Nos. 12-5273 & 12-5291

In The
United States Court of Appeals
For the District of Columbia Circuit

WHEATON COLLEGE AND BELMONT ABBEY COLLEGE,

Appellants,

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,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

Brief of the States of Texas, Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Michigan, Nebraska, Ohio, Oklahoma, South Carolina, and Virginia as Amici Curiae in Support of Appellants

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-0596
Fax: (512) 474-2697
adam.aston@texasattorneygeneral.gov

COUNSEL FOR AMICI CURIAE
[ADDITIONAL COUNSEL LISTED INSIDE COVER]

LUTHER STRANGE
Attorney General of Alabama

JOHN W. SUTHERS
Attorney General of Colorado

PAMELA JO BONDI
Attorney General of Florida

SAM OLENS
Attorney General of Georgia

LAWRENCE G. WASDEN
Attorney General of Idaho

GREGORY F. ZOELLER
Attorney General of Indiana

BILL SCHUETTE
Attorney General of Michigan

JON BRUNING
Attorney General of Nebraska

MICHAEL DEWINE
Attorney General of Ohio

E. SCOTT PRUITT
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

Rulings Under Review

The three rulings under review are listed in the Brief for Appellants and produced in the Joint Appendix: JA 63, JA 108, JA 264.

Related Cases

The Brief for Appellants listed 28 cases currently pending in federal district courts and courts of appeals. Amici States are not aware of any other pending cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

The States have a keen interest in ensuring that religious liberties are respected and protected by governments at every level. The HHS mandate, even with the temporary federal enforcement safe harbor, has created tremendous uncertainty for employers in the amici States, as demonstrated by the significant volume of litigation now pending in courts across the country. The district courts' judgments dismissing the Colleges' cases and delaying the resolution of their First Amendment and statutory challenges will only increase the uncertainty felt by the Colleges and countless similar employers in the amici States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (the "Affordable Care Act") of 2010 instituted numerous changes to the Nation's health care and health insurance systems. *See* Pub. L. No. 111-148, 124 Stat. 119 (2010). Those changes included the mandate that all "group health plan[s]" cover "preventive care and screenings" for women without cost-sharing. 42 U.S.C. § 300gg-13(a)(4). The Department of Health and Human Services ("HHS") subsequently adopted a definition for "preventive services" to include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures . . ."

HEALTH RESOURCES AND SERVICES ADMINISTRATION, HHS, WOMEN'S PREVENTIVE SERVICES: REQUIRED HEALTH PLAN COVERAGE GUIDELINES (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/. Contraceptives approved by the FDA include the drugs levonorgestrel (commonly known as Plan B or the morning-after pill) and ulipristal acetate (commonly known as Ella or the week-after pill). Under the Affordable Care Act, an employer's failure to provide insurance coverage for these products triggers enormous fines. *See* 42 U.S.C. § 300gg-13(a)(4); 26 U.S.C. § 4980D(b); 26 U.S.C. § 4980H(a), (c)(1). Moreover, plan participants may sue under ERISA for an employer's failure to cover the mandated products and services. *See* 29 U.S.C. §§ 1185d(a)(1), 1132(a)(1)(B).

A limited exemption from the contraception and sterilization coverage mandate exists for "religious employers," a term defined narrowly to include only internally focused churches and religious orders. 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011), codified at 45 C.F.R. § 147.130(a)(1)(iv)(B). Belmont Abbey College does not qualify for this exemption, and it filed suit against the Departments of Health and Human Services, Labor, and Treasury ("the Departments") on

November 10, 2011. JA 8–33. Faced with mounting public pressure and lawsuits, HHS issued a "Temporary Enforcement Safe Harbor" stating that the Departments will not enforce the mandate against certain organizations religiously opposed to covering contraception. *See* Add. 69. Critically, however, the mandate remains in effect even during the safe-harbor period, as the Departments have acknowledged. *See* Add. 76; JA 192, 225–26. Moreover, Appellant Wheaton College did not qualify for the safe harbor, because it had previously covered certain emergency contraceptives by error in its health plan. JA 147–48, 165–68. Wheaton College filed suit challenging the mandate on July 18, 2012. JA 130–61. In response to the lawsuit, the government expanded the temporary safe harbor to include Wheaton College. *See* Add. 75–81; JA 192, 250 n.4.

The district courts dismissed the Colleges' suits for lack of standing and on ripeness grounds. JA 64–87 (dismissal of Belmont Abbey College suit); JA 246, 263–64 (dismissal of Wheaton College suit). This was error, because a temporary and partial reprieve (even with the accompanying possibility that the Departments might revise the mandate in the future) is plainly insufficient to render the Colleges'

suits either unripe or moot. The reprieve is only a partial one, because the safe harbor extends only to government enforcement of the mandate and accompanying penalties for non-compliance—the mandate remains in effect even today. Thus, the Colleges are suffering present harms as a result of the mandate. *See* JA 19–20, 142–43; Appellants' Br. 53–57. And the reprieve, by its plain terms, is a temporary one. Rather than provide anything close to a guarantee that the Colleges will be permitted to remain faithful to their religious convictions unencumbered by substantial financial penalties, the federal government has merely solicited "questions and ideas" that might lead to a future accommodation. 77 Fed. Reg. 16503.

ARGUMENT

The Colleges' Brief for Appellants demonstrates that the claims remain ripe, Appellants' Br. 38–57, and are not moot, *id.* at 26–38, even in light of the hastily created (and then updated) temporary enforcement safe harbor. The amici States will not re-argue the points raised in the Colleges' brief; rather, they will provide a few brief additional arguments supporting the reversal of the judgments below.

I. THE COLLEGES' SUITS CHALLENGING THE HHS MANDATE ARE RIPE.

The district courts in these cases determined that the challenges to the Departments' mandate raised by Wheaton College and Belmont Abbey College are not ripe, because—after each College filed suit—the Departments announced that they would not enforce the mandate against the Colleges for one additional year. The decisions below were based upon a misunderstanding of the ripeness requirement.

The ripeness inquiry turns on two factors: "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), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1997). In *Abbott*, the Supreme Court explained that a pre-enforcement challenge to federal Food, Drug, and Cosmetic Act regulations was ripe because the regulations were "quite clearly definitive," *id.* at 151; the regulations "were made effective immediately upon publication," *id.* at 152; and "[t]here was no hint that th[e] regulation [was] informal," *id.* at 151.

The HHS mandate and narrow "religious employer" exemption were finalized "without change" on February 15, 2012. 77 Fed. Reg.

8725, 8730. And in acknowledging that the mandate is currently in effect, *see* Add. 76; JA 192, 225–26, the Departments concede, as they must, that the contraception and sterilization coverage mandate is a final rule. In determining finality, " '[s]uch regulations have the force of law before their sanctions are invoked as well as after.' " *Abbott*, 387 U.S. at 150 (quoting *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 418–19 (1942)). " 'When as here [regulations] are promulgated . . . and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack[.]' " *Id.*; *see also Columbia Broad.*, 316 U.S. at 420 ("The regulations' applicability to all who are within their terms does not depend upon future administrative action.").

Despite this, the Departments would have this Court hold that each College's claims were unripened when the Departments announced a one-year safe harbor from federal enforcement and suggested that a future "accommodation" might be made. *E.g.* JA 72 (The district court in Belmont Abbey's case explained that "Defendants contend that this Court does not have jurisdiction to decide Plaintiff's claims because . . . the regulation Belmont seeks to invalidate may well

be amended to address the concerns of Plaintiff and similarly situated organizations before it is enforced, thereby absolving the need for judicial intervention and rendering the matter unripe."). Speculation over possible changes to an already-finalized rule cannot render unripe challenges to that rule.

In *American Paper Institute v. United States Environmental Protection Agency*, this Court was presented with a claim that a case was not ripe because the EPA was "currently considering" whether to amend a rule governing sources of water pollution. 996 F.2d 346, 354 n.8 (D.C. Cir. 1993). The Court rejected that speculative argument, explaining that "we have no way of knowing whether [the EPA] might change its mind down the road." *Id.* (citing *Abbott Labs.*, 387 U.S. at 148–50). Similarly, the Tenth Circuit rejected an argument that when a State instituted proceedings to change a statute it rendered unripe a challenge to the statute, explaining that the current statute "had the force of law and had been applied to plaintiff in this case. Even though defendant began proceedings to change the statute, those proceedings did not lessen the force of the statute, and there was no guarantee that

defendant would actually alter the provision." *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1484 (10th Cir. 1995).

Here, there is anything but a guarantee that the Departments will permanently relieve the Colleges from the injuries caused by the mandate. First, even in soliciting public comments regarding a possible future accommodation, the Departments rejected the possibility of simply expanding the "religious employer" exemption to include employers like the Colleges. 77 Fed. Reg. 16503. It is telling that the Departments will not even consider the clearest remedy for the Colleges' injuries. Second, the comment period was initiated more than six months ago (March 21, 2012) and concluded nearly four months ago (June 19, 2012), yet the federal government has not proposed any accommodation. The "promise" of a reprieve for the Colleges thus rings hollow. *Cf.* JA 79 (The district court dismissed Belmont Abbey's claim because an amendment is "not only promised but underway.").

***

A regime whereby the federal government may delay judicial review of an agency's final rule merely by temporarily displacing some of the injuries caused by the rule is a system that begs for

gamesmanship and abuse. The district courts' judgments endorsing just such a system should be reversed.

II. THE DEPARTMENTS' ACTIONS HAVE NOT MOOTED THE COLLEGES' CLAIMS.

As the Colleges have demonstrated, the Departments' attempts to evade judicial review of the HHS mandate are properly reviewed under the mootness doctrine. Appellants' Br. 17–21. And the Departments' provision of a temporary, partial reprieve from the mandate falls far short of mooting the Colleges' claims. *Id.* at 26–38.

The Departments' efforts to have these cases improperly dismissed on standing and ripeness grounds are an attempt to avoid satisfying the "heavy burden" of "demonstrating 'that there is no reasonable expectation that the wrong will be repeated.'" *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (quotations omitted).

As the Supreme Court once again explained last term, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Id.* (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). In *Knox*, the Court explained that because the union continued to defend the legality of its challenged conduct, "it is not clear why the union would necessarily refrain from [repeating the conduct] in the future." *Id.* The same is true for the Departments here. By refusing to define "religious employer" in a manner that would exempt all employers with religious convictions from the contraception and sterilization mandate, the Departments maintain that the HHS mandate may trump the First Amendment rights of numerous American employers. This, along with the lack of any progress towards an amendment to the mandate that will protect the Colleges' religious liberties, counsels against a dismissal of the Colleges' claims.

Given the substantial First Amendment and statutory claims raised by the Colleges in these cases, the federal government's desire to avoid judicial review of the contraception and sterilization coverage

mandate is understandable. But the only avenue available for the Departments to obtain that result is to moot the Colleges' claims by actually providing a permanent, complete exemption from any requirement that the Colleges pay for products and services that are incompatible with the Colleges' sincerely held religious beliefs. The temporary and partial measures proffered in the one-year safe harbor and the speculative "accommodation" possibility fall far short of the mark. The Colleges are entitled to prompt consideration of their claims, and the district courts' judgments holding otherwise should be reversed.

CONCLUSION

The Court should reverse the district courts' judgments dismissing the Colleges' cases, and it should also vacate the district court's judgment denying Wheaton's motion for a preliminary injunction. The cases should be remanded to the district courts.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

/s/ Adam W. Aston
Adam W. Aston
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-0596
Fax: (512) 474-2697

COUNSEL FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

Under D.C. Circuit Rule 32(a)(4), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B).

1. Exclusive of the exempted portions, the brief contains 2042 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 10 for Windows in Century Schoolbook 14-point font.

3. I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Federal Rule of Appellate Procedure 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Adam W. Aston
Adam W. Aston

CERTIFICATE OF SERVICE

I certify that on October 12, 2012, I served the foregoing Amicus Brief in Support of Appellants on all parties who are registered with the Court's CM/ECF system by filing the document on that system, and other parties, if any, by delivering two copies of the brief by Federal Express for next-day delivery.

/s/ Adam W. Aston
Adam W. Aston