court's order in *Wheaton College v. Sebelius*. Opp. at 3, 10. But an unpublished, seven-line, per curiam order entered at the request of both parties cannot satisfy the Government's "heavy" burden to demonstrate mootness, especially in light of the weight of authority discussed above. *See County of L.A. v. Davis*, 440 U.S. 625, 631 (1979); D.C. Cir. R. 36 (e)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.").

2. The Government also argues that it would not be impractical to seek relief from the district court and, therefore, that under Federal Rule of Appellate Procedure 8 and 5 U.S.C. § 705, Appellants must first seek relief there. *See* Opp. at 3–4, 10–11. This too is wrong.

Here, every day that passes imposes additional harm on Appellants. The Mandate takes effect on January 1, just four months from now. Consequently, absent interim relief, Appellants must make decisions now or in the near future regarding their health insurance plans. *See* Mot. for Leave ¶ 8. For example, a

[3] *See, e.g.*, Ex. B to Appellants' Mot. for Prelim. Inj. at 7 (Comments of Archdiocese of Wash. at 2 (Apr. 4, 2013)).

denial of injunctive relief would force Appellants to make significant decisions regarding the manner in which Archbishop Carroll, the Consortium of Catholic Academies, and Catholic Charities provide health coverage to their employees. Currently, these organizations all receive coverage under the Archdiocese's self-insured plan. If the revised version of the Mandate is enforced against Appellants and these organizations remained on the Archdiocese's plan, then the Archdiocese would be required to violate Catholic teaching by impermissibly facilitating access to the objectionable products and services to employees of these organizations. 78 Fed. Reg. 39,870, 39,886 (July 2, 2013). Alternative arrangements would therefore have to be made, and such arrangements require substantial lead time. Likewise, absent injunctive relief, Appellants will be required to pay onerous fines in order to avoid being forced to act contrary to their religious beliefs. Appellants, therefore, will have to reallocate fiscal resources to prepare for significant fines stemming from noncompliance with the Mandate. The imminence of these issues renders further litigation in the district court impractical.

Returning this case to the district court to decide the preliminary injunction question in the first place, moreover, is unnecessary and would compound the harm that Appellants are currently suffering. The relevant facts are undisputed, the issues are primarily legal, and the Government has not disputed the merits of Appellants' claims. This Court is therefore fully capable of resolving the

preliminary injunction question, as have numerous appellate courts around the country.[4] A bare remand, in contrast, would force Appellants to expend the limited time available in filing an amended complaint and seeking preliminary relief in the district court. Briefing could take months, and even the "expedited" procedure for seeking a preliminary injunction does not entitle plaintiffs to obtain a hearing until 21 days after their brief is filed. *See* LCVR 65.1(d). Appellants, moreover, would face even more delay (and find themselves once again before this Court) if it is necessary for them to file another appeal. Judicial efficiency, therefore, further supports the issuance of a stay now.

In short, given the deadlines the Government has imposed, it would be impractical to remand this case to decide a question this Court is just as well-suited—indeed, given the posture of this case, better suited—to decide right now.[5]

3. Finally, the Government contends that Appellants must refile their claims in district court before 5 U.S.C. § 705 or Rule 8 of the Federal Rules of

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[4] *See, e.g., Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. # 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013): *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012).

[5] Nor can the Government avoid this conclusion by pointing to scheduling orders in other cases. Each case is unique, presenting different circumstances warranting different relief. Here, for example, this case was held in abeyance on appeal, presumably to allow this Court to act expeditiously depending upon the outcome of the final rules. Likewise, as discussed above, Appellants must soon make decisions regarding the Archdiocese's health plan and other matters.

Appellate Procedure can provide a basis for relief. *See* Opp. at 12–13. The Government's argument in this regard rests on the mistaken assertion that this case is moot. *See id.* But for the reasons explained above, this is plainly wrong.

Moreover, this is precisely the type of case in which this Court should exercise its equitable discretion to afford the relief requested. "The dispute is not 'abstract, feigned or hypothetical,' and no advisory opinion is sought on an issue which lacks the 'impact of actuality." *See Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 379 (D.C. Cir. 1983) (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968)). Appellants' motion presents a primarily legal issue over which this Court has jurisdiction, and a ruling from this Court is necessary to prevent further irreparable harm from accruing to Appellants while the district court and ultimately this Court resolve the merits of this dispute

Union of Concerned Scientists illustrates this point. In that case, the Court determined that a challenge to an interim rule was not mooted by the publication of a final rule that, though different, "preserved the 'case or controversy'" that was "the gravamen of th[e] litigation." *Id.* Though "it [wa]s true," as the Government contended, that the "issue could also be resolved" by filing a new "petition to review the final rule," the Court held that it did "not follow that [it] *must* defer review until the . . . challenge to the final rule eventually percolate[d] up" to the appellate level. *Id.* "So long as [this Court] can grant meaningful relief affecting

the controversy that precipitated the litigation, [it] may, in the interest of sound judicial administration, afford that relief." *Id.* Doing otherwise would "visit upon all parties—and another panel of this court—the burden of trudging through [a] legal morass once again at a later date. Such a disposition would squander judicial, administrative, and adversarial resources." *Id.* The same is true here.

* * *

As Appellants explained in their initial motion, under both the original and revised version of the Mandate, "the end result is the same: a nonexempt religious organization's decision to offer a group health plan results in the provision of 'free' abortion-inducing products, contraception, sterilization, and related counseling, to its employees in a manner directly contrary to Appellants' religious beliefs." Mot. for Prelim. Inj. at 5. The revised Mandate thus continues to violate Appellants' religious beliefs "in the same fundamental way" as the original Mandate, presenting a live case or controversy for this Court to adjudicate. *Associated Gen. Contractors*, 508 U.S. at 662. As this Court "can grant meaningful relief affecting the controversy that precipitated the litigation," there is no reason for this Court to "squander judicial, administrative, and adversarial resources" with a bare remand. *Union of Concerned Scientists*, 711 F.2d at 379. Accordingly, this Court should grant Appellants' request for a preliminary injunction and remand this case to the district court for further proceedings on the merits.

Respectfully submitted, this the 28th day of August, 2013.

By: /s/ *Noel J. Francisco*

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CERTIFICATE OF SERVICE

I hereby certify that, on August 28, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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