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

AVE MARIA UNIVERSITY, *Plaintiff*, v. KATHLEEN SEBELIUS, *et al.* *Defendants*.	Civil No. 2:12-cv-00088-UA-SPC **PLAINTIFF'S RESPONSE TO DEFENDANTS' EIGHTH NOTICE OF SUPPLEMENTAL AUTHORITY**

RESPONSE TO EIGHTH NOTICE OF SUPPLEMENTAL AUTHORITY

Ave Maria University respectfully submits this response to Dkt. 69, Defendants' Eighth Notice of Supplemental Authority.

Notice of Proposed Rulemaking

On February 1st, 2013, Defendants issued a Notice of Proposed Rulemaking ("NPRM") that proposes changes to the preventive services mandate ("Mandate") that is the subject of this litigation. *See* 78 Fed. Reg. 8456. In its most recent notice to the Court, the government argues that the NPRM demonstrates its intention to alter the Mandate in a manner that will protect Ave Maria's rights, and it consequently asserts that Ave Maria's pending lawsuit against the current Mandate should be dismissed for lack of standing and ripeness. *See* Dkt. 69 at 1-4. The government is mistaken.

As Ave Maria has already explained, *see* Dkt. 24 at 11-13, the government's proposed changes to the Mandate raise the issue of mootness, not standing or

ripeness. *See* Dkt. 21 at 21 (arguing that when rulemaking is complete, "plaintiff's challenge to the current regulations likely will be moot"); *see also CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 414 (D.C. Cir. 2011) (case not moot because "[t]he agency's promised rulemaking has yet to occur, and [the plaintiff's] exemption is merely temporary."). The government bears the formidable burden of proving it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000); *see also, e.g.*, *Sheely v. MRI Radiology Network, PA*, 505 F.3d 1173, 1184 (11th Cir. 2007) (noting *Laidlaw*'s "formidable . . . burden" to show mootness).

The NPRM cannot possibly satisfy the government's stringent mootness burden. *See* Dkt. 24 at 11-13. By its own terms, the NPRM merely proposes a future accommodation that may or may not come to fruition; it is not a final rule with the force of law. The government concedes this by stating candidly that "the NPRM does not technically bind defendants to a change in policy." Dkt. 69 at 5 n.2. For purposes of mootness, that admission settles the matter: the NPRM cannot moot Ave Maria's lawsuit. *See, e.g.*, *CSI Aviation*, 637 F.3d at 414 (holding challenge to agency action not moot because "[t]he agency's promised rulemaking has yet to occur, and [the plaintiff's] exemption is merely temporary"); *see also, e.g.*, *Knox v. SEIU*, 132 S. Ct. 2277, 2287 (2012) (holding that, "[a]s long as the parties have a

concrete interest, however small, in the outcome of the litigation, the case is not moot").[1]

Just as it cannot establish mootness, the NPRM can also have no effect on Ave Maria's standing. Standing is assessed as of the time a complaint was filed. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003); *see also* Dkt. 24 at 11 (explaining that "Defendants' argument is really about mootness."). Ave Maria's complaint in this matter was filed nearly a year before the NPRM was issued. Dkt. 1. The NPRM is therefore irrelevant to Ave Maria's standing.

Nor can the NPRM affect the ripeness of Ave Maria's lawsuit. An NPRM may undermine the ripeness of a challenge to a final agency rule by proposing a complete reversal of course that would fundamentally alter the existing challenge. *See, e.g.*, *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 388 (D.C. Cir. 2012) (pending challenge to final rule rendered unripe because government issued NPRM that would represent a "complete reversal of course" from prior rule and "likely moot" pending challenge). But, far from a complete reversal of course, the NPRM merely reiterates proposals the government sketched out nearly a year ago in the Advance

[1] The government relies heavily on its own assurance that it "will *never* enforce the regulations in their current form" against Ave Maria. Dkt. 69 at 3 (emphasis in original); *see also id.* at 2 (Defendants "promise that they will never enforce the current version of the challenged regulations against plaintiff"). This certainty is newfound. Previously, the government claimed only "*a significant chance* that the amendments will alleviate" Ave Maria's injuries, or that, when the rulemaking is complete, "plaintiff's challenge to the current regulations *likely will* be moot." Dkt. 21 at 20, 21 (emphasis added). The promise the government relies on occurred at oral argument in a different case in December 2012, a full nine months after the ANPRM and more than a year after the original Mandate. *See* Dkt. 69 at 3-4.

Notice of Proposed Rulemaking ("ANPRM"). *Compare* 78 Fed. Reg. at 8463-64 (NPRM) *with* 77 Fed. Reg. 16501, 16506-07 (ANPRM). These proposals continue to be inadequate for the same reasons that Ave Maria has already detailed at length in its opposition to the government's motion to dismiss. *See* Dkt. 24 at 10-13.

Most fundamentally, the NPRM confirms that Ave Maria will *not* be exempt from the Mandate. *See* 78 Fed. Reg. 8456, 8474 (clarifying that existing exemption includes only organizations qualifying as churches and their integrated auxiliaries under the tax code); *see also* Dkt. 1, ¶¶ 102-111 (explaining that Ave Maria does not qualify for exemption). By denying Ave Maria the exemption other religious groups receive, the NPRM continues to treat Ave Maria as a second-class religious organization and violate its rights under RFRA and the First Amendment.

Moreover, the "accommodation" proposed in the NPRM—assuming it is finalized—would continue to raise serious concerns with regard to Ave Maria's religious beliefs. The proposed accommodation would require Ave Maria to notify its carrier, which would then be required to automatically enroll all Ave Maria plan participants (whether or not they wish to be enrolled) in a separate policy covering the objectionable drugs and devices, ostensibly with no premium charge.[2] Even assuming this scheme would shield Ave Maria from ultimately paying for the objectionable coverage, Ave Maria's religious beliefs more broadly prohibit it from "*participating in*, paying for, training others to engage in, or *otherwise supporting* contraception, sterilization, or abortion." Complaint ¶ 35 (emphases added). In

[2] 78 Fed. Reg. at 8462-64.

other words, the NPRM's proposals continue to raise serious questions about whether "Ave Maria would be forced to serve as a gatekeeper, making objectionable drugs and services available to employees through a plan it sponsors, just as under the current final rule." Dkt. 24 at 12-13.

The NPRM therefore cannot support dismissal on ripeness grounds. The government's sole authority for dismissal—the D.C. Circuit's decision in *American Petroleum*—requires a "complete reversal of course" by an agency before ripeness concerns are triggered. *See Am. Petroleum*, 683 F.3d at 388 (requiring a "complete reversal of course" from prior rule that would "likely moot" pending challenge); Dkt. 69 at 3 (relying on *American Petroleum*). As discussed above, the NPRM does not remotely qualify as a "complete reversal of course" from the existing Mandate. Moreover, even where the agency *did* completely reverse course, the *American Petroleum* court merely held the existing challenge in abeyance, instead of dismissing the case. *See id.* at 389 (deciding to "hold the case in abeyance pending resolution of the proposed rulemaking, subject to regular reports from EPA on its status"). Thus, the government points to no authority for the proposition that the NPRM supports dismissal of Ave Maria's lawsuit on ripeness grounds.

Conlon v. Sebelius

The government also relies on *Conlon v. Sebelius*, which ruled the plaintiff did not have standing to challenge the Mandate. 12-CV-3932, 2013 WL 500835 (N.D. Ill. Feb. 8, 2013). But *Conlon* relies heavily on the now-reversed standing decision in *Belmont Abbey College v. Sebelius*. *See* 2013 WL 500835, at *1-2, 4 (relying on

Belmont Abbey, 878 F. Supp. 2d 25 (D.D.C. 2012)); *but see Belmont Abbey Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (reversing lower court decision on standing). Having concluded it had no jurisdiction, *Conlon* also opined in dicta about prudential ripeness. Its ripeness discussion, however, hinges on the proposals sketched in the ANPRM—which, as explained above, are unavailing because they would not materially alter the legal or moral situation—and on representations made at oral argument in that case, which are irrelevant here. *See id.* at *5-6. *Conlon* is unpersuasive.

Roman Catholic Diocese of Fort Worth v. Sebelius

By contrast, the decision in *Roman Catholic Diocese of Fort Worth v. Sebelius,* 4:12-cv-00314 (N.D. Tex. Jan. 31, 2013), is persuasive.

First, *Fort Worth* correctly noted that "[the government's] arguments concerning the potential for further amendments to the Mandate are irrelevant … because '[s]tanding is determined as of the time that suit is filed.'" Op. 7. The same is true here. Like the *Fort Worth* plaintiff, Ave Maria had standing at the time its complaint was filed.

Second, *Fort Worth* recognized that the Mandate is a final rule, "[a]nd [that] because the Mandate is 'on the books,' there is nothing improper about subjecting it to the limitations of the United States Constitution and other applicable laws." Op. 9. Indeed, even if the Mandate is later amended, "a prompt ruling on the merits of the Diocese's claims should add clarity to the constitutional issues presented by the

Mandate and, in that sense, 'foster effective administration of the statute.'" Op. 9-10. The same is true here.

Finally, *Fort Worth* also noted that the plaintiff's harms in planning for the imposition of the Mandate are not, as the government contends, self-inflicted. Op. 10-11. Instead, they flow from *the government's* decision to promulgate the Mandate, a decision made a year before the effective date precisely because it takes time, effort and planning to implement major changes to employee insurance. *Id.* The government cannot now deny that Ave Maria would need time and resources to plan for the imposition of the Mandate.

* * * *

The authorities discussed in the government's eighth notice do not support its argument that Ave Maria's lawsuit should be dismissed. The government's motion to dismiss should be denied.

Dated: February 25, 2013

Respectfully submitted,

/s/ S. Kyle Duncan

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and that the following parties were served via that system:

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