ORAL ARGUMENT NOT YET SCHEDULED
Nos. 12-5273 & 12-5291

In the

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHEATON COLLEGE and BELMONT ABBEY COLLEGE,
Plaintiffs-Appellants

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, *et al.*,
Defendants-Appellees

On Appeal From The United States District Court
For The District of Columbia

BRIEF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AMERICAN CIVIL RIGHTS UNION, AND CATO INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE TRIAL COURT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants:

1. Amicus Curiae Center for Constitutional Jurisprudence
2. Amicus Curiae American Civil Rights Union
3. Amicus Curiae Cato Institute

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

C. Related Cases

There are two (2) additional cases challenging the same regulation pending in the United States District Court for the District of Columbia:

1. *Roman Catholic Archbishop of Washington* v. *Sebelius*, No. 1:12-cv-815 (D.D.C. filed May 21, 2012).
2. *Tyndale House Publishers, Inc.* v. *Sebelius*, No. 1:12-cv-01635-RBW (D.D.C. filed Oct. 2, 2012).

There are twenty-six (26) additional cases challenging the same regulation pending in federal district courts in other Circuits:

Second Circuit

1. *Priests for Life* v. *Sebelius*, No. 1:12-cv-00753 (E.D.N.Y.).
2. *Roman Catholic Archdiocese of NY* v. *Sebelius*, No. 1:12-cv-2542 (E.D.N.Y.).

Third Circuit

3. *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa.).
4. *Rev. Donald W. Trautman* v. *Sebelius*, No. 1:12-cv-123 (W.D. Pa.).
5. *Most Rev. David A. Zubik* v. *Sebelius*, No. 2:12-cv-676 (W.D. Pa.).

Fifth Circuit

6. *Louisiana Coll.* v. *Sebelius*, No. 1:12-cv-00463 (W.D. La.).
7. *Roman Catholic Diocese of Dallas* v. *Sebelius*, No. 3:12-cv-1589 (N.D. Tex.).
8. *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-314 (N.D. Tex.).
9. *Roman Catholic Diocese of Biloxi* v. *Sebelius*, No. 1:12-cv-158 (S.D. Miss.).

Sixth Circuit

10. *Legatus* v. *Sebelius*, 2:12-cv-12061 (E.D. Mich.).
11. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-cv-440 (S.D. Ohio).
12. *Catholic Diocese of Nashville* v. *Sebelius*, No 3:12-cv-00934 (M.D. Tenn.).

Seventh Circuit

13. *Univ. of Notre Dame* v. *Sebelius*, No. 3:12-cv-00253 (N.D. Ind.).
14. *Diocese of Fort Wayne-South Bend, Inc.* v. *Sebelius*, No. 1:12-cv-159 (N.D. Ind.).
15. *Conlon* v. *Sebelius*, No. 1:12-cv-3932 (N.D. Ill.).
16. *Triune Health Group* v. *Sebelius*, No. 1:12-cv-6756 (N.D. Ill.).
17. *Grace Coll.* v. *Sebelius*, No. 3:12-cv-00459 (N.D. Ind.).

Eighth Circuit

18. *State of Nebraska* v. *HHS*, No. 4:12-cv-03035 (D. Neb.).
19. *O'Brien* v. *HHS*, No. 4:12-cv-00476 (E.D. Mo.).
20. *Archdiocese of St. Louis* v. *Sebelius*, No. 4:12-cv-924 (E.D. Mo.).
21. *College of the Ozarks* v. *Sebelius*, No. 6:12-cv-03428 (W.D. Mo.).

Tenth Circuit

22. *Colorado Christian Univ.* v. *Sebelius*, No. 11-cv-03350 (D. Colo.).
23. *Newland* v. *Sebelius*, No. 1:12-cv-01123 (D. Colo.).
24. *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 12-cv-1000 (W.D. Okla.).

Eleventh Circuit

25. *Eternal Word Television Network, Inc*. v. *Sebelius*, No. 2:12-cv-00501 (N.D. Ala.).
26. *Ave Maria University* v. *Sebelius*, No. 2:12-cv-00088 (M.D. Fla.).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amici curiae Center for Constitutional Jurisprudence, American Civil Rights Union, and Cato Institute make the following disclosures:

Center for Constitutional Jurisprudence. Amicus curiae Center for Constitutional Jurisprudence is a project of the Claremont Institute, a public policy organization devoted to restoring the principles of the American founding to our national life. The amicus hereby states that it has no parent companies, trusts, subsidiaries, and/or affiliates that have issued shares or debt securities to the public.

American Civil Rights Union. Amicus curiae American Civil Rights Union is a legal/educational policy organization dedicated to defending constitutional rights. The amicus hereby states that it has no parent companies, trusts, subsidiaries, and/or affiliates that have issued shares or debt securities to the public.

Cato Institute. Amicus curiae Cato Institute is a public policy research foundation dedicated to advancing principles of liberty, free markets, and limited government. The amicus hereby states that it has no parent corporation and, at the time of this filing, is in the process of dissolving the handful of shares it has issued (that have been held by several directors) as it moves to a more conventional non-

profit corporate governance structure.

CERTIFICATIONS

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

Additionally, pursuant to Circuit Rule 29(d), amici curiae certify that diligent effort has been made to gather other amici in a single brief to avoid repetition of argument.

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STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellant.

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INTERESTS AND IDENTITY OF AMICI CURIAE

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest litigation arm of the Clermont Institute for the Study of Statesmanship and Political Philosophy. The Center provides legal representation and litigation support in cases of constitutional significance. It also advances its mission of ensuring that the balance of powers created by the United States Constitution remains intact. The present case is important to the Center because it represents an opportunity to clarify the limits the Constitution places on judicial and executive power.

The Center has participated as amicus curiae in many cases of constitutional importance before the Supreme Court, including *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare

by giving the responsibility for those programs to the states through finite block grants. Since its founding, the American Civil Rights Union has filed amicus curiae briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell; and former Ohio Secretary of State J. Kenneth Blackwell.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs with the courts.

STATEMENT OF THE ISSUES

Amici focus on the erroneous application of mootness principles to an analysis of initial standing and an alarming and legally unsupported grant of jurisdiction-stripping power to the executive branch.

SUMMARY OF ARGUMENT

Our Constitution created a federal government that "rigidly separates the powers to be exercised by its executive, its legislative, and its judicial branches." *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 358 (1888); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) *citing* Federalist No. 47 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). "Th[is] principle of separation of powers was not simply an abstract generalization in the minds of the Framers." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Rather, it is an essential "constitutional design." *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983). Under its structure, no branch can usurp the powers of another or fail to properly execute its own. *Interstate Com. Comm'n v. Illinois Cent. R. Co.*, 215 U.S. 452, 470 (1910) ("Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential

legislative functions."); *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 74 (1992) (holding that selective abdication of judicial authority "would harm separation of powers principles"). Either situation entirely undermines the constitutional balance of power of our government.

The decisions in *Wheaton College v. Sebelius* and *Belmont Abbey College v. Sebelius* are frightening examples of an abdication of judicial authority. *Wheaton*, CIV.A. 12-1169 ESH, 2012 WL 3637162 (D.D.C. 2012); *Belmont*, CIV.A. 11-1989 JEB, 2012 WL 2914417 (D.D.C. 2012). In *Belmont*, the trial court refused to address Belmont's injuries in part because it incorrectly concluded that the college lacked standing. CIV.A. 11-1989 JEB, 2012 WL 2914417 at *10 (D.D.C. 2012) ("Plaintiff . . . lacks standing."). In its standing analysis, the court erroneously relied on government action subsequent to the filing of Belmont's complaint—a fact clearly immaterial in an evaluation of initial standing. *See Davis v. Fed. Election Commn.*, 554 U.S. 724, 725 (2008) ("The standing inquiry focuses on . . . the requisite stake in the outcome *when the suit was filed*.") (emphasis added). As demonstrated below, this error warrants reversal.

Further, both rulings under review permit expansion of the power of the executive branch far beyond its constitutional limits. Specifically, by dismissing the Colleges' complaints, the ruling below places in the hands of an executive agency a vast power to strip the court of jurisdiction to review executive

regulations. The executive branch cannot perpetually preclude judicial review of its own unconstitutional action by simply announcing plans to perhaps consider, at some point in time, some unspecified change in the regulation.

ARGUMENT

I. THE RULINGS UNDER REVIEW WRONGLY APPLY THE CONSTITUTIONAL TEST FOR STANDING

The district court in *Belmont Abbey College*[1] erred by conflating principles of standing with those of mootness.[2] The two doctrines interplay, but they are distinct. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness)." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) *citing* H. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1364 (1973). In other words, standing depends on the facts as they existed at the outset of the case. *See Davis*, 554 U.S. 724 at 725 ("The standing inquiry focuses on . . . the requisite stake in the outcome *when the suit was filed*.") (emphasis added); *Friends*

[1] The *Wheaton* decision makes an analogous error. To avoid repetition of arguments with those in the Brief for Appellants, the amici do not discuss Wheaton College in this section.

[2] The trial court was by no means the first judicial body to conflate the boundaries that make standing and mootness distinct. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("[T]he Court of Appeals confused mootness with standing."); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) ("In so holding, the Tenth Circuit "confused mootness with standing.").

of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 190-91 (2000) (noting that a plaintiff is not entitled to a federal judicial forum "if [he or she] lacks standing *at the time the action commences*") (emphasis added); *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1142 (D.C. Cir. 2011) ([T]he ERC has failed to demonstrate that *at the time it began this litigation* it had suffered an injury in fact sufficient to support standing.) (emphasis added). It is the doctrine of mootness, on the other hand, that accounts for post-filing factual developments. *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) ("[A] case is moot when the issues presented are *no longer* 'live.'") (emphasis added).

In holding that Belmont lacked standing, the court relied exclusively on the Advance Notice of Proposed Rulemaking issued long after Belmont initiated the case. *Belmont Abbey College*, CIV.A. 11-1989 JEB, 2012 WL 2914417 at *10 (D.D.C. 2012). In fact, both Belmont's initial and amended complaints predate the March 21, 2012, issuance of the Advance Notice of Proposed Rulemaking. 77 Fed. Reg. 16501 (Mar. 21, 2012). Belmont initiated the case on November 10, 2011—over four months before the issuance of the Advance Notice of Proposed Rulemaking —and amended its complaint on March 20, 2012. *See* Complaint; Am. Complaint. Since any standing analysis merely accounts for the facts as they existed at the outset of the case, any consideration of subsequent government action was entirely erroneous. While the Colleges had the burden of proof to

establish standing, the government had the burden to prove the action moot. By conflating the two concepts, the ruling below makes "a crucial" error that justifies reversal. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). As demonstrated below, the Advance Notice of Proposed Rulemaking does not destroy standing because it has no legal effect and thus cannot be used to strip the courts of jurisdiction to hear constitutional claims.

II. THE EXECUTIVE BRANCH'S OWN ACTIONS CANNOT STRIP THE COURT OF ITS POWER TO REVIEW A FINAL EXECUTIVE RULEMAKING

The decisions in *Belmont Abbey College* and *Wheaton College* are based almost exclusively on the issues of the finality of the Appellees' action and the corresponding imminence of the appellants' injury. As the court below agreed, the issuance of a temporary safe harbor alone would not make the issue non-justiciable. *Belmont Abbey College*, 2012 WL 2914417 at *9 ("[T]he Court holds that the temporary-enforcement safe harbor does not render the alleged injury too remote to constitute an injury."). Established law and separation of powers principles similarly establish that the issuance of an Advance Notice of Proposed Rulemaking will not strip the court of jurisdiction over an otherwise justiciable issue.

a. The Existence Of A Temporary Safe Harbor Alone Does Not Prevent Judicial Review Of The Government's Final Regulation

Absent the issuance of the Advance Notice of Proposed Rulemaking, the Appellants could challenge the government's regulation prior to the expiration of the temporary enforcement safe harbor. Under such a scenario, the regulation could easily be challenged because it is a final administrative action within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704. "Final agency action . . . is one by which rights or obligations *have been* determined, or from which legal consequences *will* flow." *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal marks omitted, emphasis added); *see also Sackett v. E.P.A.*, __.U.S. __, 132 S. Ct. 1367, 1371 (2012).

Here, there is no doubt that the challenged regulation determines the Appellants' obligations. In fact, at this time Appellants are already obligated to renegotiate their insurance contracts to comply with the regulation. Brief for Appellants at 30-32. The regulation also has a definite date when it will come into effect. 77 Fed. Reg. 16501 (Mar. 21, 2012). Following that date, Appellants will face legal consequences in the form of crippling fines. Brief for Appellant at 24. Accordingly, the regulation meets all "the hallmarks of [Administrative Procedure Act] finality." *Sackett*, 132 S. Ct. at 1371. The existence of the temporary enforcement safe harbor does not render the question of the agency's final rule any

less final. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 586-87 (7th Cir. 2011) ("In the decades since *Abbott Laboratories*, pre-enforcement review of final rules has become the norm.").

Just as the safe harbor does not subtract from the finality of the challenged regulation, it also does not make the Appellants' injury any less imminent in the eyes of the law. In fact, courts routinely review cases where the alleged injury will not appear for many years. *New York v. United States*, 505 U.S. 144, 175 (1992) (holding an action ripe where effective date was approximately three and a half years from the date of the Supreme Court's decision); *Am. Civ. Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 593 (7th Cir. 2012) ("It is well established that in preenforcement suits '[i]njury need not be certain.'").

Moreover, the appellants are not only facing a prospective injury when the temporary enforcement safe harbor expires, but also a number of immediate injuries at this time. *See* Brief for Appellants at 28-38 (citing harm on the Colleges' ability to budget, harm in having to renegotiate insurance contracts in advance, harm to the Colleges' ability to recruit and retain employees, and a serious threat of private law suits during the enforcement safe harbor period). Accordingly, there is no question that the temporary promise not to enforce the regulation does not alter the nature of the injury suffered by the colleges and does not deprive the Court of jurisdiction to hear the case.

b. The Issuance Of An Advance Notice Of Proposed Rulemaking Cannot Strip The Court Of Its Power To Review An Otherwise Justiciable Claim

Just as the temporary safe harbor alone would never prevent review of the Colleges' claims, the issuance of an Advance Notice of Proposed Rulemaking cannot prevent review. By its very nature, the Appellees cannot be legally held to the terms of their Notice. For that reason, established law does not allow legally non-binding executive action to stave off review of final executive regulations. Additionally, the Appellees attempt at executive jurisdiction stripping seeks to insulate their action from judicial review, thus combining law making, execution, an judicial review in the hands of the executive.

i. A Legally Non-Binding Action Of An Executive Agency Cannot Stave Off Judicial Review Of An Executive Regulation

There is absolutely nothing that legally binds the Appellees to the words used in the Advance Notice of Proposed Rulemaking. In fact, this very Court has recognized that an "[advance] notice of proposed rulemaking . . . may or may not be adopted or enforced." *Ctr. for Auto Safety v. Natl. Hwy. Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983). While an actual proposed rulemaking is subject to the "arbitrary and capricious" standard, an Advance Notice of Proposed Rulemaking can be withdrawn with impunity. *Compare id.* at 856 (MacKinnon, J. concurring) ("Cognizant of the strong presumption in favor of judicial review, I

nevertheless hold that the . . . withdrawal of the [Advance] Notice [of Proposed Rulemaking], . . . is not subject to judicial review.") *with Intl. Union, United Mine Workers of Am. v. U.S. Dept. of Lab.*, 358 F.3d 40, 45 (D.C. Cir. 2004) ("[The agency] failed to provide an adequate explanation for its decision to withdraw the . . . propos[ed rule]. Absent such an explanation, the agency's action was arbitrary and capricious."). Accordingly, while immediate harm to the Appellants is entirely real, its alleviation is no more than speculative. *Center for Auto Safety* was decided under a statutory regime that required specific agency action. 710 F. 2d at 844. There are no such commands here. Instead, the agency has merely announced that it may consider a change to the regulation. There is no statutory or other legally enforceable deadline for action. The agency does not need to withdraw anything, it can merely refuse to take any further action.

Combining the legal un-enforceability of the Advance Notice of Proposed Rulemaking with the holdings of the court below, the Colleges are left in "legal limbo." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 145 (2004). On one hand, established law prevents the Colleges from challenging any proposed amendment that may be offered at some unknown point in the future. At the same time the lower court's holdings deny them a chance to question the constitutionality of the final regulation—all while facing immediate and undeniable harm.

Furthermore, earlier this year, this very Court weighed in on the issue of an

executive agency's attempt to unilaterally limit the judiciary's power of review. In *American Petroleum Institute v. E.P.A.*, this Court repeated a basic principle that an executive agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking." 683 F.3d 382, 388 (D.C. Cir. 2012). "If that were true, a savvy agency could perpetually dodge review." *Id.* This principle supports long-standing separation of powers norms. Necessarily, then, an executive agency should not be able to "stave off judicial review of a challenged rule" by merely issuing an advance notice of proposed rule making.

The Court also set the limits of a narrow exception to this rule. Under the exception, an agency can postpone judicial review where (1) the amended regulation "would necessitate substantively different legal analysis," (2) the timing of the amendment "is not within the discretion of or controlled by the agency as would usually be the case," and (3) some form of legal accountability exists in proceeding with the amendment. And even if the hallmarks of this narrow exception are met, the court can do no more than "order the case held in abeyance, subject to regular reports on the status of the proposed rulemaking." *Id.* at 384.

In the instant case, the Appellees' acts do not meet the limited exception formulated by this Court. First, no actual proposed regulation has been issued. Accordingly, the appellants cannot guess what analysis would be used if a concrete proposal was actually promulgated. Second, unlike *American Petroleum Institute*,

the timing of the amendment is entirely in the hands of the government. It can postpone enforcement and at the same time set the timeframe for any "potential means of accommodati[on]." 77 Fed. Reg. 16501 (Mar. 21, 2012). Third, in *American Petroleum Institute*, the assurance that the proposed rule would eventually crystalize into a final regulation was legally enforceable as part of a settlement agreement. *Am. Petroleum Inst.*, 683 F.3d at 386. However, because the Appellees can legally withdraw the Advance Notice of Proposed Rulemaking with impunity or even a subsequent proposed rule with nothing more than an "adequate explanation," the legal accountability standard set in *American Petroleum Institute* is not satisfied. *Ctr. for Auto Safety*, 710 F.2d at 856; *Intl. Union, United Mine Workers of Am*, 358 F.3d at 45 ("[Agency] failed to provide an adequate explanation for its decision to withdraw."). Thus, the Appellees have not met the narrow exception that allows an executive agency to *postpone* judicial review. Accordingly, the cases under review should be remanded to the trial court.

ii. Separation Of Powers Principles Mandate Judicial Review Of The Instant Action

The extent of executive power has been the subject of debate since this country's infancy. *United States v. More*, 7 U.S. 159, 166 (1803) ("Congress has no power to limit the tenure of any office to which the president is to appoint."); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 541 (1838) ("What becomes of the President's responsibility to have the laws of congress faithfully

executed?"); *Myers v. United States*, 272 U.S. 52, 230 (1926) (McReynolds, J., dissenting) ("What, then, was intended by 'the executive power'?"). In recent years, commentators have noted "that the Executive has become the most powerful branch." Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 335 (2009); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251, 253 (2010) ("Editorialists . . . conclude the executive is the most powerful branch and the legislature weak by comparison."). Thus, it is not surprising that courts keep encountering separation of powers issues with respect to executive attempts at jurisdiction stripping. *Villegas de la Paz v. Holder*, 640 F.3d 650, 654 (6th Cir. 2010). The instant case presents a similar issue. In dismissing Appellants' cases, the lower court allowed an executive action to singlehandedly undercut the federal judiciary's power of review.

First, it has long been established that, "[f]or the most part, Congress can grant or withhold jurisdiction as it pleases." *Id*. There is no evidence that Congress intended the Administrative Procedure Act as a jurisdiction stripping measure. Absent any such indication, there exists a "presumption favoring interpretations of statutes [to] allow judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 831 (2010); *Sackett*, 132 S. Ct. at 1369 citing *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984) ("The APA creates a

'presumption favoring judicial review of administrative action.'"). Accordingly, this Court cannot interpret the statute-based Notice of Proposed Rulemaking as a bar to judicial review. 5 U.S.C. § 553(b).

Second, the Supreme Court has warned lower courts about the situation where the executive branch seeks to strip jurisdiction from the judiciary. *Kucana*, 130 S. Ct. at 831 ("Separation-of-powers concerns . . . caution us against . . . plac[ing] in executive hands authority to remove cases from the Judiciary's domain."). In fact, while Congress can limit jurisdiction, "it is another matter altogether to hear that *the Executive's own actions* serve to strip [the court] of jurisdiction to review the Executive's decision." *Villegas de la Paz*, 640 F.3d at 654. Such "arrogation runs through the separation-of-powers tripwires." *Id.*; *Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 679 (7th Cir. 2010) (abrogating a "proposed rule [allowing] any agency [to] strip jurisdiction from federal courts, seemingly at any stage of the proceeding"). The same is true in the instant case where the executive's issuance of an Advance Notice of Proposed Rulemaking seeks to prevent review of the executive's earlier regulation. Separation of powers simply does not allow the executive branch to "yank the case out of the courts" in such a way. *Id.*

Last, the interplay of the judicial and legislative branches is instructive in delineating the true limits of executive power. In the legislative context, laws start

as proposed bills. A bill that successfully passes through Congress becomes law with the President's signature. U.S. Const. art I § 7, cl. 2. In the executive branch, regulations start as Notices of Proposed Rulemaking. 5 U.S.C. § 553. An Advanced Notice of Proposed Rulemaking is merely an announced intention to consider issuing a Notice of Proposed Rulemaking at some point in the future. The actual rulemaking process, however, does not begin until the agency publishes a Notice of Proposed Rulemaking in the Federal Register. Following a public comment period, the executive agency may promulgate the final rule. An aspiring litigant cannot challenge a proposed bill or a proposed rule because both lack the requisite finality. *Ctr. for Auto Safety*, 710 F.2d at 846 (the issuance of a notice of proposed rulemaking . . . often will not be ripe for review). If a Notice of Proposed Rulemaking is not subject to challenge, then an Advance Notice – the publication of the agency's intent to *consider* a Notice of Proposed Rulemaking *at some point in the future* is certainly not subject to challenge.

On the flipside, a challenger can litigate the constitutionality of an established federal statute even where the legislature has begun to institute an amendment. *See Log Cabin Republicans v. U.S.*, 658 F.3d 1162, 1166 (9th Cir. 2011). In fact, such a challenge is justiciable throughout the amendment process, upon an amendments' successful passage though Congress, and even where a repeal of the challenged statute is signed by the President. *Id.* In the legislative

context, justiciability ends with the amendment's effective date. *Id.* ("[The] suit became moot when the repeal . . . took effect."); *see also Kennedy v. Jones*, 412 F. Supp. 353, 356 (D.D.C. 1976) (holding that a justiciable controversy existed where a Senator sought declaration that certain laws were validly enacted even though "Congress saw fit to enact subsequent legislation covering the same subject area").

The rulings under review improperly set a different measure in the context of a final executive regulation. Where, as *Log Cabin Republicans* suggests, even an irrevocable promise of Congress sealed with the signature of the President cannot strip the courts of jurisdiction, Wheaton and Belmont were unjustly deprived of their right to be heard because of an unenforceable act of a lower executive officer. This erroneous move constitutes a long stride to an unconstitutional expansion of executive power. Separation-of-powers principles direct that the Court not give a non-binding statement of an executive agency deference it would never give to a comparable act of Congress. Such ruling would entirely undermine our system of "co-equal branches of Government." *New York Times Co. v. United States*, 403 U.S. 713, 742 (1971).

CONCLUSION

Based on the foregoing, this Court should reverse the trial court's decisions. Additionally, the Court should use this case as a vehicle for delineating the limits of ever-increasing executive control so that the powers in our government remain separate as the founders of this Nation intended.

DATED: October 12, 2012

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because:

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I hereby certify that, on this 12th day of October, 2012, I caused copies of the foregoing brief to be delivered via electronic mail through the Court's electronic filing system.

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