[Oral Argument Not Yet Scheduled]

12-5273 and 12-5291 (consolidated)

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

WHEATON COLLEGE,
Plaintiff-Appellant,
v.
KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

(Caption continued on inside cover)

On Appeal from the U.S. District Court for the District of Columbia

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AND REGENT UNIVERSITY IN SUPPORT OF PLAINTIFFS-APPELLANTS

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
American Center for Law & Justice
[redacted]

Edward L. White III*
American Center for Law & Justice
[redacted]

Louis A. Isakoff*
Regent University
[redacted]

* Not admitted to this Court's Bar

(Additional attorneys listed on inside cover)

(Caption continued from front cover)

BELMONT ABBEY COLLEGE
Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

(Attorneys list continued from front cover)

CeCe Heil*
American Center for Law & Justice
[redacted]

Francis J. Manion*
Geoffrey R. Surtees*
[redacted]

* Not admitted to this Court's Bar

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Undersigned counsel certifies that, to the best of his knowledge, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for the Appellants, except for the following:

- Amici American Center for Law and Justice and Regent University.
- Amici Roman Catholic Archbishop of Washington, a Corporation Sole; Consortium of Catholic Academies of the Archdiocese of Washington; Archbishop Carroll High School; Catholic Charities of the Archdiocese of Washington; and Catholic University of America.
- Amicus Women Speak for Themselves.

B. Rulings Under Review

Undersigned counsel further certifies that, to the best of his knowledge, the rulings under review are set forth in the Brief of the Appellants and are incorporated by reference herein.

C. Related Cases

Undersigned counsel further certifies that, to the best of his knowledge, there are no related cases other than those set forth in the Brief of the Appellants, which are incorporated by reference herein.

D. Corporate Disclosure

(1) Amicus curiae, the American Center for Law and Justice is not a publicly held corporation, issues no stock, and has no parent corporation.

(2) Because the American Center for Law and Justice issues no stock, no publicly held corporation owns 10% or more of its stock.

(3) The American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). ACLJ attorneys also have participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

(4) Amicus Regent University is a 501(c)(3) corporation, issues no stock, and has no parent company.

(5) Because Regent University issues no stock, no publicly held corporation owns 10% or more its stock.

(6) Regent University is a private institution of higher learning whose mission is to serve as a center of Christian thought and action to provide excellent

education through a Biblical perspective and global context, equipping Christian leaders to change the world.

CIRCUIT RULE 29(D) CERTIFICATE

Under Circuit Rule 29(d), "[a]mici on the same side must join in a single brief to the extent practicable." To the best of the undersigned counsel's knowledge, no other amicus curiae brief is covering the precise subject matter discussed in this brief and filing a joint brief is not practicable.

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GLOSSARY

ABBREVIATIONS	DEFINITIONS
"ACA"	Affordable Care Act
"ACLJ"	American Center for Law and Justice
"ANPRM"	Advanced Notice of Proposed Rulemaking
"The Colleges"	Plaintiffs-Appellants Wheaton College and Belmont Abbey College
"HHS"	United States Department of Health & Human Services
"The Mandate"	"Coverage of Preventive Services," 45 C.F.R. § 147.130
"Regent"	Regent University

STATUTES AND REGULATIONS

Undersigned counsel certifies that, to the best of his knowledge, all applicable statutes, etc., are contained in the Addendum to the Brief for the Appellants and are incorporated by reference herein.

STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*,

Pleasant Grove City v. Summum, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). ACLJ attorneys also have participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the Affordable Care Act ("ACA") from which the United States Department of Health & Human Services ("HHS") is authorized to promulgate the Mandate, at issue here, to require employers to cover sterilization, prescription contraceptives, abortion-inducing drugs, and related patient education and counseling services in their health insurance plans ("the Mandate"). The ACLJ filed several amicus curiae briefs in support of various challenges to the ACA, such as *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), and represented the plaintiffs in their challenge to the ACA in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *superseded on other grounds by NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

Moreover, the ACLJ has been active in the litigation concerning the Mandate. In particular, the ACLJ represents the plaintiffs-appellants in *O'Brien v. U.S. Department of Health & Human Services*, Case No. 12-3357 (8th Cir.), which is an action brought by a for-profit business to challenge the Mandate.

As such, the ACLJ has expertise in the issues raised here and has an interest that may be affected by the outcome of this action because any decision by this court will be persuasive authority in *O'Brien*.

Furthermore, this brief is filed on behalf of amicus curiae Regent University ("Regent"), which is a fully accredited Christian institution of higher education. Regent is established as a Virginia non-stock non-profit corporation, and is exempt from income taxation under section 501(c)(3) of the Internal Revenue Code. Since its incorporation, its Christian mission has been fundamental to its existence. Regent's mission is to serve as a "leading center of Christian thought and action to provide excellent education through a Biblical perspective and global context equipping Christian leaders to change the world."[1]/

While Regent is not affiliated with any denomination or church, traditional Biblical Christianity permeates all that Regent does. Classes at Regent are taught from a Biblical perspective, and all employees, including professors, support staff, groundskeepers, custodians, the President, and Trustees of Regent are required to

[1]/ *Regent's Vision - A Leading Global Christian University*, Regent University, http://www.regent.edu/about_us/overview/mission_statement.cfm (last visited Oct. 8, 2012).

be Christians and to affirm in writing their agreement with the University's Statement of Faith.[2]/

Regent has two separate health care coverage programs—one for students and one for employees. Following the clear Biblical mandate that life begins at conception,[3]/ Regent does not provide health care coverage for abortions or for abortifacients. To require Regent to make abortion coverage available under either of its health care coverage plans would violate the sincerely-held religious values that have consistently guided Regent since its inception.

The amici curiae are dedicated to the founding principles of religious freedom in this country. They believe that the laws of this nation constitutionally cannot empower Defendants to force people of faith to violate their religious principles in the manner required by the mandate. Amici curiae bring a perspective to this case that should assist this court in resolving the issues before it. Amici curiae file this brief in support of Wheaton College and Belmont Abbey College.

Having obtained consent from all parties to file this brief, and having

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[2]/ *See, e.g.*, Regent University, *Faculty & Academic Policy Handbook* 10 (2012), http://www.regent.edu/academics/academic_affairs/faculty_handbook.cfm (last visited Oct. 8, 2012); Regent University, *Student Handbook* 7 (2011), http://www.regent.edu/admin/stusrv/docs/StudentHandbook.pdf (last visited Oct. 8, 2012).

[3]/ S*ee, e.g.*, *Psalm* 22; *Psalm* 139; *Luke* 1:41.

notified this court of such consent by filing their Notice of Consent to File on October 5, 2012, amici curiae have authority to file this brief pursuant to Fed. R. App. P. 29(a).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae and their counsel made such a monetary contribution.

SUMMARY OF THE ARGUMENT

The Founding Fathers made it clear that under the Constitution, the right to practice religion must be respected, not trampled upon by the law. The Mandate is a final regulatory rule that violates America's longstanding history of protecting conscience rights. Plaintiffs-Appellants, Wheaton College and Belmont Abbey College ("the Colleges"), are currently injured by the Mandate. The Mandate requires them to violate their religious beliefs or pay annual penalties. As they will not willingly violate their religious beliefs, the Colleges must prepare now to pay the penalties. Hence, they are currently injured by the Mandate, resulting in their standing to raise their ripe claims. This Court should reverse the judgments of the district courts and remand these cases for a determination on the merits of the Colleges' claims.

INTRODUCTION

The Mandate runs counter to longstanding American tradition. This Nation has a long and proud tradition of accommodating the religious beliefs and practices of all its citizens, not dividing them into "approved" and "disapproved" camps at the discretion of government functionaries. *See Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) (noting that government follows "the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs").

The Founding Fathers made it clear that both conscience rights and religious rights occupy the highest rung of civil liberty protections. For example, before the end of Thomas Jefferson's second term as President, he wrote to the Baltimore Baptist Association stressing the importance of religious freedom under the Constitution.[4]/ Regarding potential challenges posed to the religious freedom guaranteed to all Americans, Jefferson stated that "a recollection of our former vassalage in religion . . . will unite the zeal of every heart, and the energy of every hand, to preserve that independence."[5]/

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[4]/ *Jefferson Letter to the Members of the Baltimore Baptist Association, 1808*, RJ&L Religious Liberty Archive, http://www.churchstatelaw.com/historicalmaterials/8_8_8.asp (last visited Oct. 8, 2012).

[5]/ *Id.*

Moreover, President George Washington stated in a 1789 letter to the United Baptists in Virginia his views regarding the protections afforded religious liberties by the Constitution and that he would fight against any efforts by the government to threaten those religious liberties:

> If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical Society, certainly I would never have placed my signature to it; and if I could now conceive that the general Government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution.[6]/

Before these statements by Jefferson and Washington—in fact, even before the Declaration of Independence in 1776—the Continental Congress passed a resolution in 1775 exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services

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[6]/ Matthew L. Harris & Thomas S. Kidd (editors), *The Founding Fathers & the Debate Over Religion in Revolutionary America: A History in Documents* 137–38 (Oxford U. Press 2012).

> to their oppressed Country, which they can consistently with their religious principles.[7]/

Even when the country was in dire need of men to take up arms to fight for independence, our forefathers knew that conscience is inviolable and must be honored. They understood that to conscript men into military service against their conscience would have undermined the very cause of liberty to which they pledged their lives, property, and sacred honor.

The Mandate imposes a substantial burden on individuals and organizations, including the Christian Colleges here, who firmly oppose having to violate their sincere religious beliefs to comply with the Mandate. The Christian Church's longstanding moral opposition to abortion does not stem from a tangential, minor point of doctrine; it is a core principle of the Church that life, beginning at conception, must be valued and preserved.[8]/ The Colleges' position on this issue is not something that can be carved out from their religious belief system. As one writer has described it, "to force religious organizations to provide coverage for procedures that are abortive . . . [is to] violate[] a deeply held moral principle

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[7]/ Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

[8]/ *See, e.g.*, *Psalm* 22; *Psalm* 139; *Luke* 1:41; *Genesis* 9:6.

against killing."[9]/ Christian leaders have even referred to the Mandate as "abhorrent," in that "[i]t forces [Christians] to choose between their religious convictions about when human life begins and providing health care for themselves, their families, or their employees."[10]/

For Defendants to mandate that Christian employers provide insurance coverage for services that are contrary to their basic religious tenets demonstrates a contempt by Defendants for what it means to be Christian. Faithfulness to the teachings of the Church permeates every aspect of the Colleges' activities. Thus, the Mandate presents all Christian employers with a stark choice: obey Caesar, or obey Christ. The burden of such a choice is clearly "substantial" in the constitutional sense.

The Colleges ask to be permitted to continue their work without having to violate their sincerely held religious beliefs; the Mandate currently puts the Colleges in that position. The Colleges seek the same protection of conscience provided to other religious groups from the time of the Continental Congress.

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[9]/ Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harvard J. L. & Pub. Pol'y 741, 753 (2005).

[10]/ Press Release, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, On the Obama Administration's Abortion Rule (Feb. 7, 2012), *available at* http://erlc.com/documents/pdf/20120207-landduke-abortion-hhs.pdf.

ARGUMENT

THE COLLEGES HAVE STANDING AND THEIR CLAIMS ARE RIPE

Article III standing consists of three elements: (1) an "injury in fact" that is concrete and particularized and is actual or imminent, (2) a causal connection between the injury and the conduct complained of, and (3) an injury that is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way," *id.* at 560 n.1, while the element of "imminent" harm is "a somewhat elastic concept," *id*. at 564 n.2, that "requires only that the anticipated injury occur with[in] some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Florida State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

In considering the related concept of ripeness, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Hardship to the parties is present when the law places a plaintiff in a "very real dilemma," "has a direct effect on the [plaintiff's] day-to-day business," or "requires an immediate and significant change in the plaintiffs' conduct of their affairs." *Id.* at 152–53. In *Blanchette v. Connecticut General Insurance Corp.*, the

Supreme Court stated that, "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." 419 U.S. 102, 143 (1974) (citations omitted).

As discussed *infra*, the Mandate is currently injuring the Colleges, resulting in the Colleges having standing to bring their ripe claims.

A. The Mandate is a Final Rule.

The Mandate was first enacted in July 2010, and was amended in August, 2011, to add a narrow exemption for certain religious employers, which does not apply to the Colleges. In February 2012, the Mandate was "*adopted as the final rule without change*." 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012) (emphasis added). Although Defendants contend that there may be changes to the final rule, including a possible accommodation, that contention is meaningless. "[A]n agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *American Petroleum Inst. v. EPA*, 906 F.2d 729, 739–40 (D.C. Cir. 1990). In other words, while Defendants could eventually make a mootness argument in the event that a hypothetical statutory or regulatory change is made at some point in the future that exempts the Colleges and other individuals and organizations in a similar position

from the Mandate, that hypothetical possibility does not negate the existence of the present justiciable controversy that arises from currently existing legal requirements.

Furthermore, because Defendants were aware of the burden on religious non-profits' Constitutional rights for approximately one-and-a-half years and nonetheless published final rules without addressing those Constitutional violations, the Mandate's history renders vapid Defendants' claim that they will remove the burden on the Colleges' constitutional rights that were imposed by the Mandate as promulgated in February 2012.

When the Mandate was first published in 2010,[11]/ many religious non-profit organizations submitted comments to Defendants expressing concern regarding the impact of the Mandate on religious liberties and conscience rights of religious non-profit employers.[12]/ Despite knowing of the Mandate's burden on religious

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[11]/ 75 Fed. Reg. 41,726 (July 19, 2010) *available at* http://www.healthcare.gov/center/regulations/prevention/regs.html.

[12]/ *See, e.g.*, Comments from The Witherspoon Institute regarding the Interim Final Rule for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Service (Sept. 28, 2010) (accessible via http://www.regulations.gov); Comments from The National Catholic Bioethics Center regarding the Interim Final Rule for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Service (Sept. 17, 2010) (accessible via http://www.regulations.gov); Comments from the Catholic Medical Association regarding the Interim Final Rule for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Service (Sept. 17, 2010) (accessible via http://www.regulations.gov).

exercise after initial comments were submitted, Defendants promulgated the proposed final rule with no exception for religious non-profit employers such as the Colleges.[13]/ Religious non-profit employers, including Appellant Wheaton College, notified Defendants again of the Mandate's Constitutional infirmities.[14]/ Yet, six months later, Defendants persisted in publishing the Final Regulations, without protecting religious non-profit employers' conscience rights.

At the time the final rule was announced, Defendants stated that the Mandate was a "final rule" and that all comments and "important concerns" regarding "religious liberty" had been taken into account.[15]/ Defendants gave religious non-profits such as the Colleges an ultimatum, giving them one year to "comply with the new law": that is, one year to either violate their conscience, or pay the penalty.[16]/

After two years of failure to address significant Constitutional concerns in the Mandate, a promise to revise this Mandate in the future does not relieve the Colleges from the current burden of preparing to meet their obligations under the

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[13]/ 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (codified in 45 C.F.R. § 147.130).

[14]/ Comments from Wheaton College President Philip G. Ryken, regarding Interim Final Rules on Preventive Services (Sept. 27, 2011) *available at* http://www.dol.gov/ebsa/pdf/1210-AB44a-13789.pdf.

[15]/ Press Release, HHS Press Office, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

[16]/ *Id.*

Defendants' ultimatum.

B. The Mandate Imposes Present and Palpable Harm on the Colleges Because They Must Prepare to Comply with the Law or Pay the Penalty for Non-Compliance.

The Mandate presents the Colleges with a dilemma: comply with the Mandate and violate the tenets of their religion or not comply with the Mandate and pay significant annual penalties. (Wheaton Compl. at ¶¶ 88, 101–02; Belmont Compl. at ¶¶ 91–92). The penalties imposed for not providing Mandate-compliant insurance coverage are not trivial. The Colleges may be subject to annual fines, which include $2,000 a year multiplied by the number of full-time employees minus thirty employees. 26 U.S.C. § 4980H (Supp. IV 2011). Thus, since Wheaton College has over 700 full-time employees, (Wheaton Compl. at ¶ 35), it faces annual penalties of over $1.3 million. Belmont Abbey College, with 200 full-time employees, (Belmont Compl. at ¶ 27), will be subject to annual penalties of approximately $340,000. Therefore, the Colleges are necessarily compelled to adjust their financial affairs now to prepare to pay significant amounts to the federal government on an annual basis, and will be unable to use that money for other purposes. (*See* Belmont Compl. at ¶ 96).

In addition to being compelled to presently prepare to pay significant penalties, the Colleges suffer current harm in hampered employee recruitment efforts. (*See* Wheaton Compl. at ¶¶ 88–89 (pleading that "[t]he Mandate imposes a

burden on Wheaton's employee recruitment efforts by creating uncertainty as to whether Wheaton will be able to offer health insurance beyond 2012," and "[t]he Mandate places Wheaton at a competitive disadvantage in its efforts to recruit and retain employees"); *see also* Belmont Comp. at ¶¶ 77–78 (same)).

Defendants' claim that they may revise the Mandate in the future does not alleviate the Colleges' current necessity of preparing to comply with the final rule as published. The possibility that the Mandate will change to completely alleviate the burden on the Colleges' rights is merely speculative and is not concrete. The Colleges have no reason to believe that their present opposition to the Mandate (an opposition based on the Colleges' religious beliefs) will change so drastically that they will voluntarily comply with the Mandate when the safe harbor period ends; rather, the Colleges will be forced, among other options, to pay significant annual penalties.

As in *Blanchette*, the Colleges' financial decisions "to be made now or in the short future" are directly affected by whether the merits of their claims are decided now. *See* 419 U.S. at 144. If the Colleges' claims are not decided, the Colleges may suffer irreparable injury through loss of bargaining power in recruiting employees and students, and must suffer monetary injury by preparing to pay the penalties imposed for their refusal to violate their religious tenants. The Colleges,

then, are currently injured by the Mandate and their injury can be redressed by a favorable decision from this Court.

The situation here is similar to what occurred in the lawsuits filed in 2010 that challenged the Affordable Care Act's individual mandate, which requires virtually all American citizens to purchase government-approved health insurance from private companies starting on January 1, 2014. The government initially raised standing and ripeness defenses because the individual mandate would not go into effect until *four years* after the filing of the lawsuits and a lot could happen in that time period. Courts, however, rejected the government's arguments because the cases presented largely legal questions (as the instant action does), and plaintiffs were experiencing actual injury by having to prepare financially for the cost of health insurance if they complied with the individual mandate, or for the cost of the annual penalties (as the Colleges must) if they did not comply with the individual mandate. *E.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 23–28 (D.D.C. 2011), *aff'd by Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 690–94 (M.D. Pa. 2011) (citing additional cases); *accord TMLC v. Obama*, 651 F.3d 529, 535–39 (6th Cir. 2011) (noting that the Supreme Court has permitted lawsuits to go forward where the complaints were filed roughly three to six years before the laws

went into effect and that the D.C. Circuit has permitted a case to proceed where the law would not go into effect for thirteen years).[17]/

Moreover, the present case is analogous to the situation in *Riva v. Massachusetts*, 61 F.3d 1003 (1st Cir. 1995), in which the First Circuit held that plaintiff Robert Keenan's challenge to a state accidental disability retirement scheme was ripe. Keenan was notified that a law could reduce his monthly accidental disability benefits when he turned sixty-five years old. *Id.* at 1006. Keenan joined a suit challenging the law despite the *seven-year gap* until his benefits would be reduced; as the First Circuit phrased it, he "subscrib[ed] to the adage that an ounce of prevention is sometimes worth a pound of cure." *Id.*

In discussing *Abbott Labs*, the First Circuit noted that the hardship prong entailed an analysis of whether "the challenged action creates a 'direct and immediate' dilemma for the parties" and whether "the sought-after declaration would be of practical assistance in setting the underlying controversy to rest." *Id.* at 1009–10 (citations and internal quotations omitted). The government argued that whether Keenan's benefits would actually be reduced was speculative because

[17]/ *McConnell v. FEC*, 540 U.S. 93, 224–26 (2003), is distinguishable because there is a key difference between a challenge to a provision that might affect decisions that the plaintiff *will make five years later* (such as the decisions that Senator McConnell would make immediately before a future election) and a challenge to a provision that has a *direct impact on the plaintiff's decision-making now* (such as the Colleges' current financial planning in this case).

he could die before age sixty-five, he might no longer be disabled at that age, or the state law could be amended over the next seven years. *Id.* at 1011. The First Circuit held that, despite these potential contingencies, Keenan's injury was "highly probable," and explained:

> In all events, *a litigant seeking shelter behind a ripeness defense must demonstrate more than a theoretical possibility that harm may be averted*. The demise of a party or the repeal of a statute will always be possible in any case of delayed enforcement, yet it is well settled that a time delay, without more, will not render a claim of statutory invalidity unripe if the application of the statute is otherwise sufficiently probable. The degree of contingency is an important barometer of ripeness in this respect.

Id. (emphasis added; citations omitted).

Additionally, the First Circuit stated that "the most immediate harm to Keenan comes in the form of *an inability prudently to arrange his fiscal affairs*." *Id.* at 1012 (emphasis added). Keenan could not prepare his fiscal affairs with certainty until the resolution of whether the law, which could reduce his monthly accidental disability benefit, was valid. The First Circuit explained, "[w]e believe that this uncertainty and the considerations of utility that we have mentioned coalesce to show that Keenan is suffering a sufficient present injury to satisfy the second prong of the *Abbott Labs.* paradigm." *Id.*

As in the above-mentioned cases, the Colleges have been, and continue to be, injured by the Mandate because they must rearrange their fiscal affairs now to prepare to pay significant annual penalties, and their injury can be redressed by a

favorable ruling from this court. A present injury of this nature is sufficient to establish that the Colleges have standing and that their claims are ripe.

C. The Proposed Rule Change Does Not Remove the Current Harm and is Merely a Game of Smoke and Mirrors that Still Requires the Colleges to Directly Fund Abortifacients.

The recently promised "accommodation" for some religious employers in the form of an Advance Notice of Proposed Rulemaking ("ANPRM"), does not remove the harms currently suffered by the Colleges or the future burden on religious exercise imposed by the Mandate. Although the ANPRM proposes that "a health insurance issuer may not include contraceptive coverage in [a qualifying] organization's insured coverage," "the issuer would be required to provide participants and beneficiaries covered under the plan separate coverage for contraceptive services . . . without cost sharing."[18]/ Under the ANPRM, the Colleges are still required to purchase insurance or pay a penalty. The insurance provider the Colleges pay is required to provide abortifacients "without cost sharing" to the Colleges' employees. In other words, if the Colleges pay the provider for an insurance plan, the insurance provider provides contraceptives to the Colleges' employees and students. If the Colleges do not pay the insurance provider, the insurance provider does not provide contraceptives to the Colleges' employees.

[18]/ 77 Fed. Reg. 16,501, 16,505 (Mar. 21, 2012).

As such, the promised "accommodation" is, in effect, a smoke and mirrors game. There is no choice. If the Colleges provide insurance coverage for their employees, the only option is to pay an insurer that provides ANPRM-mandated contraceptive coverage. If the Colleges do not provide such coverage for their employees, they must pay a substantial penalty. Thus, even under the proposed ANPRM "accommodation," the Colleges would still be required to violate their religious beliefs or pay a penalty.

Furthermore, in seeking a dismissal, Defendants overemphasize the ANPRM as a reason why the Colleges lack standing and ripe claims. Just because Defendants have issued the ANPRM does not mean they will amend the Mandate by August 1, 2013, to satisfy the constitutional and statutory concerns raised by the Colleges.

Indeed, Defendants have stated in the past that "religious concerns have been taken into account" without seriously accommodating religious employers such as the Colleges.[19]/ Should this court dismiss this case, as Defendants seek, there is nothing to stop Defendants from waiting until right before August 1, 2013, the end of the safe harbor period, to announce they will not amend the Mandate to address the Colleges' constitutional and statutory concerns. Under Defendants'

[19]/ Press Release, HHS Press Office, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

approach, the Colleges would not have the benefit, as they would now if their cases continue, of receiving a judicial determination of their rights either to know whether 1) they will be subjected to the Mandate and have to continue to prepare for penalties during the safe harbor period, or 2) they will not be subjected to the Mandate and be able to budget accordingly. Rather, under Defendants' approach, the Colleges would be in a state of limbo until about August 1, 2013, not knowing how to conduct their affairs with certainty.

This uncertainty and inability to operate effectively and efficiently is, itself, an injury sufficient to establish Article III standing. *See Abbott Labs.*, 387 U.S. at 152–53 (explaining that hardship is present when the law places a plaintiff in a "very real dilemma," "has a direct effect on the [plaintiff's] day-to-day business," or "requires an immediate and significant change in the plaintiffs' conduct of their affairs.").

The instant situation differs from that in the recent case of *American Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012). There, this Court did not dismiss the case, but held it in abeyance subject to status reports over roughly a six month period. *Id.* at 384, 386. The EPA was required, based on a settlement in a related matter, to issue a Notice of Proposed Rulemaking (not a preliminary Advanced Notice as here) that, if adopted, would significantly change the EPA's regulation at issue. *Id.* at 385–86. In contrast, the Mandate, as discussed *supra*, is

the *final rule* by which the Colleges are governed. The Mandate is currently injuring the Colleges, and requires judicial review now, which should not be delayed based on Defendants' promise to think more about the Mandate. Such a delay would only further the Colleges' injury and deny legal recourse to stop the injury.

In sum, this case is ripe because 1) the Mandate is final, 2) the Colleges are currently harmed by having to prepare now to pay the penalty for not complying with the Mandate, and 3) the ANPRM's proposed accommodation does not reduce the harms suffered by the Colleges either now or in the future.

CONCLUSION

Amici curiae respectfully request that this Court reverse the judgments of the district courts and remand these cases for a resolution on the merits of the Colleges' claims.

Respectfully submitted on this 10th day of October, 2012,

/s/ Jay Alan Sekulow

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
American Center for Law & Justice
[redacted]

CeCe Heil*
American Center for Law & Justice
[redacted]

Edward L. White III*
American Center for Law & Justice
[redacted]

Francis J. Manion*
Geoffrey R. Surtees*
American Center for Law & Justice
[redacted]

Louis A. Isakoff*
Vice President & General Counsel
Regent University
[redacted]

* Not admitted to this Court's Bar

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 4,891 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Jay Alan Sekulow
Jay Alan Sekulow
[redacted]

CERTIFICATE OF SERVICE

I certify that on October 10, 2012, I caused the foregoing *Brief for Amici Curiae* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

Counsel for Plaintiffs-Appellants:

Stuart Kyle Duncan
[redacted]

Counsel for Defendants-Appellees:

Adam C. Jed
[redacted]

Alisa B. Klein
[redacted]

Mark B. Stern
[redacted]

Craig Lawrence
[redacted]

The foregoing *Brief for Amici Curiae* was also served electronically via the Court's electronic filing system on the following Counsel for Amici Curiae who were listed in the Court's electronic filing system as of 3:30PM EST, on October 10, 2012:

Dorinda Bordlee, Esquire
[redacted]

Noel Francisco
[redacted]

In addition, on October 12, 2012, I will cause eight true and correct copies of the foregoing brief amicus curiae to be delivered to the Clerk of Court's Office,

United States Court of Appeals for the District of Columbia Circuit, 333 Constitution Ave., NW, Washington, D.C. 20001.

/s/ Jay Alan Sekulow
Jay Alan Sekulow
American Center for Law & Justice
[redacted]