Nos. 12-5273 & 12-5291

# In the U.S. Court of Appeals for the District of Columbia Circuit

WHEATON COLLEGE AND BELMONT ABBEY COLLEGE,
*Plaintiffs-Appellants*,

vs.

KATHLEEN SEBELIUS, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; HILDA SOLIS, SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; TIMOTHY GEITHNER, SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; AND U.S. DEPARTMENT OF THE TREASURY,
*Defendants-Appellees.*

APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

## *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") states that (a) Eagle Forum is a non-profit, tax-exempt corporation under §501(c)(3) of the Internal Revenue Code with no parent corporation; (b) no publicly traded entity – or any other entity – holds a ten-percent ownership interest in Eagle Forum; and (c) Eagle Forum is an education and legal defense fund that – as relevant to this litigation – advocates for traditional American values and constitutional government, including governmental respect for freedom of religion and for the rule of law.

Dated: October 12, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") presents the following certificate as to parties, rulings, and related cases.

### A. Parties and *Amici*

Eagle Forum adopts Appellants' statement of parties and *amici*, with the addition of American Center for Law and Justice, Regent University, 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, Catholic University of America, Women Speak for Themselves, Association of American Physicians & Surgeons, American Association of Pro-Life Obstetricians & Gynecologists, Catholic Medical Association, National Catholic Bioethics Center, Physicians for Life, National Association of Pro Life Nurses, Center for Constitutional Jurisprudence, American Civil Rights Union, Cato Institute, Christian Legal Society, Association of Rescue Gospel Missions, Prison Fellowship Ministries, Council for Christian Colleges & Universities, Christian Medical Association, Association of Christian Schools International, National Association of Evangelicals, Queens Federation of Churches, Diocese of the Mid-Atlantic of the Anglican Church in North America, Ethics & Religious Liberty Commission of the

Southern Baptist Convention, Patrick Henry College, and Institutional Religious Freedom Alliance, State of Texas, State of Alabama, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Michigan, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, Commonwealth of Virginia, Geneva College, Louisiana College, Biola University, Grace Schools, Wayne L. Hepler, Carrie E. Kolesar, Seneca Hardwood Lumber Co., WLH Enterprises, William Newland, Paul Newland, James Newland, Andrew Newland, Christine Ketterhagen, Hercules Industries, Cardinal Newman Society, College of Saints John Fisher and Thomas More, DeSales University, Holy Spirit College, Christendom Educational Corporation d/b/a Christendom College, the College of Saint Mary Magdalen, Ignatius-Angelicum Liberal Studies Program, John Paul the Great Catholic University, Mount St. Mary's University, Benedictine College, Catholic Distance University, St. Gregory's University, Thomas Aquinas College, Thomas More College of Liberal Arts, the University of Mary, Wyoming Catholic College and Eagle Forum as *amicus curiae* before this Court.

**B. Rulings Under Review**

Eagle Forum adopts Appellants' statement of rulings under review.

**C. Related Cases**

Eagle Forum adopts the Appellants' statement of related cases.

Dated: October 12, 2012

Respectfully submitted,

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## CERTIFICATE ON NEED FOR A SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") requires a separate brief to address the procedural merits and their interplay with justiciability under the "procedural standing" cases; prior to drafting its brief, counsel for Eagle Forum engaged in correspondence with counsel for other *amicus curiae,* and none indicated that they were addressing this topic.

Dated: October 12, 2012

Respectfully submitted,

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## GLOSSARY

| | |
|---|---|
| APA | Administrative Procedure Act |
| ANPRM | Advanced Notice of Proposed Rulemaking |
| NPRM | Notice of Proposed Rulemaking |

## IDENTITY, INTEREST AND AUTHORITY TO FILE

*Amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") filed this brief with the consent of all parties. Eagle Forum is an Illinois nonprofit corporation organized in 1981. For over thirty years it has defended principles of limited government and individual liberty, including freedom of religion. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.[1]

## INTRODUCTION

This litigation asks whether the Executive Branch of the federal government (the "Administration") can violate the procedural requirements for rule making and then evade judicial review by providing an unenforceable, temporary "safe harbor" and representing that the Administration might reconsider its rule. *Amicus* Eagle Forum respectfully submits that the district court erred in deferring to the Administration's *post hoc* litigation position by finding that the Administration's representations denied the plaintiffs – Wheaton College and Belmont Abbey College (collectively, the "Colleges") – their day in court.

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[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

## STATEMENT OF THE CASE AND FACTS

*Amicus* Eagle Forum adopts the Statement of Facts in the Colleges' brief. *See* Colleges' Br. at 5-14. For purposes of evaluating jurisdiction under Rule 12(b)(1), this Court must assume the Colleges' merits views in evaluating standing and ripeness. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 439 (D.C. Cir. 1986) ("we must assume the challenging party's view of the merits in determining ripeness"); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (same for standing); *cf. Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983) ("EPA's position – that final action has not been taken – does not affect our jurisdiction"). Under the circumstances, this Court must evaluate jurisdiction for this litigation under the assumption that the Administration promulgated its interim final rule, Dep't of the Treasury *et al.*, Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (2010) (hereinafter, the "Contraceptive Mandate"), without complying with the notice-and-comment requirements of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. §553.

As explained in this *amicus* brief and the College's brief, moreover, the two other administrative developments on which the district court relied do not change

the analysis.[2] In brief, the "Safe Harbor" purports to shield employers, group health plans, and insurers from federal-agency enforcement for violations of the Contraceptive Mandate until the first plan year after August 2013, provided that they meet certain self-certification requirements and provide notice to insureds. The ANPRM "announced plans to expeditiously develop and propose changes to the [Contraceptive Mandate]," without identifying or proposing any changes. 77 Fed. Reg. at 16501. The ANPRM also sought public input on that endeavor. *Id.*

## SUMMARY OF ARGUMENT

The Contraceptive Mandate's publication as an "interim final rule," without the notice-and-comment rulemaking, violated not only the APA (Section I.B) but also the Constitution (Section I.A). Moreover, because they are either nullities for the same failures to comply with APA rulemaking requirements or are simply unenforceable policy statements, the Safe Harbor and the ANPRM cannot alter the

[2] The two documents are (1) "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code" (Feb. 10, 2012) (hereinafter, the "Safe Harbor") issued by the Center for Consumer Information and Insurance Oversight in the Centers for Medicare & Medicaid Services, and (2) an advanced notice of proposed rulemaking ("ANPRM") from the Department of the Treasury *et al.*, captioned Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (2012).

analysis for judicial review (Sections I.C, I.D). On standing, the Colleges have standing not only because the Contraceptive Mandate is sufficiently imminent for Article III but also because even the Safe Harbor purports to require actions – namely, certification and notice – that impose compliance costs and out-of-pocket costs (Section II.A.1). Further, the procedural injuries that the Colleges suffer lower the required showing on immediacy for constitutional standing (II.A.2). The Colleges' action is ripe because (a) the Colleges' procedural claims are ripe notwithstanding the alleged lack of ripeness for the merits issues (Section II.B.1), (b) neither the courts nor the Administration have a cognizable institutional interest in avoiding review under the fitness-for-review prong of prudential ripeness (Section II.B.2.a), and (c) the hardship prong of prudential ripeness does not enter the analysis if the issue is fit for review (Section II.B.2.b). Finally, although the Safe Harbor and ANPRM are best analyzed as a defendant's attempt to moot these proceedings via voluntary cessation, the Administration neither moots all of the Colleges' injuries (*i.e.*, some injuries result from the Safe Harbor and others survive the Safe Harbor and ANPRM) nor demonstrates that its purely voluntary, non-binding Safe Harbor and ANPRM necessarily moot the Colleges' injuries (Section II.C).

# ARGUMENT

## I. THE CONTRACEPTIVE MANDATE VIOLATES THE PROCEDURAL REQUIREMENTS OF THE APA AND THE CONSTITUTION

"The history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.*, 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Before addressing the jurisdictional bases on which the district court dismissed the Colleges' actions, *amicus* Eagle Forum first reviews the procedural merits. Although this merits-first approach is atypical, parties who suffer procedural injury have an easier task of demonstrating jurisdiction under Article III. *See* Section II.A.2 *infra*. As such, this Court at least should consider the powerful procedural arguments that the Colleges bring, if only to aid this Court in assuring itself that the Colleges suffer procedural injuries.

### A. The Contraception Mandate Violated the Constitution's Law-Making Requirements

Although the most heavily contested procedural issues arise under the APA – and the Administration's failure to comply with the APA – this Court should not forget the underlying constitutional issues: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). In this action, the Administration purports to rely on the exception to congressional lawmaking that Congress itself has enacted. *See* 5 U.S.C. §553(b) (congressionally proscribed rulemaking procedures). In doing so, an agency cannot

"replace the statutory scheme with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969); *accord U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989). Failure to follow APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). Thus, if the Administration failed to comply with the APA, the Administration's attempt to make law violates not only the APA but also the Constitution.

### B. The Contraception Mandate Violated the APA's Rulemaking Requirements

Unless certain exceptions apply, agencies must undertake notice-and-comment rulemaking in order to issue "legislative rules" under the APA. The parties do not question that the Contraceptive Mandate is a legislative rule. As such, the only potential exception to the APA's rulemaking requirements is where the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B). Although the Administration made weak findings to support bypassing a rulemaking, the Administration also promulgated its Contraceptive Mandate as

an "interim final rule." In the absence of a viable exception to notice-and-comment rulemaking, the concept of interim final rules (*i.e.*, rules that take effect until the agency gets around to promulgating lawful rules) is foreign to the APA.

The Colleges allege that the Administration's findings on the good-cause issue are inadequate, and the Colleges are entitled to review of that. *See, e.g.*, *Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425, 447 (D.C. Cir. 1982). Moreover, "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dept. of Environmental Protection v. U.S. Environmental Protection Agency*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same). Certainly, for the jurisdictional purposes at issue in the district court's dismissal, that establishes that the Colleges raise a valid – indeed, *compelling* – procedural claim against the Contraceptive Mandate.

### C. The ANPRM Does Not Alter the Contraceptive Mandate

Just as the APA recognizes a Final Rule, but not an *Interim* Final Rule, *see* Section I.B, *supra*, the APA also recognizes a Notice of Proposed Rulemaking ("NPRM"), but not an *Advanced* Notice of Proposed Rulemaking.

At the outset, the district court is simply wrong to assume that the ANPRM

says that the Administration definitely will amend the Contraceptive Mandate in any way meaningful to this litigation. In its ANPRM, the Administration "has embarked upon the least responsive course short of inaction." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983); *In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C. Cir 1988) (same). An ANPRM merely takes under advisement the question of *whether* potentially to change a rule in the future; an ANPRM neither makes the decision to consider changing the rule nor commences the process of changing the rule. *In re Bluewater Network*, 234 F.3d 1305, 1313 (D.C. Cir. 2000) ("an agency's pronouncement of its intent … to engage in future rulemaking generally does not constitute final agency action reviewable by this court"). An "ANPRM [is] a preparatory step, antecedent to a potential future rulemaking, not itself a decision to reconsider the [Contraceptive Mandate] rule." *P & V Enterprises v. U.S. Army Corps of Engineers*. 516 F.3d 1021, 1026 (D.C. Cir. 2008). Far from taking serious action here, the ANPRM merely kicks the can down the road.

By contrast, when an agency issues an *actual* NPRM, the affected public can sue to ensure the completion of the process within a reasonable time, *Sierra Club v. Thomas*, 828 F.2d 783, 794-97 (D.C. Cir. 1987), which puts the agency on track to avoid unreasonable delay, consistent with agencies' APA duty to avoid such delay. 5 U.S.C. §§553(b), 706(1); *see also Monroe Communications*, 840 F.2d at

946. But even an NPRM commands no deference. *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Comm'r, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)). The district court gave the ANPRM altogether too much credence.

Significantly, an NPRM can moot *unreasonable-delay* claims under certain circumstances, without mooting merits claims:

> An agency's notice of proposed rulemaking necessarily moots a petitioner's claim of unreasonable delay if that claim is based upon (1) a period of delay occurring prior to the agency's issuance of a notice of proposed rulemaking, and (2) a matter that the agency proposes to regulate in that rulemaking.

*In re Int'l Union, United Mine Workers of America*, 231 F.3d 51,54 (D.C. Cir. 2000). Similarly, if sufficiently confined by a fixed deadline such as a court-sanctioned settlement, an NPRM that would sufficiently alter a reviewing court's legal analysis with the agency's proposed "complete reversal of course" could render judicial review prudentially unripe. *American Petroleum Institute v. E.P.A.*, 683 F.3d 382, 388-89 (D.C. Cir. 2012). Without an NPRM, however, these mootness and ripeness issues simply do not arise. *See* Sections II.B, II.C *infra.* On balance, then, the district court's conclusion that the ANPRM can terminate the Colleges' right to judicial review is unsupportable.

### D. The Safe Harbor Does Not Alter the Contraceptive Mandate

For purposes of justiciability, the parties and the district court dispute the

extent to which the "Safe Harbor" undermines the Colleges' standing and the ripeness of this action. *See* Sections II.A, II.B, *infra.* In this section, *amicus* Eagle Forum questions whether the "Safe Harbor" provides any "safety" *at all.*

Because safe harbors bind the promulgating agency, the APA requires notice-and-comment rulemaking to promulgate a safe harbor. *See General Elec. Co. v. E.P.A.*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (*quoting* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992)). Similarly, under *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), four criteria trigger the requirement for notice-and-comment rulemaking: (1) whether the rules provide adequate legislative authority, absent the rule, for the same result; (2) whether the agency promulgated the rule into the C.F.R.; (3) whether the agency invoked its general legislative authority; and (4) whether the rule effectively amends prior legislative rules. By effectively amending the Contraceptive Mandate, the "Safe Harbor" required a rulemaking.[3]

[3] The fact that the Administration was "not required by law to promulgate any rules limiting its discretion" does not undermine the fact that the Administration "was nonetheless bound by [APA] when it decided to do so." *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918 (D.C. Cir. 1982).

On the other hand, however, the Administration may argue that the "Safe Harbor" is merely an enforcement policy, which is exempt from APA notice-and-comment requirements as a "general statement of policy." 5 U.S.C. §553(b)(A). Significantly, such enforcement statements are not entitled to deference when an agency relies on them to resolve a future substantive question because, logically, the future action (not the initial statement) is the final agency action. *Pacific Gas & Elec. Co. v. F.P.C.*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Moreover, unlike interpretive rules, agencies can change policy statements at will, without rulemaking. *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Prof'l Hunters Ass'n, Inc., v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Syncor*, 127 F.3d at 94-95. Under this view, however, the "Safe Harbor" would not bind either public or private litigants in the future:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

*F.C.I.C. v. Merrill*, 332 U.S. 380, 384 (1947). Such a non-binding policy cannot, therefore, carry the load that the district court had the "Safe Harbor" carry in making the Colleges' ripe action somehow unripe.

Either the "Safe Harbor" is an administrative nullity for failure to comply with the APA's notice-and-comment rulemaking or the "Safe Harbor" is merely a

non-binding enforcement policy that – while it required no APA process – the Administration can change (or ignore) at will. In either case, the "Safe Harbor" cannot affect the justiciability of a challenge to the Contraceptive Mandate.

## II. THE COLLEGES HAVE STANDING AND BRING A RIPE CHALLENGE TO THE CONTRACEPTIVE MANDATE

The three inter-related doctrines of standing, ripeness, and mootness all arise in Article III's requirement that federal courts confine themselves to cases and controversies. *Worth v. Jackson*, 451 F.3d 854, 855 (D.C. Cir. 2006). The doctrines "relate in part, and in different though overlapping ways, to an idea … about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). By the same token, however, the principles of justiciability cannot be misused to avoid a justiciable question today because deferring review might be convenient. As Chief Justice Marshall put it, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Here, the district court's dismissal on jurisdictional grounds improperly rejected the Colleges' justiciable controversy with the Administration over the Colleges' right to avoid violating the tenets of their religious faith to comply with a procedurally defective and substantively unlawful final rule.

### A. The Colleges Have Standing

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The plaintiff's injury must involve "a legally protected interest" and its "invasion [must be] concrete and particularized" and "affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560-61 & n.1. For standing, an "injury-in-fact" includes both injury and threatened injury, *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), which "need not be to economic or … comparably tangible" interests. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1547-48 (D.C. Cir. 1989). Under the prudential "zone of interest" test, the plaintiff's injury must be "*arguably* within the zone of interests to be protected … by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998) (Court's emphasis and alteration, *quoting Ass'n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) ("*N.C.U.A.*"). Standing must satisfy both the constitutional and prudential tests.

Although an abstract or generalized interest (*e.g.*, ensuring proper government operation and general compliance with the law) cannot *establish* standing, the mere fact that many people share an injury cannot *defeat* standing. *FEC v. Akins*, 524 U.S. 11, 23 (1998). Moreover, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all

grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Thus, the Colleges can challenge the Administration's action for any unlawfulness, once the Colleges establish their standing to challenge that action. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing). Under these familiar tests, the Colleges plainly have standing to challenge the Administration's imposition of economic and administrative burdens, without complying with the procedural requirements for making law or regulations.

### 1. The Colleges Have Standing Based on Financial Costs and Administrative Burdens Imposed by the Contraceptive Mandate

The Contraceptive Mandate plainly imposes financial and administrative burdens on the Colleges, not only in the future but also now. If nothing else, under the Administration's view of the case, the Colleges must devote time to completing the certification and providing notice in order to avail themselves of the "Safe Harbor." Even those burdens cost money, and the imposition of such burdens plainly qualifies as an injury. *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976). Unlawful administrative burdens "[c]learly… me[e]t the constitutional requirements, and… [the Colleges] therefore ha[ve] standing to

assert [their] own rights," the "[f]oremost" of which is the "right to be free of arbitrary or irrational [agency] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Moreover, it is plain that requiring insurers to provide contraceptives for free will raise the cost of the underlying insurance package. *United Transp. Union v. I.C.C.*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989) ("courts routinely credit" "basic economic logic" for standing). By whatever amount the Colleges must devote to the Contraceptive Mandate now or whatever amount extra they will pay for insurance later, the Colleges plainly have standing to challenge the Mandate.

Even if the economic or administrative burden is trivial, the burden provides a sufficient basis for standing:

> The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax. While these cases were not dealing specifically with [§10] of the APA, we see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.'

*U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S.

669, 689 n.14 (1973) (citations omitted). Summing up, the Court indicated that the "basic idea … is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Id.* (interior quotations omitted); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1547-48 (D.C. Cir. 1989) (same).[4]

In addition, the Contraceptive Mandate also regulates and burdens the terms on which the Colleges may interact with third parties, which represents a distinct type of first-party (not third-party) injury that *directly* impairs the freedom to interact with others. Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.*, 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan, *supra*); *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407, 422-23 (1942); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.*, 843 F.2d 517, 524 (D.C. Cir. 1988). Here, "the legal right … asserted – the right not to be injured by unauthorized agency action – [is] their own," *Gracey*, 809 F.2d at 811

[4] Even if *SCRAP* is standing's high-water mark, lower courts must follow it until the Supreme Court overturns it. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

n.13, and the Colleges have standing to assert that right directly.

### 2. The Colleges Have Procedural Standing, Which Reduces the Immediacy Required for Standing

The Colleges challenge the Administration's failures to observe procedural safeguards, for which "those adversely affected … generally have standing to complain." *Akins*, 524 U.S. at 25 (citing cases). Rescission and remand may produce the same result, *id.*, but until that happens, the initial injury remains "fairly traceable" to the agency's initial action, and redressable by an order striking the initial agency action, *id.* Although *FEC v. Akins* did not involve a rulemaking violation, this Circuit has extended its causation and redressability rationale to such violations. *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (*en banc*) ("*ALDF*"). Plaintiffs need not show that a rulemaking will provide the desired result: "If a party claiming the deprivation of a right to notice-and-comment rulemaking . . . had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

Only if the Colleges have substantive standing do they also have procedural standing for injuries such as the denial of the APA-mandated rulemaking. *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) ("procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural

breach will cause the essential injury to the plaintiff's own interest") (*en banc*); *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7 (only parties with an underlying *concrete* interest – *e.g.*, those living next to a proposed dam – can base standing on *abstract* procedural rights). Here, the Colleges meet the threshold test, *see* Section II.A.1 *supra*, and thus also can assert procedural standing.

Given the clear procedural violations here, *see* Section I, *supra*, the Colleges have procedural standing, in addition to the substantive standing outlined in Section II.A.1, *supra*. This procedural standing does not redundantly *double* the Colleges' standing to challenge the Contraceptive Mandate. Instead, procedural standing *relaxes* the standing inquiry's redressability and immediacy requirements. *Defenders of Wildlife*, 504 U.S. at 572 n.7 (procedural-rights plaintiffs "can assert that right without meeting all the normal standards for redressability and immediacy"); *Wyo. Outdoor Council v. U.S.F.S.*, 165 F.3d 43, 51 (D.C. Cir. 1999) (in procedural rights cases, the "necessary showing" for the "constitutional minimal of injury-in-fact, causation, and redressability ... is reduced"). Thus, given the Colleges' concrete injuries, redressability and immediacy apply to the *present procedural violation*, which may someday injure the concrete interest, rather than to the concrete (but less certain) future substantive injury. *Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Here, the Administration's procedural failure to convene rulemakings under §553(b) thus

make it *easier* to prove the substantive injuries, which undermines the district court's contrary rulings on the immediacy required by Article III.

### 3. The Colleges' Injuries Are Within the Relevant Zones of Interest of the Statutory and Constitutional Protections

Standing's "zone-of-interest" test is a prudential doctrine that asks whether the interests to be protected *arguably* fall within those protected by the relevant statute. *N.C.U.A.*, 522 U.S. at 492. The test asks whether a plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Camp*, 397 U.S. at 153. This generous and undemanding test focuses not on Congress' intended beneficiary, but on those who in practice can be expected to police the interests that the statute protects. *ALDF*, 154 F.3d at 444; *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 52 (D.C. Cir. 1983) ("the relatively rigorous requirements for establishing congressional intent to create a private right of action should not be equated with the 'slight' indicia standard under the 'zone' test") (footnote omitted).

But even if the Colleges' injuries somehow were not even arguably within the statute's zone of interests, the Colleges still would satisfy the zone-of-interest test here for the Administration's *ultra vires* rulemaking procedures. *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); *cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 812 (D.C. Cir. 1987). In essence, the zone-of-interest test either does not apply or implicates zone of interests of the overriding

constitutional issues raised by a lawless agency:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

*Gracey*, 809 F.2d at 812 n.14; *accord Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989). By acting outside its authority, the Administration purports to make law without the constitutional process for making law, violating "the separation-of-powers principle, the aim of which is to protect … the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991). With the Administration acting outside its authority (*i.e., ultra vires*),[5] the zone of interest test would not limit standing, even if the Colleges fell outside the statutory zones of interests.

### B. The Colleges' Claims Are Ripe

Like standing, ripeness has a constitutional and a prudential component,

[5] *Ultra vires* means that the "officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). Here, the APA requires rulemakings (or a valid exception to a rulemaking) before an agency promulgates legislative rules. *See* 5 U.S.C. §553.

with the constitutional component essentially mirroring the constitutional standing component of a case or controversy. U.S. CONST. art. III, §2; *DKT Memorial Fund Ltd. v. A.I.D.*, 887 F.2d 275, 298 (D.C. Cir. 1989). If plaintiffs have constitutional standing, their claims are constitutionally ripe, and vice versa.

As the Colleges point out, Colleges' Br. at 24-26, the Administration's tinkering is at the margins and, at best, involves only minor timing issues. For ripeness purposes, it is immaterial whether the Colleges will hit this wall in 2012, 2013, or 2014. The wall is there, and ripeness provides no barrier to litigating the wall's legality: "Where 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." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (*quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)); *accord Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 143 (1974). Here, there is no question that the Contraceptive Mandate will injure the Colleges.

**1. The Colleges' Procedural Claims Are Ripe**

The prudential-ripeness doctrines on which the district court relied do not apply to the Colleges' challenge to the Contraceptive Mandate's procedural defects because procedural injuries are extant today and can never get more ripe. *Ohio Forestry Ass'n, Inc., v. Sierra Club*, 523 U.S. 726, 737 (1998) (plaintiff "may

complain at the time … that failure … takes place, for the claim can never get riper"). Thus, whatever the Court decides about the Colleges' substantive claims, the Court should allow the Colleges to proceed on their procedural claims.

### 2. The Colleges' Substantive Claims Are Ripe

Working under a "presumption of reviewability," prudential ripeness for merits questions requires "pragmatic balancing" of two independent, but related, factors: (1) fitness for review (*i.e.*, "the interests of the court and agency in postponing review"), and (2) the hardship of postponing review (*i.e.*, plaintiffs' "countervailing interest in securing immediate judicial review"). *Ciba-Geigy*, 801 F.2d at 434; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Both factors favor review now.

#### a. The Colleges' Claims Are Fit for Review

Purely legal issues are presumptively fit for review, *AT&T Corp. v. FCC*, 349 F.3d 692, 699 (D.C. Cir. 2003); *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990), particularly where they "would not benefit from further factual development of the issues presented." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (interior quotations omitted); *Public Service Elec. & Gas Co. v. F.E.R.C.*, 485 F.3d 1164, 1168 (D.C. Cir. 2007) (same). Here, the issues in question are purely legal and depend only on the Administration's constitutional powers and statutory interpretation. Moreover, as

indicated, the Colleges' procedural claims are ripe now. It makes little institutional sense – from the perspective of judicial and litigant economy – to litigate only some of the issues raised here.

Finally, this case does not present the unique circumstances of *American Petroleum Institute* where the schedule is tightly controlled and the proposed future resolution would overturn the entire rule that was currently under review. *Compare American Petroleum Institute,* 683 F.3d at 388-89 (finding continued review unripe) *with American Petroleum Institute v. U.S. E.P.A.,* 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("[i]f the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely"). Thus, no facts remain to develop, and neither the Administration nor the courts have an interest in delaying review.

**b. The Hardship Prong Does Not Deny Review**

The hardship prong comes into play when a claim is not fit for review, such that the plaintiff "must demonstrate that postponing review will cause [it] 'hardship' in order to overcome a claim of lack of ripeness and obtain review of the challenged rule at this time." *Florida Power & Light Co. v. E.P.A.*, 145 F.3d 1414, 1420-21 (D.C. Cir. 1998). Indeed, when no institutional issues counsel for postponing review, the hardship prong is "unnecessary." *Public Service Elec. & Gas,* 485 F.3d at 1168; *Sabre, Inc. v. DOT,* 429 F.3d 1113, 1120 (D.C. Cir. 2005)

("absent institutional interests favoring the postponement of review, a petitioner need not show that delay would impose individual hardship to show ripeness"). Thus, "[s]ettled principles of ripeness require that [a court] postpone review of administrative decisions where (1) delay would permit better review of the issues while (2) causing no significant hardship to the parties." *Northern Indiana Public Service Co. v. FERC*, 954 F.2d 736, 738 (D.C. Cir. 1992) ("*NIPSCO*"). Here, neither *NIPSCO* factor applies: delay *would not* benefit review, but it *would* cause hardship. As such, the district court's ripeness arguments are doubly misplaced.

### C. The Colleges' Claims Are Not Moot

Shorn of this Circuit's recent, unique, and inapposite precedent on ripeness, *American Petroleum Institute*, 683 F.3d at 388-89, the Administration's arguments are readily recognizable as claiming mootness based on the defendant's voluntary cessation of the challenged conduct, which has nothing to do with either standing or ripeness. As the district court implicitly recognized by not even addressing mootness, the Administration cannot prevail here. First, the ANPRM and Safe Harbor do not even moot all of the injuries that the Colleges suffer. Second, as the Colleges explain, the Administration cannot meet the "formidable burden of showing that it is absolutely clear [their] allegedly wrongful behavior could not reasonably be expected to recur." Colleges Br. at 18 (*quoting Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 189-90 (2000)). Third, this Court's

allowing an ANPRM to moot a merits challenge would run directly counter to Circuit precedent that *conditionally* allows an actual NPRM to moot unreasonable-delay claims. See *United Mine Workers*, 231 F.3d at 54 (quoted in Section I.C, *supra*). This Court should recognize the Administration's challenge to justiciability for what it is – an argument for mootness – and reject it accordingly.

## CONCLUSION

For the foregoing reasons and those argued by the Colleges and the other *amici* in support of the Colleges, this Court should reverse the district court.

Dated: October 12, 2012

Respectfully submitted,

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## BRIEF FORM CERTIFICATE

Pursuant to FED. R. APP. P. 32(a), I certify that the foregoing brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 5,785 words, including footnotes, but excluding this Brief Form Certificate, the Corporate Disclosure Statement, the Statement with Respect to Parties and *Amici*, the Table of Authorities, the Table of Contents, the Glossary, and the Certificate of Service. I have relied on Microsoft Word 2010's word calculation feature for the calculation.

Dated: October 12, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of October, 2012, I have caused the foregoing *amicus curiae* brief to be served on the parties' counsel of record via the Court's CM/ECF System.

/s/ Lawrence J. Joseph

Lawrence J. Joseph