IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE, *Plaintiff*, v. SYLVIA MATHEWS BURWELL, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*.	No. 1:13-cv-8910 Judge Robert M. Dow, Jr. Magistrate Judge Sidney I. Schenkier

WHEATON COLLEGE'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

The students, faculty, and staff of Wheaton College have voluntarily joined together in a religious community to pursue their shared religious convictions. For Wheaton's entire history, up to and including the present moment, Wheaton has enjoyed the freedom to act according to that shared religious faith while providing health insurance for members of its community. Absent relief here, that state of affairs will come to a halt on July 1, as Wheaton must either violate its sincere religious beliefs or face potentially crushing fines.

The government opposes even a short preliminary injunction, and argues that Wheaton should be required to change its existing plans by executing and delivering EBSA Form 700 to its insurer and TPA by July 1. According to the government, if Wheaton does not sign and deliver the Form in the coming days, an avalanche of horribles will ensue, ranging from placing women "at a competitive disadvantage," to "inflict[ing] a very real harm on the public" and even threatening "negative health consequences" for "both women and developing fetuses." Opp. at 6.

These aggressive and overblown harm arguments both fail on their own terms and—most importantly—eviscerate the government's prior claim that the Form is irrelevant because contraceptives flow via "independent legal obligations" that have nothing to do with Wheaton's actions. The government has already acknowledged, in the Federal Register and in this case, that Wheaton is the type of institution for which the government's interests are *not* threatened by an exemption. 78 Fed. Reg. 39870, 39874 (July 2, 2013) (religious employer exemption "does not undermine the governmental interests furthered by the contraceptive coverage requirement" if employers "employ people of the same faith"); Defs' Resp. to Wheaton's Facts (Docket No. 47) ¶ 5 (admitting that Wheaton employs people of the same faith). And the government's harm arguments doom its merits argument: apparently the Form really *is* central to the government's contraceptive delivery system—otherwise, why would the government so aggressively pursue

Wheaton's immediate signature, and why would so many alleged consequences flow from its failure to sign?

There is no reason to base a decision on the alleged urgency raised by the government, and many reasons not to. The real harm in this case is the threat to the entire Wheaton community if Wheaton is forced to choose between dropping its generous health benefits altogether or paying crushing fines beginning July 1. Congress has already exempted plans covering a multitude of employees from the Mandate, *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), and courts across the country have protected many more. These very defendants have written rules that protect every non-profit with a plan year starting in August, September, October, November, or December of this year from immediate compliance. A short injunction is appropriate here, so that Wheaton is not irreparably harmed while the Court and the parties await the Supreme Court's decision about the application of RFRA to the contraceptive Mandate in the for-profit context.

ARGUMENT

This Court should grant Wheaton's motion for preliminary injunction.

A. Wheaton is likely to succeed on the merits of its claims.

As the Court is aware, the centerpiece of the government's merits argument is that Wheaton is simply wrong about the impact of executing and delivering EBSA Form 700. According to the government, Wheaton's execution and delivery of that form does not "trigger" or "enable" third parties to provide abortion-inducing drugs to Wheaton's students and employees. As the government explains:

> By opting out, eligible organizations do not trigger or otherwise "enabl[e]", [Complaint] ¶122, the provision of contraceptive coverage by a third party. Rather, the third parties in this case—plaintiff's insurer and TPA—provide coverage as a result of independent legal obligations.

Defs' Mot. to Dismiss (Document No. 26) at 1. As the government sees it, insurers and TPAs have "independent legal obligations" that are not triggered by the content of Wheaton's policy or by Wheaton's execution of EBSA Form 700.

The government is wrong, as Wheaton has explained at length in its prior briefs.[1] But to the extent the summary judgment briefing left any room for doubt about the impact of EBSA Form 700, the government's latest brief resolves that doubt entirely. That is because *the government* now suggests that Wheaton's execution and delivery of EBSA Form 700 actually *is* the trigger for the distribution of the drugs at issue. In particular, the government claims that if Wheaton is permitted to delay signing EBSA Form 700—even for just a few weeks—that delay will:

- "undermine the government's ability to achieve Congress's goal[] of improving the health of women and newborn children" (Opp. at 5);
- "undermine the government's ability to achieve Congress's goal[] of . . . equalizing the coverage of preventive services for women and men" (*id.*);
- "be contrary to the public interest" (*id.*);
- deny Wheaton's employees (and their families) and Wheaton's students "the benefits of the preventive coverage regulations" (*id.*);
- prolong a situation in which "both women and developing fetuses suffered negative health consequences" (Opp. at 6);
- prolong a situation in which "women [are] put at a competitive disadvantage due to their los[t] productivity and the disproportionate financial burden they [bear] in regard to preventive health services" (*id.*); and
- "inflict a very real harm on the public and, in particular, a readily identifiable group of individuals" (*id.*).

All of these arguments presuppose that Wheaton's immediate execution and delivery of EBSA Form 700 is an integral part of the government's system to deliver the drugs at issue. If the drugs

[1] *See* Wheaton's Memo. in Supp. of Summ. J. (Docket No. 41) at 19-23; Wheaton's Reply in Supp. of Summ. J (Docket No. 52) at 11-15.

flowed simply by virtue of "independent legal obligations"—and if Wheaton's Form did not "trigger" or "enable" the drugs to flow—then no harm could come from giving Wheaton a short delay during which it does not have to sign the Form. Put another way, if EBSA Form 700 does not "trigger" or "enable" anything, then how could *not* signing EBSA Form 700 have *any* of these negative consequences, much less all of them? And why wouldn't the Supreme Court's solution in *Little Sisters of the Poor v. Sebelius*—under which the Little Sisters informed the government of their objection *without* signing and delivering EBSA Form 700—work just as well here?

In reality, however, the government has no choice but to rely on Wheaton to carry out the conversion of its conscience-compliant health plans into plans that violate Wheaton's conscience. That is because rather than pursue its goals directly, the government has instead chosen a course which seeks to co-opt Wheaton's health plans. Thus, as the government admitted when announcing the accommodation scheme, Wheaton's execution and delivery of EBSA Form 700 is necessary to "ensure[]" that Wheaton's TPA has "legal authority to arrange for payments for contraceptive services and administer claims in accordance with ERISA's protections for plan participants and beneficiaries." 78 Fed. Reg. at 39880; *see* Wheaton's Memo. in Supp. of Summ. J. (Docket No. 41) at 23; Wheaton's Reply in Supp. of Summ. J at 13-14. Likewise, Wheaton's existing contract with its TPA prevents the TPA from acting as a plan administrator or taking on the kinds of fiduciary duties that the government's accommodation scheme requires. *See* Wheaton's Memo. in Supp. of Summ. J. (Docket No. 41) at 22-23 (quoting and discussing the Administrative Services Agreement between Wheaton College and BlueCross BlueShield of Illinois (Docket No. 41-4)). The government's system depends on forcing Wheaton violate its religion by using EBSA Form 700 to override this agreement and enable the flow of abortion-inducing drugs. *See id.*

Thus the government's arguments against a preliminary injunction conclusively rebut their arguments on the merits. The Form really does matter—it really is essential to the complicated contraceptive delivery system constructed by the government. If "independent legal obligations" actually could do all the work, there would be no need for the government to even be in court arguing for the right to force Wheaton to sign, or the power to crush Wheaton with fines for not signing. For purposes of the preliminary injunction, the government's acknowledgement of the centrality of EBSA Form 700 is more than enough to confirm that Wheaton is at least likely to succeed on the merits.[2]

The government also argues that there is no reason to delay a final ruling in this case until after the Supreme Court rules in *Hobby Lobby v. Burwell* (No. 13-354), on the ground that *Hobby Lobby* "will not likely control the merits of this case" because the government has offered Wheaton an "accommodation" for which businesses are not eligible. Opp. at 3. While it is true that Wheaton has one more option than a for-profit business would,[3] it remains entirely likely that a *Hobby Lobby* decision will provide important guidance about RFRA and the contraceptive Mandate. For

[2] The government likewise has no answer to Wheaton's further argument that *even if* the conversion of its health plans took place without any action by Wheaton itself (which it does not), it would still be a substantial burden under RFRA. *See* Wheaton's Mot. for Prelim. Inj. at 4; Wheaton's Memo. in Supp. of Summ. J. (Docket No. 41) at 21-22; Wheaton's Reply in Supp. of Summ. J at 14-15. As the Solicitor General acknowledged during oral argument in *Burwell v. Hobby Lobby*, if the government banned kosher slaughter, customers wishing to purchase kosher meat could file suit under RFRA. That is because a ban on a religiously-required product is a burden on the religious exercise of the religious believers who are obligated to use that product. *See, e.g.*, *Gonzales v. O Centro*, 546 U.S. 418, 425 (2006). Here, the religiously-required product is health coverage that complies with Wheaton's beliefs about the sanctity of life. There are many ways the government can provide emergency contraceptives to Wheaton's employees without co-opting Wheaton's health plans and forcing Wheaton to violate its religious beliefs. *Korte*, 735 F.3d at 686. Yet because the government has instead chosen a system that requires Wheaton's coerced involvement, it has substantially burdened Wheaton's religious exercise.

[3] It is undisputed, however, that Wheaton is prevented from complying with the "accommodation" because doing so would force Wheaton to violate its sincere religious beliefs. Defs' Resp. to Wheaton's Facts (Docket No. 47) ¶ 12-14. The government has not challenged the existence, religiosity, or sincerity of Wheaton's religious obligations in this regard. *See id.*

example, in *Hobby Lobby*, the government has argued, as it does here, that RFRA does not protect against burdens that are too "attenuated," or that "involve[e] the actions and rights of independent actors and affected third parties." Pet. Br. at 32-33, *Hobby Lobby v. Burwell* (U.S. No. 13-354). The government has also argued that its Mandate system satisfies strict scrutiny. Pet. Br. at 37-58, *Hobby Lobby v. Burwell* (U.S. No. 13-354). Given that the Supreme Court is likely to address and perhaps resolve these arguments in the coming days—and to do so in the context of the same statute (RFRA), and in the context of the same regulatory mandate—it would make far more sense for this Court to await that result than to rush to judgment.[4]

For all of these reasons, and for the further reasons discussed in Wheaton's summary judgment briefs, Wheaton is likely to succeed on the merits of its claims.

B. The remaining preliminary injunction factors strongly favor Wheaton.

The remaining factors in the preliminary injunction analysis—irreparable harm, the balance of the equities, and the public interest—likewise favor Wheaton.

Irreparable Injury. The government's only response to Wheaton's showing of irreparable injury is to restate its incorrect view that Wheaton cannot prevail on the merits. Opp. at 4. But this is not a case where the only injury to Wheaton arises from not being able to speak or practice its faith. If Wheaton persists in offering conscience-compliant health coverage, the government has also promised to make Wheaton pay millions of dollars in fines. Ryken Decl. (Docket No. 41-1) ¶ 69, (describing the $34.8 million in annual fines that Wheaton faces for continuing to offer conscience-compliant health benefits). By affecting its ability to recruit and retain employees, the

[4] The government's insistence that for-profit cases are very unlikely to impact the result in a non-profit case is different from its approach within the Third Circuit. In that circuit, where the government won the for-profit case at the court of appeals (*Conestoga Wood*), the government has relied heavily on the for-profit case as controlling key portions of the RFRA and First Amendment analysis for non-profits. *See, e.g.,* Defs' Memo. in Supp. of Mot. to Dismiss, *Persico v. Sebelius*, No. 1:13-cv-00303 (W.D. Pa. Nov. 8, 2013), available at 2013 WL 6061297 (relying extensively on *Conestoga Wood* in a non-profit case).

threat of these enormous fines is causing Wheaton present harm. *Id.* ¶¶ 80-83. And the sheer magnitude of these fines would have a potentially devastating effect on a small religious college like Wheaton. *Id.* ¶¶ 4, 68-69, 73-74. These kinds of injuries are irreparable in themselves, and justify a preliminary injunction now on any of Wheaton's claims, including those that arise under the Administrative Procedure Act.

Balance of Harms. The government cites cases for the proposition that "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." Opp. at 5 (citing, *inter alia*, *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998)). But where a law is "likely unconstitutional," the interests of those the government represents "do not outweigh [a plaintiff's interest] in having [its] constitutional rights protected."[5] *Awad v. Ziriax*, 670 F.3d 1111, 1131–32 (10th Cir. 2012); *see also Korte*, 735 F.3d at 666 (applying a similar principle).

Even if this were not so, the balance of harms would still favor Wheaton, because all but a tiny fraction of the government's interest in the ACA—and, indeed, the Mandate itself—will still be fully realized if this Court enters an injunction. The government asserts that enjoining the Mandate would undermine "Congress's goals," Opp. at 5, but Congress did not adopt the Mandate; HHS did. The government has made no showing that Congress required or even contemplated that HHS would adopt a rule requiring religious institutions like Wheaton to cover the narrow class of contraceptives with potentially life-ending properties, and the sources the government cites do not

[5] This principle is basic to the American justice system. As it says over the door to the Attorney General's office in Washington, D.C.: "[T]he United States wins its case whenever justice is done one of its citizens in the courts." U.S. Dep't of Justice, Letter re DOJ Seal – History and Motto, Feb. 14, 1992, at n.25, *available at* http://www.justice.gov/jmd/ls/dojseal.htm (last visited June 16, 2014).

support this assertion.[6] Nor has the government come forward with any evidence that any harm flowed from its own choice to exempt plans covering tens of millions of people for other reasons, or from injunctions protecting many religious institutions and businesses. Because an injunction would affect only a very small portion of the Mandate's required preventive services, and because enforcing the law is substantially likely to violate Wheaton's rights, the balance of harms favors Wheaton.

Public Interest. "Once the moving party establishes a likelihood of success on the merits, the balance of harms 'normally favors granting preliminary injunctive relief' because 'injunctions protecting First Amendment freedoms are always in the public interest.'" *Korte*, 735 F.3d at 666 (applying this principle in a RFRA case). Thus, the public interest is served by enjoining the Mandate, which likely violates the First Amendment and RFRA. And it is served by enjoining the Mandate for violating the Administrative Procedure Act as well, because failing to do so would expose a 150-year-old religious liberal arts college that serves hundreds of students and employees to potentially ruinous fines.

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[6] The only Congressional sources the government cites are two floor statements made during the debate over the women's preventive services amendment. *See* Opp. at 6; Defs' Mot. for Summ. J. (Docket No. 26) at 20 n.14 (citing 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009)). But these statements mention only "family planning," not "emergency contraceptives."

The government also cites the IOM Report, a non-Congressional document. But even that does not support its point: the IOM Report mentioned "emergency contraceptives" only in passing, excluded the "ethical, legal and social issues" relevant to coverage for emergency contraceptives from its analysis, and considered the contours of actual "insurance coverage requirements"—such as the Mandate—to be "beyond the scope" of its review. *Compare* Opp. at 6 (citing IOM Rep. at 19-20, 102-04) *with* IOM Rep. at 76 (stating that "a methodology to fully address insurance coverage was beyond its scope" and noting that insurance coverage requirements "may consider a host of other issues, such as . . . ethical, legal, and social issues" and "cost," which were beyond the scope of the IOM's review) *and id.* at 105 (mentioning "emergency contraception" as one among many FDA-approved contraceptive methods, without further discussion or analysis).

The government nevertheless argues that an injunction would "inflict a very real harm" on "a readily identifiable group of individuals"—Wheaton's students and employees. Opp. at 6. But the government simply ignores its own acknowledgement that Wheaton's students and employees are part of a voluntary religious community governed by shared religious beliefs. Ryken Decl. ¶¶ 14-19 (describing Wheaton's Community Covenant); Defs' Resp. to Wheaton's Facts (Docket No. 47) ¶ 5. Indeed, the real harm to Wheaton's students and employees would come from *not* entering an injunction, because without an injunction their school and employer faces the untenable choice between violating their shared religious commitments or facing massive fines.

The government's newest suggestion—that Wheaton's employees and students would somehow be better off if Wheaton is forced to drop all of its insurance entirely in the next few days, Opp. at 4, n.2—further demonstrates that the public interest favors a short injunction here. Simply put, Wheaton's students and employees would not be better off being stripped of their health insurance and sent scrambling to the exchanges to try to sign up for insurance policies by July 1. It would harm, not help, Wheaton's students, employees, and families if they were to be thrown off their insurance policies, and forced to face the accompanying risks of interrupted treatment and changes in physician-patient relationships. Both Wheaton—which has a religious commitment to provide benefits, Ryken Decl. ¶20; Defs. Resp. to Wheaton's Facts (Docket No. 47) ¶12—and its students, employees, and families would be substantially burdened (to say the least) by that sort of forced disruption.

The public interest favors providing short term protection for Wheaton to allow for an orderly disposition of this case without either Wheaton facing crushing fines or its families facing a sudden cancellation of their benefits.

CONCLUSION

For all these reasons, as well as for the reasons stated in Wheaton's opening brief, this Court should grant Wheaton's motion for a preliminary injunction. A proposed order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on June 16, 2014, and was thereby electronically served on counsel for Defendants.

s/ Mark L. Rienzi

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