UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

AVE MARIA UNIVERSITY, *Plaintiff,* v. SYLVIA BURWELL, *et al.*, *Defendants*.	Case No. 2:13-cv-00630-JES-UAM **PLAINTIFF AVE MARIA UNIVERSITY'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

The government's opposition to Ave Maria University's motion for a preliminary injunction is a singular effort to avoid the obvious: both the Eleventh Circuit and Supreme Court have already held that religious organizations with religious objections to the HHS Contraception Mandate should not be forced to litigate their claims under crushing weight of potentially millions of dollars in fines. Yet the government's brief makes no mention of the Eleventh Circuit's ruling in *EWTN v. Sec'y, Department of Health and Human Services*, 756 F.3d 1339 (11th Cir. 2014), which unanimously enjoined enforcement of the Mandate against the Catholic network television station. Nor does it mention the ruling in *Little Sisters of the Poor v. Sebelius*, in which the Supreme Court enjoined the Mandate on the eve of its taking effect against an order of nuns. 134 S. Ct. 1022 (2014); *see also Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (staying Mandate and indicating likely grant of certiorari). And to compound matters, the government ignores much of the substantive analysis from *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which is binding here. The courts in these cases could not have been clearer—there is no justification for forcing a religious organization like Ave Maria into the Hobson's choice of either violating its religious beliefs or facing millions of dollars in fines, especially before the courts have had opportunity to fully consider the issues on their merits.

The government's recent issuance of "augmented" regulations provides no grounds for its insistence that Ave Maria must be forced into compliance or insolvency right now. The government concedes that the new rules have precisely the "same" effect as the old rules,[1] the only difference being that, under the new rules, the form Ave Maria must submit to require its insurer to provide the coverage through Ave Maria's plan will first be routed to the Department of Health and Human Services. But courts nationwide have not been enjoining the Mandate because the religious plaintiffs object to speaking directly with their insurers. They have stayed it because it forces the plaintiffs to participate in providing coverage that violates their religious beliefs. Having admitted that the new regulations have the same effect, the government should not now be heard to argue that they somehow negate the force of the Eleventh Circuit and Supreme Court rulings.

The government's protest that enjoining the Mandate against Ave Maria would harm Ave Maria's employees rings hollow. The Mandate has currently been stayed for hundreds of plaintiffs in dozens of separate lawsuits. Indeed, every plaintiff that is seeking injunctive relief, except the two currently before this court, now has it. In none of the other cases has the government sought to undo injunctions in light of the newly augmented regulations. Nor has it rushed to apply the augmented accommodation to churches, religious orders, or grandfathered plans—all of which are fully exempt. Even as to religious for-profit employers, which also currently enjoy a full exemption after *Hobby Lobby*, the government is still pondering whether and how to enforce the Mandate. In short, there is no reason to think that an injunction in Ave Maria's favor would impose any unique harm to the government's claimed interests. Following the clear guidance from the Supreme Court and

[1] The Center for Consumer Information & Insurance Oversight, Fact Sheet, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (Oct. 2, 2014) ("Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules, or provides notice to HHS in accordance with the August 2014 [Interim Final Rules], the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same.").

Eleventh Circuit, this Court should grant Ave Maria injunctive relief for the same reasons relief has been granted to every other religious objector thus far: Ave Maria is likely to succeed on the merits of its claims under both RFRA and the First Amendment and the equities of granting relief weigh overwhelmingly in its favor.

I. Ave Maria Is Likely To Succeed on the Merits of Its Claims.

A. The Mandate Violates RFRA.

In its opposition brief, the government concedes that Ave Maria's "desire not to participate in the provision of contraception is a sincere religious belief." Opp. 14. But its contention that the augmented regulations don't substantially burden that religious exercise are counterfactual and defy the ruling in *Hobby Lobby*. Similarly, its strict scrutiny arguments fail for lack of evidence showing that it has compelling interests that can be met only by forcing Ave Maria to provide free contraceptive coverage in violation of its beliefs.

1. The Mandate substantially burdens Ave Maria's religious exercise.

In *Hobby Lobby*, the Supreme Court held unequivocally that the threat of millions of dollars in fines for non-compliance with the Mandate constitutes a substantial burden. 134 S. Ct. 2751 ("If these consequences do not amount to a substantial burden, it is hard to see what would."). The Eleventh Circuit's ruling in *EWTN* echoes that point. 756 F.3d at 1340 ("If that is not a substantial burden on the free exercise of religion, then it is hard to imagine what would be.") (Pryor, J., concurring). Yet the government ignores these controlling cases entirely—never once citing either opinion for its analysis of what constitutes a substantial burden. *See* Opp. 13-17. Instead, the government relies on analysis from the Sixth and Seventh Circuits—analysis which Judge Pryor's concurrence in *EWTN* denounces as "rubbish" and "wholly unpersuasive." *Id.* at 1347. Having already admitted that Ave Maria's "desire not to participate in the provision of contraception is a sincere religious belief," Opp. 14, the government cannot now argue that the regulations pressuring

it to violate that belief under the threat of crushing fines is not a substantial burden. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[A] 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.").[2]

Seeking to avoid *Hobby Lobby's* straightforward "burden" analysis, the government tries to argue that the alternative notice Ave Maria would be required to sign under the augmented regulations is purely an "opt out," that "effectively exempt[s]" Ave Maria, and "does not trigger" the contraceptive coverage. Opp. 9-10. But these arguments are counterfactual for several reasons. First, the new notice requirement is not a true "opt out," because Ave Maria is still being required to facilitate the government's contraception distribution scheme by providing the name and contact information for its insurance company. Unless Ave Maria provides that information, there will be no coverage. Indeed, the government admits that this information is "needed to implement the requirement" that the insurer pay for the coverage, Opp. 24, confirming that any form Ave Maria submits will still be the "trigger" for the objected-to coverage. Ave Maria's signature on the form with its insurer's name and contact information will directly impose on the issuer an obligation to make payments that the issuer otherwise would not be required to make.

Second, the government's argument ignores that Ave Maria would still be providing the platform for the government's distribution scheme. Ave Maria objects not only to

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[2] The government's view of what makes a burden "substantial" is mistaken. *See* Opp. 13-14 & n.6. Any law that "require[s] a person to do something contrary to the person's religious beliefs" constitutes "a substantial burden on free exercise, whatever the penalty imposed for violating the law." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1151 (10th Cir. 2013) (Hartz, J., concurring), *aff'd sub nom Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (U.S. 2014). The modifier "substantial" plays a role with laws that "do not order the violation of a religious duty but simply make it more difficult for a person to obey that duty." *Id.*; *see, e.g., Midrash Sephardi*, 366 F.3d at 1228 (holding in zoning case that "[w]hile walking may be burdensome and 'walking farther' may be even more so, we cannot say that walking a few extra blocks is 'substantial.'"). The Mandate and accommodation directly require Ave Maria to take actions that its faith forbids. Towey Decl. [Dkt. 52-1] ¶¶ 38, 55-57. Thus, even without fines, the Mandate's burden is substantial.

paying for or triggering the coverage, but also to having its private healthcare plan used as a distribution platform in violation of its beliefs. The coverage would be available to individual employees only "so long as they remain" on Ave Maria's plan. 26 C.F.R. § 54.9815–2713A(c)(2)(B). It would be provided subject to the same network and medical management limitations as all other coverage under the plan. 78 Fed. Reg. 39870-01, 39873 (July 2, 2013). Payments could be processed the same as all other payments under the plan. *See id*. And employees would enjoy the same consumer protections as available for all other coverage under the plan. 78 Fed. Reg. at 39876. In every respect, the coverage would still be provided through Ave Maria's plan, and signing a form to allow that to happen would still violate Ave Maria's beliefs. Towey Decl. [Dkt. 52-1] ¶¶ 38, 55-57.

Consider, for example, a federal mandate for all hospitals to perform medical abortions, except that religious hospitals could "opt out" by notifying the government of their objection. If the government still required the hospital to grant hospital privileges to non-objecting doctors, who could use the facilities to perform the abortion if they wanted to, the "opt out" would be meaningless. Clearly, the hospital's objection would extend not only to having its own doctors perform abortions, but also to having its facilities used for abortions performed by anyone else. In the same way, Ave Maria objects not only to providing contraception and abortion-causing drugs through its healthcare plan, but also to having its plan used for that purpose by anyone else.

The government's argument that Ave Maria's refusal to sign would be akin to conscientious objectors refusing to notify the government they cannot go to war is inapposite. Ave Maria has no problem notifying the government of its religious objection. If that was not clear enough from the filing of this lawsuit, Ave Maria has also already delivered to HHS a separate notification of its objection in the form approved by the Supreme Court in *Little Sisters* and *Wheaton*. Baxter Decl. [Dkt. 47-1] ¶ 2, Ex. A. But here

the government is not interested in giving a simple opt out. It needs the "conscientious objector" not just to give notice, but also to specifically identify a replacement, to pay the replacement's overhead expenses, and to provide the replacement with general guidelines and administrative support for carrying out its duties.[3] The fact that the government might try having the replacement cover his own expenses for precise portions of the process would do nothing to compensate for the fact that the objector would still be violating his conscience by participating in the overall scheme.[4]

The relationship between plan sponsors and plan issuers belies the government's claim that issuers have some kind of "independent" obligation to pay for the contraception costs of the sponsor's employees. The Affordable Care Act requires each "group health plan and . . . issuer" to provide certain "coverage." 42 U.S.C. § 300gg-13(a). But "coverage" is possible only via the contractual agreement between the plan sponsor and issuer. In essence, the Mandate forces Ave Maria and its issuer to alter the terms of that agreement, even though Ave Maria's faith forbids it from doing so for purposes of facilitating access to contraceptives and abortion-causing drugs. Thus, Ave Maria is not challenging (and needs no standing to challenge, *see* Opp. 17 n.10) an "independent" duty supposedly thrust upon its issuer. There is only one source of coverage at issue, and that is the healthcare plan contracted and paid for by Ave Maria. The government admits that Ave Maria has a

[3] Maintaining the infrastructure for tracking employees and ensuring they are properly enrolled each plan year is time consuming and costly. This is just one example of how the Mandate depends upon Ave Maria's participation and resources and operates through Ave Maria's healthcare plan.

[4] Under the Mandate, it is not at all clear that Ave Maria will avoid paying outright for the contraceptive coverage, at least in part. Although the government claims that the medical loss ratio is calculated across a broad group of insureds, Opp. 15 n.7, the cost of the contraception coverage payments are still counted against any rebate that would otherwise accrue to Ave Maria. Moreover, notwithstanding regulations forbidding issuers from imposing cost-sharing, the simple truth is that it will be impossible for Ave Maria or any court to determine whether the insurer has folded the costs of contraceptive coverage into its general overhead expenses, which will then imperceptibly impact Ave Maria's premiums.

"sincere religious belief" against "participat[ing] in the provision of contraception" through that plan. Opp. 14. It follows that threatening Ave Maria with millions of dollars in fines if it refuses to participate is a substantial burden on Ave Maria's religious exercise.[5]

Contrary to the government's repeated suggestions, *see, e.g.*, Opp. 3, 10, 26, Ave Maria is not using RFRA as a "sword" to stop third parties from independently facilitating its employees' access to contraceptives and abortion-causing drugs. Regardless of Ave Maria's private views of such efforts, it is simply seeking to shield itself from coerced participation to either pay for, trigger, or provide a platform for the objectionable coverage. If the government believes it can provide the coverage independently, it must do so without Ave Maria's help or participation.[6]

Contrary to the government's suggestions in its brief, neither *Hobby Lobby* nor *Wheaton* gives a stamp of "validity [to] the alternative method of 'opting out' promulgated in the [augmented] regulations." Opp. 12 (internal quotation marks added). The Court in

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[5] The government essentially concedes that it has no direct authority to force issuers to make separate payments for contraceptive coverage. Opp. 17 n.10. Its claim that the general rulemaking authority afforded by 42 U.S.C. § 300gg-92 gives it authority to require the payments would mean that it also has authority to force insurers to pay for any of the broad array of preventive care required by the Affordable Care Act for anyone, regardless of whether they have an existing healthcare plan. The government's resort to such an extreme claim helps explain why it is demanding from Ave Maria what is essentially a signature of approval.

[6] Referring to Ave Maria's employees, the government accuses Ave Maria of "ignor[ing] the Supreme Court's repeated admonition that, under RFRA, the interests of nonbeneficiaries of a requested accommodation count." Opp. 11 (citing *Hobby Lobby*, 134 S. Ct. at 2781 n.37). But the *Hobby Lobby* Court emphasized that such considerations are relevant to the "strict scrutiny" analysis, not "substantial burden." 134 S. Ct. at 2781 n.37 ("That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means . . . . But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties."). Moreover, the interests of Ave Maria's employees are unlikely to be implicated by an injunction in this matter, because Ave Maria limits its hiring overwhelmingly to Catholics and exclusively to individuals who uphold its Catholic mission and teachings, including teachings concerning the sanctity of life and the purposes of human sexuality. Towey Decl. [Dkt. 52-1] ¶ 18. The government has already conceded that such hiring practices eliminate its claimed compelling interest in ensuring access to free contraceptive coverage, because employees who share the religious objection are less likely to use contraception in the first place. *See* 78 Fed. Reg. at 39874.

Hobby Lobby made clear that it was not ruling on the validity of the accommodation's original notice provision." *Hobby Lobby*, 134 S. Ct. at 2782 ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims."); *see also id.* at 2803 (Ginsburg, J., dissenting). Indeed, the Court specifically noted that it had already enjoined enforcement of the original accommodation against the Little Sisters of the Poor. *Id*. at 2782 n.39; *see also id*. at 2763 n.9. Similarly, in *Wheaton*, the Court stated only that the government could rely on the straightforward notice of Wheaton College's objection to the extent it had truly independent means of providing free access to Wheaton's employees. 134 S. Ct. at 2807. Notably, the Little Sisters of the Poor, Wheaton College, and Ave Maria University have already given such notice, Baxter Decl. [Dkt. 47-1] ¶ 2, Ex. A, yet no coverage has "independently" issued, underscoring that the government is still depending on Ave Maria's participation to make the scheme work.

Under the original accommodation, Ave Maria had to sign a notice of objection and deliver it directly to its issuer. Under the new regulations, Ave Maria has to sign a similar notice, but with its issuer's name and contact information, and deliver that to HHS, so that HHS can then deliver it to the issuer. The government admits that the impact of the notice is the same in both instances. *See supra* n.1. Thus, to suggest that injunctive relief is not appropriate under the new regulations, even though it has already been granted by the Supreme Court under the old regulations, would mean that the Supreme Court in *Little Sisters* and *Wheaton* only intended to protect those plaintiffs from being forced to communicate directly with their insurers. But none of the objecting plaintiffs are religiously opposed to communicating with their insurers. It is the *effect* of the communication, not the communication itself that is a violation of their religious beliefs. Since the accommodation's effect under the augmented regulations is unchanged, the same relief as universally granted under the original regulations is still warranted.

2. The Mandate cannot satisfy strict scrutiny.

Compelling interest. Under strict scrutiny, the burden shifts to the government to prove a compelling interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Thus, even at the preliminary injunction state, the *government* must show a likelihood of prevailing on the merits of *its* claim that it has compelling interests that justify quashing religious exercise. *Id*. Congressional findings are not alone sufficient evidence. In *O Centro*, the government relied on Congressional findings that DMT, a schedule I narcotic, had "'a high potential for abuse,'" and "'a lack of accepted safety for use . . . under medical supervision.'" *Id*. at 432. The Supreme Court agreed that DMT was "exceptionally dangerous," but rejected the government's alleged compelling interest in promoting "public health" by restricting access, because there was "no indication that Congress, in classifying DMT, considered the harms posed by the *particular use at issue*," *i.e.*, "sacramental use" of a tea made from the drug. *Id*. (emphasis added).

Expert testimony also must be specific to the religious exercise at issue. Again in *O Centro*, the government claimed a second compelling interest in complying with a United Nations Convention to which the United States was signatory and that restricted use of the drug. The government submitted affidavits "by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs." *Id*. at 438. But the Court rejected this interest, noting that "it suffice[d] to observe that the Government did not even *submit* evidence addressing the international consequences of granting an exemption." *Id*.

Here, the evidence is far less compelling. The government has not presented any congressional findings or identified any evidence that Congress even considered the need to mandate free contraceptive coverage. Rather, it is undisputed that Congress delegated the determination of what preventive care should be mandatory to a government agency,

which in turn sought recommendations from the Institute of Medicine, a non-government institution. *Hobby Lobby*, 134 S. Ct. at 2762. The government has not submitted any affidavits to explain how the Institute reached its conclusions, to validate any research the Institute may have relied on, or to otherwise support the Institute's findings. There is no evidence that the Institute specifically considered the need to prioritize free access through employer healthcare plans. And there is no evidence that granting an exception to religious organizations like Ave Maria would defeat the government's interests, whether compelling or not. *See Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) ("[P]olicies grounded on mere speculation . . . will not suffice.").

Indeed, the *only* evidence specific to Ave Maria's religious exercise is the government's own admission that completely exempting churches from the Mandate "does not undermine the governmental interests," because churches "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874. Ave Maria too, however, is such an institution—it overwhelmingly hires Catholics and only individuals who agree with and support its mission. Towey Decl. [Dkt. 52-1] ¶ 18. Thus, the government has no compelling interest in enforcing the Mandate against Ave Maria, because its employees are "less likely than other people to use contraceptive services." 78 Fed. Reg. at 39874.

At this stage of the litigation, the Court need not even "doubt the validity" of the government's asserted compelling interests, because "under RFRA invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. And although the government may yet seek to actually prove its claims, "bold argument" at this stage "cannot compensate" for failure to adduce actual evidence. *Id.*; *accord Rich*, 716 F.3d at

533 ("While safety and cost can be compelling governmental interests, the Defendants have not carried their burden to show that Florida's policy in fact furthered these two interests.").

The government relies heavily on Justice Kennedy's concurrence in *Hobby Lobby* to suggest that it has already succeeded in establishing a compelling interest. Opp. 18-19. But its reliance is misguided. Justice Kennedy joined the majority opinion, which only assumed a compelling interest, without "adjudicat[ing] this issue," 134 S. Ct. at 2780, and Justice Kennedy himself explained that the government's compelling interest was only "a *premise* of the Court's opinion," 134 S. Ct. at 2786 (emphasis added). Certainly, he did not overrule *O Centro*'s command that the government provide evidence of its interest as applied "to the person." 546 U.S. at 420.

The government also fails to respond to Ave Maria's argument that when Congress required grandfathered plans to comply with "particularly significant protections" of the Affordable Care Act, the Mandate was not included. Mot. 26. Nor has it adequately addressed the fact that, however important its interests, it has left them unprotected with regard to tens of millions of citizens. Mot. 7-8; *see also O Centro*, 546 U.S. at 432-33 (existence of exemptions "indicates that congressional findings . . . should not carry the determinative weight"). Its argument that grandfathering is "not a permanent 'exemption,'" Opp. 22 n.13, is false. Regardless of its hope that "[f]ewer and fewer group health plans will be grandfathered over time," the truth is that "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.[7]

With regard to the exemption for churches, the government responds that it would be "perverse to hold that the government's provision of a limited religious exemption

[7] The government's further argument that an "incremental transition does not call into question the compelling interests," Opp. 22 n.13, undercuts its argument, that the public interest weighs against issuing a preliminary injunction, Opp. 32. If grandfathering that leaves millions of employees outside the Mandate—even if only for a time—is not against the public interest, a preliminary injunction for Ave Maria obviously cannot be either.

eliminates its compelling interest." Opp. 22-23. But that gets everything backward. If the government's interest is such that it can afford to accommodate a conflicting exercise of religion, it *must* do so—"that is how [RFRA] works." *O Centro*, 546 U.S. at 434. Conversely, it *would* be perverse to allow the government to pick and choose whom to accommodate, especially where—as here—religious objectors have the same objection for the same reasons. It is in part to protect against such abuse that "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required." *Id*.

Least restrictive means. The government grumbles that accommodating religious believers like Ave Maria would require the government to "fundamentally restructure its operations." Opp. 18. But the Mandate already exempts "religious employers" and grandfathered plans without requiring them to provide a form at all. And RFRA plainly requires the government to consider less restrictive alternative laws. *Cf. McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1458-59 (2014) (election laws failed strict scrutiny because alternative laws could be imposed); *Hobby Lobby*, 134 S. Ct. at 2781 (rejecting argument that "RFRA cannot be used to require creation of entirely new programs"). The government never even addresses Ave Maria's suggestion that it could give employees who are dissatisfied with their employers' non-compliant healthcare plans the option of going on the federal exchanges instead. Ave Maria has also suggested several other ways for the government to achieve its aims, including direct provision or subsidy through Title X, tax credits for contraceptive purchases, or empowering doctors, pharmaceutical companies, and public interest groups to create free and easy access. Mot. 28-29. Yet the government fails to prove that any of these options are unworkable. On the "least restrictive means" prong, it is the government, not Ave Maria, that has the burden of proof. *O Centro*, 546 U.S. at 429. Thus, Ave Maria "must be deemed likely to prevail unless the Government has shown that [the] proposed less restrictive alternatives are less

effective than [enforcing the Mandate]." *Id*. Having not even responded to all of Ave Maria's suggestions, the government failed to meet that burden.

B. The Mandate Violates the Religion Clauses.

The Mandate unconstitutionally discriminates among religious organizations due to their institutional, structural, doctrinal, and financial affiliation, and does so based on the government's admitted speculation about the religiosity of the organization and the pervasiveness of its beliefs among its employees. Mot. 31-34. In so doing, the Mandate violates the First Amendment in three ways: It is not neutral toward some religious organizations; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("the minimum requirement of neutrality is that a law not discriminate on its face"); it violates general applicability by making "a value judgment in favor of secular . . . but not religious motivations," *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (1999); and it is a classic case of "discriminating among religious organizations" in violation of the Establishment Clause; *Larson v. Valente*, 456 U.S. 228, 234 (1982).

The government responds that only *intentional* governmental discrimination, against particular religious *denominations* is impermissible, Opp. 27, not discrimination among religious *institutions*, Opp. 29-30. But courts have overwhelmingly rejected that argument.

In *Colorado Christian University v. Weaver*, for example, the court held that "when the [government] passes laws that facially regulate religious issues"—as the Mandate unabashedly does—"it must treat individual religions and religious institutions without discrimination or preference." 534 F.3d 1245, 1257 (2008). Thus, a Colorado law banning "pervasively sectarian" colleges from accessing state scholarship funds but allowing access to "sectarian" colleges unconstitutionally discriminated among religious institutions. *Id.* There, as here, the government argued that its law was permissible because it "distinguishes not between types of religions, but between types of institutions." *Id.* at 1259. *Weaver*

rejected that distinction as "puzzling and wholly artificial," concluding that, regardless of denomination, the law may not "discriminate[] among religious institutions on the basis of the pervasiveness or intensity of their belief." *Id.*; *accord Larson*, 456 U.S. at 246 n.23 (rejecting that a law's disparate impact among religious organizations is constitutionally permissible even when "such distinctions result from application of secular criteria").

In an attempt to distinguish *Weaver* on its facts, the government cites *Michigan Catholic Conference v. Burwell*, 755 F.3d 372, 395 (6th Cir. 2014), but that attempt is unavailing. Opp. 30 n.17. It claims that, in *Weaver*, the impermissible discrimination was based on "the nature and religious belief and practice at the university" as opposed to "distinctions based on organizational form," which are supposedly benign. But discrimination based on organizational form is exactly what the Supreme Court invalidated in *Larson*, the case *Weaver* relied upon. *Compare Larson*, 456 U.S. at 231-32 ("[o]nly those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt") *with* 26 C.F.R. § 1.6033-2(h)(2)-(4) (an integrated auxiliary must not "normally receive[] more than 50 percent of its support" from non-church sources). Moreover, the government has admitted that assumptions about "the nature and religious belief and practice at the university" are exactly what the defendants have based their distinctions on. Baxter Decl. ¶ 5, Ex. D at 34:9-24 (speculating whether employees at various institutions "are more likely not to object to the use of contraceptives").

Weaver also rejected the government's assertion that the Religion Clauses only protect against *intentional* discrimination. 534 F.3d at 1260 ("The 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently.").

Gillette v. United States, 401 U.S. 437 (1971) also cuts against the Mandate. It upheld military conscientious-objector status because it was based on the objectors who asserted

the same objection and sought to engage in the same practice. *Id.* at 442 n.4, 450-51. Here the Mandate discriminates among institutions that engage in the *exact same activity* and have the *exact same* religious objections. That is impermissible.

II. The Other Preliminary Injunction Factors Are Satisfied

The government agrees: any "loss of First Amendment freedoms" is "irreparable injury." Opp. 31. RFRA protects such freedoms. *Korte*, 735 F.3d at 666; *Hobby Lobby*, 723 F.3d at 1146. Despite the government's claim, Opp. 31, *Elrod* is not contrary. 427 U.S. at 373. With millions not covered by the Mandate, and Ave Maria's employees sharing its beliefs, the government cannot credibly claim an injunction would harm the public interest.

CONCLUSION

For these reasons, the Court should grant the motion for a preliminary injunction and enjoin enforcement of the Contraception Mandate against Ave Maria and its issuer.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2014, *Plaintiff Ave Maria University's Reply Memorandum in Support of Motion for Preliminary Injunction* was served on all counsel of record via the Court's electronic filing system.

s/ *Eric S. Baxter*
Eric Baxter