IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GRACE SCHOOLS and **BIOLA UNIVERSITY**, *Plaintiffs,* v. **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	**CASE NO. 3:12-cv-459-JD-CAN**

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

Jay Alan Sekulow*
Jordan Sekulow*
Stuart J. Roth*
American Center for Law & Justice

Edward L. White III**
Counsel of Record
American Center for Law & Justice

CeCe Heil*
American Center for Law & Justice

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

Louis A. Isakoff*
Regent University

** Admitted to N.D. Indiana Bar
* Not admitted to N.D. Indiana Bar

CONSENT TO FILE AMICUS BRIEF

After contacting all parties, no party is opposed to the American Center for Law and Justice and Regent University's request to file as Amici. In particular, counsel for the plaintiffs has consented to Amici filing a brief and counsel for the defendant has expressly taken no position.

FRCP 7.1 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) Amicus Regent University is a 501(c)(3) corporation, issues no stock, and has no parent company.

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

Dated: December 7, 2012.

/s/ Edward L. White III
Edward L. White III

Counsel for Amici

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INTEREST OF THE AMICI CURIAE

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's insurance requirement for individuals, such as *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), and represented the plaintiffs in their challenge to that requirement in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *superseded on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

Moreover, the ACLJ has been active in the litigation concerning the Mandate. For example, the ACLJ represents the plaintiffs-appellants in *O'Brien v. U.S. Department of Health & Human Services*, Case No. 12-3357 (8th Cir.), and represents plaintiffs in other actions challenging the Mandate. As such, the ACLJ has an interest that may be affected by the outcome

of this action because any decision by this court will be persuasive authority in the ACLJ's Mandate litigation.

This brief is also filed on behalf of the ACLJ's Committee of Concerned Citizens which consists of over 40,000 Americans who support religious freedom and who oppose efforts to force religious employers to violate their sincerely held religious beliefs.

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 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

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[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).

[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.

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 cannot empower Defendants to force people of faith to violate their religious principles in the manner required by the Mandate and, in fact, the Constitution prohibits this. 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 plaintiffs Grace Schools and Biola University ("the Colleges" or "the Christian Colleges").

ARGUMENT

This case is about affirming Constitutional principles of Free Speech and Free Exercise, adhering to the statutory requirements of the Religious Freedom and Restoration Act, and most of all providing an adequate remedy for Plaintiffs who have suffered and continue to suffer harm as a result of Defendants' violation of longstanding principles of American law and tradition. Defendants have established final regulations that require Plaintiffs to pay for abortifacients and related counseling in violation of the Plaintiffs sincerely held religious beliefs. Although four courts have already granted preliminary injunctions to plaintiffs challenging the same Mandate that the Colleges challenge here,[4]/ Defendants seek to dismiss this case based on the erroneous assertion that Plaintiffs are not harmed by the Mandate.

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[4]/ *O'Brien v. U.S. H.H.S.*, No. 12-3357, Order (8th Cir. Nov. 28, 2012); *Tyndale House Publrs. v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Nov. 1, 2012); *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012). *But see Hobby Lobby Stores, Inc. v. Sebelius*, 2012 U.S. Dist. LEXIS 164843 (W.D. Okl. Nov. 19, 2012) (denying motion for preliminary injunction) *appeal docketed*, No. 12-6294 (10th Cir. Nov. 20, 2012).

Plaintiffs are harmed by the Mandate because it runs counter to longstanding American law and tradition and violates both Constitutional and statutory principles of Free Speech and Free Exercise. Furthermore, Plaintiffs have standing and their claims are ripe because, regardless of a brief stay of government enforcement and the illusory possibility of reform, Plaintiffs must prepare now to pay the significant financial penalties that will be levied on non-exempt organizations that do not subsidize the provision of abortion-inducing drugs.

I. THE MANDATE RUNS COUNTER TO LONGSTANDING AMERICAN LAW AND 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.[5]/ 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."[6]/

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[5]/ *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).

[6]/ *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.[7]/

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 to their oppressed Country, which they can consistently with their religious principles.[8]/

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.

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[7]/ 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).

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

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.[9]/ 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 against killing."[10]/ 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."[11]/

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 non-exempt 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 simply ask to be permitted to continue their work without having to violate their sincerely held religious beliefs, and invoke the same protection of conscience recognized since the time of the Continental Congress.

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

[10]/ 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).

[11]/ 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.

II. 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). The motion before this court hinges primarily on Defendants' erroneous allegation that Plaintiffs have not suffered an "injury in fact" that is concrete, particular, and actual or imminent. 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) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211–12 (1995)).

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).

The most recent court to address standing and ripeness in a similar case involving the Mandate concluded that "notwithstanding the ANPRM, plaintiffs have standing to bring this suit based on their future injuries" because "the possibility of a future amendment to the Coverage Mandate that relieves plaintiffs from their obligation to cover contraceptive services and renders this action moot is speculative and is not sufficient to make plaintiffs' claims non-justiciable." *Roman Catholic Archdiocese of New York v. Sebelius*, 12-cv-2542 (BMC) 2012 U.S. Dist. LEXIS 172695 at *49 (E.D.N.Y Dec. 5, 2012). Other courts to address this issue have erroneously dismissed similar suits based on a misapplication of *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012).[12]/ Those courts "overestimate[d] the significance of the ANPRM and underestimate the finality of the Coverage Mandate." *Roman Catholic Archdiocese*, 2012 U.S. Dist. LEXIS 172695 at *49. This court should follow the persuasive reasoning of the court in *Roman Catholic Archdiocese* and find, as discussed *infra*, that the Mandate is currently injuring the Colleges, resulting in the Colleges having standing to bring their ripe claims.

A. The Claims are Ripe Because the Mandate, as Written, has a Direct Effect on Plaintiffs' Day-to-Day Business and Requires Immediate and Significant Changes to Plaintiffs' Conduct.

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,

[12]/ *See, e.g., Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162 (D.D.C. Aug. 24, 2012), *appeal docketed*, No. 12-5273 (D.C. Cir. Sept. 12, 2012); *Belmont Abbey Coll. v. Sebelius*, Civil Action No. 11-7989 (JEB), 2012 WL 2914417 (D.D.C. July 18, 2012), *appeal docketed*, No. 12-5291 (D.C. Cir. Sept. 14, 2012). The court in *American Petroleum* noted that "initiating a new proposed rulemaking" cannot "stave off judicial review of a challenged rule," *American Petroleum*, 683 F.3d at 388, and merely adopted a narrow exception not applicable here.

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 for purposes of ripeness. "[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. United States 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.

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. (Compl. at ¶¶ 102, 106). The penalties imposed for providing coverage that does not comply with the Mandate are $100 per day per employee, 26 U.S.C § 4980D; this amounts to roughly $85,000 per day of non-compliance for Biola University and $45,000 per day of non-compliance for Grace Schools, totaling over $47 million in combined penalties annually. The amount would be less, but still substantial, if the Colleges choose to provide no insurance at all. In such case, the Colleges would be subject to annual fines of $2,000 a year per full-time employee, not counting the first thirty. 26 U.S.C. § 4980H. Thus, since Biola University has over 850 full-time employees, it faces annual penalties of over $1.6 million. (Compl. at ¶¶ 66, 85). Grace Schools, with over 450 full-time employees, would be subject to annual penalties of over $800,000. (Compl. at ¶¶ 31, 85). 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. (Compl. at ¶ 126). In addition to being compelled to presently prepare to pay significant penalties, the Colleges suffer current harm in hampered employee recruitment efforts. (Compl. at ¶¶ 107–108).

Plaintiffs have nothing to gain through litigation save maintaining the status quo, which, prior to the Mandate's enactment, protected their right to practice their religion without being forced to pay for abortion-inducing drugs in violation of their religious beliefs. Defendants ask this court to discount the actual and imminent injuries alleged in the Complaint and dismiss the case based on a litigation position that has produced nothing but an illusory promise to consider changing the unconstitutional regulations at some point. This proposal to possibly *consider* changing the Mandate in some undefined way in the future does not deprive this court of jurisdiction over the current regulation.

B. The Advanced Notice of Proposed Rulemaking Should Hold Only the Weight of an Illusory Promise and Litigation Posturing.

Defendants' issuance of the Advanced Notice of Proposed Rulemaking (ANPRM) should be viewed as an illusory promise because Defendants were fully aware of the constitutional and statutory violations that would occur, yet published the "Final Regulation" without change. Furthermore, that this illusory promise was made merely as a litigation position is evidenced by the fact that Defendants published the ANPRM on March 16, 2012 only *after* litigation was filed challenging the Mandate and only days before their reply was due in another case challenging the Mandate.

When the Mandate was first published in 2010,[13]/ many religious non-profit organizations submitted comments to Defendants expressing concern regarding the impact of the Mandate on the conscience rights of religious non-profit employers.[14]/ Despite knowing of the Mandate's substantial burden on religious exercise after initial comments were submitted, Defendants promulgated the proposed final rule with no exception for religious non-profit employers such as the Colleges.[15]/ Religious non-profit employers again provided comments concerning the Mandate's constitutional infirmities.[16]/ 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 explicitly that the Mandate was a "final rule" and that all comments and "important concerns" regarding "religious liberty" had been taken into account.[17]/ Defendants gave religious non-profits such as the Colleges an

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[13]/ 75 Fed. Reg. 41,726 (July 19, 2010) *available at* http://www.healthcare.gov/center/regulations/prevention/regs.html.

[14]/ *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).

[15]/ 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (codified in 45 C.F.R. § 147.130).

[16]/ *E.g.* 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.

[17]/ 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.

ultimatum, giving them one year to comply with the new law: that is, one year to either violate their consciences, or start paying the penalties.[18]/

Defendants were aware of the Mandate's constitutional and statutory infirmities, yet published it as a final rule nonetheless. If Defendants did not mean the rule to be final, they should not have published it as final. 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 concerns, the Mandate's history renders Defendants' claim that they may remove the burden on the Colleges' constitutional rights imposed by the Mandate as promulgated in February 2012 highly suspect. Indeed, as the court noted in *Roman Catholic Archdiocese*,

> The earliest case challenging the Coverage Mandate was commenced over a year ago. The ANPRM was announced nearly ten months ago and entered in the Federal Register over eight months ago. In that time, the Departments have had ample opportunity to enact a meaningful change to the Coverage Mandate. The fact that they have not further suggests the likelihood of injuries to plaintiffs.

Roman Catholic Archdiocese, 2012 U.S. Dist. LEXIS 172695 at *50.

Furthermore, despite awareness of the Mandate's infirmities, the ANPRM was only issued *after* litigation was started challenging the Mandate and only weeks before Defendants' reply to Plaintiff's opposition brief was due in another case challenging the Mandate. *See* Docket for *Belmont Abbey Coll. v. Sebelius*, Civil Action No. 11-7989 (JEB), 2012 WL 2914417 (D.D.C. July 18, 2012); Certain Preventative Services under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,505 (Mar. 21, 2012). Any weight given to the illusory promises of the ANPRM should be minimized by the clear evidence that Defendants have intentionally failed to address

[18]/ *Id.*

Plaintiffs' concerns for two years. The ANPRM is merely a litigation position with no concrete effect.

C. Even if the ANPRM is a Good Faith Commitment to Consider Changes to the Mandate, *it Does Not Actually Change or Even Promise to Change Anything*, nor Does it Alleviate the Actual and Imminent Injuries Currently Imposed on Plaintiffs.

Defendants' claim that they will consider revising the Mandate in the future does not alleviate the Colleges' current necessity of preparing to comply with the final rule as published.

> Despite defendants' attempt to characterize the ANPRM as a binding promise not to enforce the Coverage Mandate, the fact is that the ANPRM does not prevent the Coverage Mandate, as it currently exists, from going into effect. It is not a change in policy; it merely seeks input to allow the Departments to consider possible revisions to the Coverage Mandate. The Departments need not make any changes to the Coverage Mandate to accommodate religious groups at all.

Roman Catholic Archdiocese, 2012 U.S. Dist. LEXIS 17269 at *46–47. 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' 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

[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.

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.

The standing and ripeness issues here are similar to those present 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 conceivably happen in that time period. Courts, however, rejected the government's arguments because the cases presented mainly 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), *superseded in part by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (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).[20]/

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 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

[20]/ *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).

> 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.

CONCLUSION

Amici curiae respectfully request that this Court deny Defendants' motion to dismiss and remedy Plaintiffs' current and imminent injuries by granting an injunction against the enforcement of the Mandate.

Respectfully submitted on this 7th day of December, 2012,

/s/ Edward L. White III

Jay Alan Sekulow*
Jordan Sekulow*
Stuart J. Roth*
American Center for Law & Justice

Edward L. White III**
Counsel of Record
American Center for Law & Justice

CeCe Heil*
American Center for Law & Justice

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

Louis A. Isakoff*
Regent University

** Admitted to N.D. Indiana Bar
* Not admitted to N.D. Indiana Bar

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the page limitation of N.D. Ind. L.R. 7-1(e)(1) (limiting briefs to 25 pages) because this brief is 17 pages long, excluding the parts of the brief exempted by N.D. Ind. L.R. 7-1(e)(1). Furthermore, this brief complies with the format requirements of N.D. Ind. L.R. 5-4(a).

/s/ Edward L. White III
Edward L. White III
Counsel of Record
Admitted to N.D. Indiana Bar
American Center for Law & Justice

CERTIFICATE OF SERVICE

I certify that on December 7, 2012 I caused the foregoing *Amici Curiae Brief* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

Counsel for Plaintiffs:	**Counsel for Defendants:**
Gregory S Baylor	Benjamin L Berwick
Matthew Scott Bowman	
David A Cortman	
Jerry D Mackey	
Jane Dall Wilson	

/s/ Edward L. White III
Edward L. White III
Counsel of Record
Admitted to N.D. Indiana Bar
American Center for Law & Justice