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An Empty Promise? *Wheaton College v. Sebelius* and its Policy Implications on Impending PPACA Litigation

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I. INTRODUCTION

Chief Justice Earl Warren wrote, "the 'many subtle pressures' which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours."[1] Indeed, while the justiciability doctrine restricts federal adjudication, in part, to actual disputes between adverse litigants, recent litigation challenging the Department of Health and Human Services Mandate (HHS Mandate) under the Patient Protection and Affordable Care Act (PPACA) substantiates Justice Warren's conclusion policy considerations commonly influence Article III's justiciability doctrine.[2]

In *Wheaton College v. Sebelius*, the United States District Court for the District of Columbia considered policy in holding the federal government's commitment not to enforce the HHS Mandate sufficiently eradicated Wheaton College's standing.[3] Accordingly, *Wheaton College* has

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1. *Flast v. Cohen*, 392 U.S. 83, 97 (1968). Not every case before a federal district court is suitable for adjudication on the merits. *Id.* "Justicability" concerns case requirements for a federal court to adjudicate on the merits. *Id.* While Article III does not explicitly outline a "justiciability doctrine," judicial interpretation of Article III's case-and-controversy doctrine requires, *inter alia*, "justiciability" for federal adjudication. *Id.*

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1101, 124 Stat. 119, 124 (2010) [hereinafter PPACA]. PPACA Section 1101 provides regulatory authority for the HHS Mandate. *Id.; see also Wheaton Coll. v. Sebelius*, No. 1:12CV1169(ESH), 2012 WL 3637162, at 4 (D.D.C. Aug. 24, 2012).

3. *Wheaton Coll.*, 2012 WL 3637162, at 4, 7; *see also About HHS*, HHS.GOV, http://www.hhs.gov/about (last visited Oct. 27, 2012). The Department of Health and

significant policy implications for over 100 plaintiffs comprising thirty-six pending federal lawsuits challenging the HHS Mandate's constitutionality, as litigants must overcome both changing policy considerations, as well as Article III's constitutional limitations to reach a judgment on the merits.[4]

This article will explore *Wheaton College's* implications surrounding the federal government's commitment not to enforce the HHS Mandate. Section II will provide background to the HHS Mandate and Wheaton College's aforementioned complaint. Section III will discuss the court's judgment dismissing Wheaton's case for lack of standing and ripeness. Finally, section IV will analyze *Wheaton College's* policy implications for the thirty-six pending federal lawsuits challenging the HHS Mandate, and *Wheaton College's* effect on the PPACA's foundation for universal coverage in the United States.[5]

II. THE HHS MANDATE AND THE WHEATON COLLEGE COMPLAINT

PPACA Section 1001 appended Section 2713(a)(4) to the Public Health Service Act (PHS Act).[6] Concisely, Section 2713(a)(4) requires all non-

Human Services is the federal agency tasked with providing essential human services and protecting individual health throughout the United States. *Id.*

3. *Wheaton Coll.*, 2012 WL 3637162, at 4; *see also HHS Mandate Information Central*, BECKETFUND.ORG, http://www.becketfund.org/hhsinformation central (last visited Oct. 27, 2012) [hereinafter *HHS Mandate Information Central*] (listing the 36 pending HHS Mandate challenges by federal circuit).

4. *Wheaton Coll.*, 2012 WL 3637162, at 4; *see also HHS Mandate Information Central*, BECKETFUND.ORG, http://www.becketfund.org/hhsinformation central (last visited Oct. 27, 2012) [hereinafter *HHS Mandate Information Central*] (listing the 36 pending HHS Mandate challenges by federal circuit).

5. Madison Park, *Where in the World Can You Get Universal Health Care*, CNN.COM, http://www.cnn.com /2012/06/28/health/countries-health-care/index.html (last visited Oct. 25, 2012) [hereinafter *Where in the World*]. The PPACA did not provide universal coverage in the United States. *Id.* Instead, the PPACA established the underpinnings for future universal coverage legislation in the United States. *Id.*

6. CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, 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, SECTIONS 715(A)(1) OF THE EMPLOYEE RETIREMENT INCOME ACT, AND SECTION

grandfathered group health plans, and issuers of group or individual plans, to provide "preventive care" and screening to women beneficiaries without cost sharing.[7] Section 2713(a)(4) provided regulatory authority to the Health Resources and Services Administration (HRSA) establishing comprehensive guidelines defining "preventive care" under the PHS Act.[8]

Accordingly, on August 1, 2011, after amending the guidelines to exempt religious employers, HRSA issued comprehensive guidelines, known as the HHS Mandate, defining "preventive care" as, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[9] Thus, the HHS Mandate required all non-grandfathered, non-exempt health insurance issuers provide contraceptive coverage in compliance with HRSA guidelines for plan years beginning on or after August 1, 2012.[10]

9815(1)(1) OF THE INTERNAL REVENUE CODE 1 (2012) [hereinafter GUIDANCE ON TEMPORARY ENFORCEMENT], http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

7. *Id.*; Bernadette Fernandez, *Grandfathered Health Plans Under the Patient Protection and Affordable Care Act (PPACA)* CONG. RESEARCH SERV. 1 (2011), http://www.ncsl.org/documents/health/grandfatheredplans.pdf. Under the HHS Mandate, a health insurance plan is considered "grandfathered" if the beneficiary was enrolled in the existing plan before March 23, 2010. *Id.*

8. 42 U.S.C. § 300gg-13(a)(1)-(4) (2012); GUIDANCE ON TEMPORARY ENFORCEMENT, *supra* note 6.

9. *Women's Preventive Services: Required Health Plan Coverage Guidelines*, U.S. DEP'T OF HEALTH & HUMAN SERVS. HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Oct. 5, 2012) [hereinafter *Women's Preventive Services Guidelines*]. "The Health Resources and Services agency (HRSA) of the U.S. Department of Health and Human Services, is the primary Federal agency for improving access to health care services for people who are uninsured, isolated or medically vulnerable." *Id.* HRSA affirmed the regulatory objective of the guideline was "developed by the Institute of Medicine (IOM) [to] help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible." *Id.*

10. *Id.* On July 19, 2010, the Department of Health and Human Services released interim final regulations without an exemption for religious employers. GUIDANCE ON TEMPORARY ENFORCEMENT, *supra* note 6. However, in response to comments, HRSA amended the interim final regulations to provide an exemption for religious employers objecting coverage of contraceptive services on religious grounds. *Id.* A religious employer: "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who

On January 20, 2012, HHS reaffirmed the religious employer exemption, but outlined a temporary enforcement safe-harbor for all non-grandfathered, non-exempt health insurance issuers of group plans objecting to HRSA guidelines on religious grounds.[11] The safe-harbor provided objecting institutions one additional year for its group health plans to comply with HRSA guidelines.[12] In the interim, HHS promised to amend the HRSA guidelines to both "provid[e] contraceptive coverage without cost-sharing to individuals who want it and accommodat[e] non-exempted, non-profit organizations' religious objections to covering contraceptive services".[13] In other words, HHS promised to void HHS Mandate enforcement until August 1, 2013 and amend the HHS Mandate in the interim.[14]

After the safe-harbor announcement, Wheaton College declared it qualified for and would self-certify under the temporary safe-harbor.[15] As a qualified institution, Wheaton College would not be subject to HHS Mandate enforcement until the first plan year beginning on or after August 1, 2013.[16] Nonetheless, Wheaton filed suit against HHS in the United States District Court for the District of Columbia challenging the HHS Mandate's constitutionality.[17] Wheaton's complaint declared, "Wheaton's

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share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." *Id.*

11. GUIDANCE ON TEMPORARY ENFORCEMENT, *supra* note 6. In order to qualify for an objection, each religious institution must not have covered HRSA approved contraceptives from February 10, 2012 onward. *Id.*

12. *Id.*

13. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,727 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590 & 45 C.F.R. pt. 147).

14. *Id.*

15. *Wheaton Coll.*, 2012 WL 3637162, at 2.

16. *Id.*

17. *Id.*

religious beliefs forbid it from participating in, providing access to, paying for, training other to engage in, or otherwise supporting abortion."[18] Wheaton asserted violations of the Religious Freedom Restoration Act, the First Amendment of the United States Constitution, and the Administrative Procedure Act.[19]

III. THE DISTRICT COURT'S JUDGMENT

On August 24, 2012, the United States District Court for the District of Columbia granted HHS's motion to dismiss on each of Wheaton College's claims for lack of standing and ripeness.[20] To establish standing, the court stated Wheaton College needed to prove the HHS Mandate caused it a "concrete and particularized" and "actual or imminent" injury in fact.[21] The court determined Wheaton failed to demonstrate injury because: (1) Wheaton qualified for and self-certified under the temporary "safe-harbor" voiding HHS Mandate enforcement for one additional year; and (2) HHS vowed to amend the HHS Mandate precisely in order to accommodate Wheaton's concerns.[22] Moreover, the court denied Wheaton's claim potential ERISA lawsuits attempting to enforce the preventive services regulations were "certainly impending" injuries.[23] Thus, the court

18. Complaint at 1, Wheaton Coll. v. Sebelius, No. 1:12CV1169(ESH), 2012 WL 3637162, at 4 (D.D.C. Aug. 24, 2012). *Wheaton Coll.*, 2012 WL 3637162 (No. 1:12CV1169(ESH)).

19. *Id.*

20. *Wheaton Coll.*, 2012 WL 3637162, at 9.

21. *Id.* at 4.

22. *Id.* at 6, 9. The court further stated, "Wheaton College may therefore continue to offer its current health plans, which do not cover Plan B and Ella, for the upcoming plan year without fear of government interference." *Id.* at 9.

23. *Id.*; *See* 29 USCS § 1002; *See also The Employee Retirement Income Security Act (ERISA)*, DOL.GOV, http://www.dol.gov/compliance/laws/comp-erisa.htm#.UIwmscWHKSo (last visited Oct. 27, 2012) [hereinafter ERISA]. The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law setting minimum standards for pension plans. *Id.* ERISA requires plans to regularly provide participants with information about the plan including information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding. *Id.* ERISA also guarantees payment of

concluded Wheaton College lacked standing because it failed to establish a "concrete and particularized. . . certainly impending" injury in fact.[24]

To establish ripeness, the court stated Wheaton College needed to prove: (1) the fitness of each issue for judicial review; and (2) the extent to which withholding a decision would cause it hardship.[25] The court determined because the federal government would not enforce the HHS Mandate for one additional year while the HHS Mandate was amended, the preventive services regulations were, by definition, a "tentative agency position" unfit for judicial review.[26] Further, the court dismissed Wheaton's undue hardship assertion stating undue hardship "will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions."[27] Consequently, the district court granted HHS's motion to dismiss on each of Wheaton College's claims.[28]

IV. WHEATON COLLEGE'S IMPLICATIONS FOR CURRENT HHS LITIGANTS

Wheaton College substantiates Justice Warren's conclusion federal courts commonly take policy into consideration when adjudicating on the merits.[29] Particularly, *Wheaton College* has considerable implications for over 100 plaintiffs comprising 36 pending federal lawsuits challenging the HHS Mandate's constitutionality because when government "deliberation" becomes a "promise" not to enforce remains ambiguous. Further, a government "promise" not to enforce does not eradicate the statute's

certain benefits through the Pension Benefit Guaranty Corporation, a federally chartered corporation, if a defined plan is terminated. *Id.*

24. *Wheaton Coll.*, 2012 WL 3637162, at 7.
25. *Id.*
26. *Id.* at 8.
27. *Id.*
28. *Id.* at 9.
29. *Flast*, 392 U.S. at 95 (1968); *compare Wheaton Coll.*, 2012 WL 3637162, at 9.

binding nature, exposing businesses to potential civil liabilities.[30] Such implications are particularly important for the PPACA's foundation for universal coverage in the United States.[31]

A. When "Deliberation" Becomes "Promise" is Problematic for Pending Litigants

Wheaton College is problematic for pending complainants challenging the HHS Mandate because exactly when government "deliberation" voiding statutory enforcement becomes a "promise" to govern accordingly remains unclear, yet is imperative in establishing standing in federal court.[32] In this case, the district court held Wheaton did not face "certainly impending" injury because it self-certified under the temporary safe-harbor such that the government "promised" not to enforce the HHS Mandate until the first plan year beginning on or after August 1, 2013.[33] Thus, since the government's vow not to enforce the HHS Mandate was the product of "a final decision," Wheaton failed to allege a "concrete and particularized. . .certainly impending" injury.[34]

However, *Wheaton College* did not address precisely *when* government "deliberation" becomes a "promise" of "sustained agency. . . represent[ing] a final decision," resulting in a problematic judgment for pending HHS Mandate litigants.[35] In this case, HHS publicly agreed not to enforce the Mandate on two occasions.[36] Yet, whether public deliberation is necessary, or merely sufficient, for a government "promise" to become a product of a

30. *HHS Mandate Information Central*, *supra* note 4; *see also Wheaton Coll.*, 2012 WL 3637162, at 9.

31. *Where in the Word*, *supra* note 5.

32. *Wheaton Coll.*, 2012 WL 3637162, at 4.

33. *Id.* The court further reasoned, "Wheaton College may therefore continue to offer its current health plans, which do not cover Plan B and Ella, for the upcoming plan year without fear of government interference." *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; *see also* GUIDANCE ON TEMPORARY ENFORCEMENT, *supra* note 6.

"final decision" remains ambiguous.[37] Therefore, while *Wheaton College* held the government "promise" not to enforce the HHS Mandate sufficiently eradicated Wheaton College's standing, the district court's judgment is problematic for over 100 pending litigants challenging the HHS Mandate because precisely when "deliberation" becomes a product of "sustained agency and public deliberation. . . represent[ing] a final decision" remains unclear, yet is imperative to establish "certainly impending" injury in fact.[38] In the absence of such impending injury, *Wheaton College* indicates pending complainants will lack standing in federal court.[39]

B. A "Promise" Voiding Enforcement does not Eradicate the Statute's Binding Nature and is also Problematic for Pending Litigants

Wheaton College indicates the government's vow not to enforce a given statute does not eradicate the statute's binding nature on those under the statute's jurisdiction.[40] This is problematic for pending litigants because even with an established government "promise" not to enforce, individuals and businesses are subject to civil liabilities without the ability to challenge the statute in federal court.[41] Wheaton College alleged even if the court found the government's pledge not to enforce the HHS Mandate a product of "sustained agency and public deliberation," it still faced "certainly impending" injury from the possibility of ERISA lawsuits attempting enforcement of the HHS Mandate's preventive services regulations.[42] However, the court stated, "Even crediting Wheaton's assertion that it is 'completely exposed' to such actions, it is well-established that the

37. *Wheaton Coll.*, 2012 WL 3637162, at 6.
38. *Id.* at 4.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.; see also* ERISA, *supra* note 23.

theoretical possibility of harm from current litigation does not, without more, confer standing."[43] Thus, *Wheaton College* indicates a government "promise" voiding statutory enforcement does *not* eradicate the statute's binding nature, yet, litigants must establish more than the "theoretical possibility" of harm to establish standing.[44]

On one hand, it is reasonable for federal courts to restrict organizations from raising legal challenges before the statute becomes the product of "sustained agency and public deliberation."[45] By allowing litigants to challenge statutes not yet the product of a "final decision," civil lawsuits in the United States district courts would increase.[46] In fact, in 2011, alone, civil filings in the United States district courts increased to 289,252, or two percent.[47] Allowing the federal courts to render a decision on a statute not yet a product of a "final decision" would likely increase civil litigation further in federal courts and permit the federal judiciary to interfere with the legislative process or even encourage federal adjudication on claims not fit for judicial review under Article III.[48]

Conversely, because *Wheaton College* indicates a "promise" not to enforce, but does not eradicate a statute's binding nature, its implications are problematic because it puts businesses directly at risk of civil liabilities without the ability to challenge the statute in federal court.[49] In other words, under the court's reasoning, a government "promise" voiding

43. *Wheaton Coll.*, 2012 WL 3637162, at 4.
44. *Id.*
45. SUPREME COURT OF THE UNITED STATES, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 14 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.
46. *Id.*
47. *Id.*
48. *Flast*, 392 U.S. at 95 (1968). Adjudicating on the merits of a case involving a statute not yet defined would present a number of justiciability issues including a lack of ripeness and the inability of the federal courts to render advisory opinions to other branches of government. *Id.*
49. *Wheaton Coll.*, 2012 WL 3637162, at 4.

statutory enforcement provides businesses with peace of mind the federal government will not carry out the statute, but since the "promise" does not eradicate the statute's binding nature, businesses may be exposed to civil liabilities by those challenging the business' compliance with the statute.[50] Under *Wheaton College*, such businesses will *not* have an applicable legal remedy in federal court until the statute becomes a product of "sustained agency and public deliberation."[51] In essence, the peace of mind the government "promise" not to enforce bestows to businesses is nullified by the fear of civil liabilities from lawsuits demanding statutory compliance.[52]

C. Wheaton College's Implications on the PPACA'S Foundation for Universal Coverage in the United States

Wheaton College's implications have particular importance regarding the PPACA's foundation for universal coverage in the United States because the PPACA has numerous employee mandates rendering businesses susceptible to future liabilities.[53] Since its enactment on March 23, 2010, PPACA initiates comprehensive health care reform on a 'roll-out' basis through 2014.[54] Meaning, while a particular PPACA requirement may not be in effect presently, the provision is still the product of binding statute.[55]

For example, in March 2012, the PPACA required any ongoing or new federal health programs to report racial, ethnic, and language data to HHS to reduce health care disparities.[56] Under the *Wheaton College* reasoning, if the government renders a "promise" voiding enforcement of this provision until March 2014 with the "promise" of amending said requirement in the

50. *Id.*
51. *Id.*
52. *Id.*
53. *What's Changing and When*, U.S. DEP'T HEALTH & HUMAN SERVS., http:// www.healthcare.gov/law/timeline/ index.html (last visited Oct. 5, 2012).
54. *Id.*
55. *Id.*
56. *Id.*

interim, businesses offering either new or existing health programs are obligated to abide by the statute's requirements; they are subject to civil liability for non-compliance, but are not provided a legal remedy to challenge the statute in federal court until the statute becomes the product of "final decision" in 2014.[57] Even in the presence of a government "promise" not to enforce, parties under the statute's jurisdiction are obligated to comply without the ability to challenge the statute in federal court.[58]

Accordingly, because *Wheaton College* indicates a "promise" does not eradicate the statute's binding nature, its implications are problematic for over 100 plaintiffs challenging the HHS Mandate, as litigants are obligated to abide by the HHS Mandate, are subject to civil liabilities for non-compliance, and are devoid ability to challenge the Mandate in federal court until it becomes the product of a "final decision."[59] Therefore, *Wheaton College* is problematic for current litigants because: (1) when government "deliberation" becomes a "promise" not to enforce remains unclear; and (2) a government "promise" not to enforce does not eradicate the statute's binding nature thus exposing businesses to potential civil liabilities.[60] Such implications are particularly important for the PPACA's foundation for universal coverage in the United States.[61]

V. CONCLUSION

As Justice Warren affirmed, "[j]usticiability is itself a concept of

57. *Id.*; *see also Wheaton Coll.*, 2012 WL 3637162, at 4.

58. *Wheaton Coll.*, 2012 WL 3637162, at 4; *see also* Kyle Duncan, *Not-So-Safe-Harbor*, NAT. REV. ONLINE (Sept. 6, 2012, 4:00 AM), http://www.nationalreview.com/articles/315995/not-so-safe-harbor-interview [hereinafter *Not-So-Safe-Harbor*]. "It's as if the government said, 'This law binds you, but we are not going to enforce the law's penalties against you for the time being.'" *Id.*

59. *Wheaton Coll.*, 2012 WL 3637162, at 4.

60. *Id.*

61. *Id.*

uncertain meaning and scope."[62] While the justiciability doctrine constitutionally restricts adjudication to cases asserting actual disputes between adverse litigants, Wheaton College's challenges to the HHS Mandate under the PPACA substantiates Justice Warren's notion policy considerations frequently enhance Article III's constitutional limitations for federal adjudication on the merits.[63] Therefore, *Wheaton College* has considerable implications for over 100 plaintiffs comprising 36 pending federal suits challenging the HHS Mandate and the PPACA's foundation for universal coverage in the United States.[64]

62. *Flast*, 392 U.S. at 95 (1968).
63. *Id.*; *see also Wheaton Coll.*, 2012 WL 3637162, at 4.
64. *Where in the World*, *supra* note 5.