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 MOTION FOR PRELIMINARY INJUNCTION** **(One Hour Oral Argument Requested)**

INTRODUCTION

In less than two months, beginning November 1, 2014, Defendants the Department of Health and Human Services, the Department of Labor, and the Internal Revenue Service (collectively "HHS") will compel Ave Maria University to begin providing free access to potentially life-terminating drugs such as Plan B and Ella (the "morning-after" and "week-after" pills), contraceptive drugs and devices, and sterilization services—all in violation of its religious beliefs. If Ave Maria refuses to comply with this mandate (the "Mandate") and adheres to its religious beliefs, it will face crushing government fines of over $17 million annually. Ave Maria thus seeks a preliminary injunction enjoining HHS from enforcing the Mandate on the grounds that it violates the Religious Freedom Restoration Act ("RFRA") and First Amendment to the United States Constitution.[1]

[1] This Court's Order of August 7, 2014, states that the Court will decide this motion prior to Ave Maria's November 1 deadline. Ave Maria respectfully asks for a ruling as soon as possible to afford it time to take necessary steps in case of an adverse holding.

Ave Maria is not alone in this coercive predicament. There are currently forty-three lawsuits brought by non-profit religious organizations in courts across the nation seeking protection from the HHS mandate (the "Mandate").[2] Courts in thirty-one of those cases—including the United States Supreme Court and Eleventh Circuit Court of Appeals—have already granted preliminary injunctive relief to objecting nonprofit religious organizations. *Id*. In only three cases has relief been denied, *id*., and all three of those cases were decided before the Supreme Court's rulings in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). Having been stayed pending *Hobby Lobby*, *see* Dkt. 46, this case is among the nine still awaiting preliminary rulings.

Now that the Supreme Court has resolved *Hobby Lobby* by holding that the Mandate violates RFRA when applied to closely-held businesses, and further enjoined the Mandate as applied to nonprofit organizations in *Wheaton*, Ave Maria's entitlement to a preliminary injunction is clear. Indeed, in *Hobby Lobby*, the Supreme Court cited with approval the preliminary injunction it had previously granted to an objecting class of nonprofit religious organizations in *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014). *See Hobby Lobby*, 134 S. Ct. at 2763 n.9. There, the Court addressed the final rule purporting to "accommodate" religious nonprofits by allowing them to avoid the fines by submitting EBSA[3] Form 700 to their insurer, which triggers a requirement that the issuer itself provide

[2] An up-to-date listing of the various challenges to the HHS Mandate and the current status of each lawsuit is maintained at www.becketfund.org/hhsinformationcentral.

[3] EBSA is the Employment Benefits Security Administration, a division of the Department of Labor.

and pay for the objectionable coverage through the employers' healthcare plan. 134 S. Ct. 1022. The Little Sisters of the Poor argued that requiring a third party do the same thing they could not do directly would still be a violation of their religious beliefs. The Court granted their motion for preliminary injunction, holding that objecting parties must instead "be permitted to opt out of the contraceptive mandate" simply "by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators." *See Hobby Lobby*, 134 S. Ct. at 2763 n.9.

Just hours after the Court in *Hobby Lobby* cited favorably the injunction in *Little Sisters*, the Eleventh Circuit Court of Appeals ruled that, "[i]n light of the Supreme Court's decision," the nonprofit religious broadcaster Eternal Word Television Network was also entitled to preliminary injunctive relief. *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs. ("EWTN")*, 756 F.3d 1339, 1340 (11th Cir. 2014). And then three days later, the Supreme Court again ruled that a religious objector—this time Wheaton College—was entitled to an injunction simply by "inform[ing] [HHS] in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Wheaton Coll. v. Burwell*, 134 S. Ct. at 2807.

On July 30, 2014, Ave Maria sent HHS just such a notice in the exact format as deemed sufficient by the Supreme Court to warrant preliminary relief in *Little Sisters* and

Wheaton.[4] Baxter Decl. [Dkt. 47-1] ¶ 2, Ex. A. HHS nevertheless refused to consent to a preliminary injunction, insisting that Ave Maria litigate its religious liberty claims under the looming November 1 deadline and the threat of crushing fines.

Presumably, HHS will argue that Ave Maria's *Wheaton*-style notice is ineffectual because, on August 22, 2014, HHS issued an "augment[ed]" interim final rule for religious objectors. 79 Fed. Reg. 51092, 51092 (Aug. 27, 2014). But the new rule—HHS's *seventh* attempt to obscure the Mandate's imposition on religious freedom—cannot be grounds for denying a preliminary injunction. The augmented rule demands far more than what the Supreme Court required in *Wheaton*, and, in fact, is substantively indistinguishable from the original rule that the *Wheaton* Court enjoined. Rather than simply requiring notice that Ave Maria is a religious nonprofit with a religious objection, the augmented rule would require Ave Marie to provide its insurance company's name and contact information for the specific purpose of allowing HHS to issue a notice requiring the insurer to provide the exact same items through Ave Maria's healthcare plan as if Ave Maria had given the insurer Form 700 directly.

Simply routing the form through HHS is a distinction without a difference. Indeed, HHS concedes that the augmented rule simply provides an "alternative" that has the exact "same" effect as before,[5] and that this additional means of triggering the objectionable

[4] Ave Maria has never objected to merely identifying itself so that the government can leave it alone. What it objects to is the government's unending attempt to use it and its healthcare plan as the vehicle for contraception distribution.

[5] The Center for Consumer Information & Insurance Oversight, Fact Sheet, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-

coverage "does not meet [the] concerns" of religious objectors.[6] HHS also acknowledges that the Supreme Court's injunction in *Little Sisters* with the basic notice requirement remains valid and in effect, despite the issuance of the new interim final rule.[7] Thus, there is no meaningful basis for distinguishing Ave Maria from the other religious objectors that have obtained preliminary relief based on the same notice that Ave Maria has already delivered to HHS.

As in the related Supreme Court and Eleventh Circuit cases, Ave Maria is likely to prevail on the merits of its RFRA claim and faces the imminent prospect of irreparable harm to its religious liberty, its continuing existence, and the welfare of its employees if preliminary relief is not granted. It is also likely to prevail on its Establishment and Free Exercise claims. In contrast, HHS can identify no legitimate harm that would result from allowing Ave Maria to litigate its claims under the protection of a preliminary injunction. HHS has already granted relief to thousands of religious objectors, including Ave Maria, through a one-year "safe harbor." It has also exempted plans covering hundreds of millions of individuals from the Mandate because those plans have been "grandfathered" for reasons of convenience. And over the past several months, federal courts have granted preliminary

---

02012013.html (last visited Sept. 8, 2014) ("CCIIO Fact Sheet") ("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.").

[6] *See* Gov't Letter to the Clerk at 2, *Roman Catholic Archbishop of Wash. v. Burwell*, No. 14-5371 (D.C. Cir. Aug. 22, 2014).

[7] *See* Supp. Br. for the Gov't at 5, *Little Sisters of the Poor v. Burwell*, No. 13-1540, (10th Cir. Sept. 8, 2014).

injunctions to dozens of religious objectors whose "safe harbor" and "grandfathering" exceptions have expired.[8] Thus, there can be no harm in, or public interest against, also extending protection to Ave Maria for the duration of this lawsuit. Ave Maria is in the same position as all the other protected religious organizations and deserves the same remedy—the ability to litigate its religious liberty claims without accumulating thousands of dollars in fines every day throughout the process. Accordingly, Ave Maria respectfully requests that the court grant its motion for preliminary injunction pending a decision on the merits.

STATEMENT OF FACTS

Ave Maria

Ave Maria's Catholic faith infuses everything it does: its very purpose is "[t]o educate students in the principles and truths of the Catholic Faith." *See* Towey Decl. [Dkt. 52-1] ¶¶ 9-14. The University is officially recognized as a Catholic university under the Canon Law of the Catholic Church. *Id.* ¶ 12. Members of its board of trustees, by requirement, are all "practicing Catholics in good standing with the Church," *id.* ¶ 15, and approximately 90% of all full-time staff are practicing Catholics. *Id.* ¶ 17. The University President "personally interview[s] *all* candidates recommended for full-time employment . . . to ensure they will embrace and advance the University's Catholic mission." *Id.* ¶¶ 18-19.

As one element of its faithfulness to the Catholic Church, Ave Maria holds and professes traditional Catholic teachings concerning the sanctity of life. *Id.* ¶ 34. It believes that each human being bears the image and likeness of God, and therefore that any abortion—including through post-conception contraception—ends a human life and is a

[8] *See, supra* note 2.

grave sin. *Id.* Furthermore, Ave Maria believes that any action "specifically intended to prevent procreation"—including contraception and sterilization—is morally wrong. *Id.* ¶ 37.

The Mandate

The Affordable Care Act mandates that any "group health plan and a health insurance issuer offering group or individual health insurance coverage" must provide "coverage" for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). Congress did not define "preventive care" but instead allowed HHS to define the term. 42 U.S.C. § 300gg-13(a)(4). HHS's definition includes all FDA-approved contraceptive methods and sterilization procedures, including abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and Ella (the "week-after" pill). Verm Decl. [Dkt. 22-2], Ex. B-2 at 16.[9] Failure to provide this coverage triggers severe penalties. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ($100 per day per affected individual if coverage is incomplete); 26 U.S.C. § 4980H(c)(1) ($2000 per year per employee if coverage dropped entirely).

"Exempt" employers. Vast numbers of employers are exempt from the Mandate. Employers with "grandfathered" health care plans, which cover tens of millions of Americans, are exempt from the Mandate. *See* 42 U.S.C. § 18011 (2010); Verm Decl. [Dkt. 22-2], Ex. B-5 at 35; *Hobby Lobby*, 134 S. Ct. at 2764 n.10 (noting that "the total number of Americans" on grandfathered plans is "substantial, and there is no legal requirement that

[9] The FDA's Birth Control Guide notes that these drugs and devices may prevent "attachment (implantation)" of a fertilized egg in the uterus. Verm Decl. [Dkt. 22-2], Ex. B-2 at 16-17.

grandfathered plans ever be phased out"). Employers with fewer than fifty employees, covering an estimated 34 million Americans, may avoid the Mandate and any penalties by not offering insurance at all. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); Verm Decl. [Dkt. 22-2], Ex. B-6 at 39. A subset of "religious employers"—namely, churches and religious orders—are also exempt. 78 Fed. Reg. 39870, 39874 (July 2, 2013); 45 C.F.R. § 147.131(a). These employers are all automatically exempt; they are not compelled to certify their religious beliefs to anyone, to notify their insurers, or to designate or obligate anyone else to provide contraceptive coverage.

"Non-Exempt" Employers and EBSA Form 700. Religious entities like Ave Maria that do not qualify for the "religious employers" exemption because they are not a church or religious order sought an equivalent exemption from HHS. *See, e.g.*, Towey Decl. [Dkt. 52-1] ¶ 73. Instead, the government developed an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501 (March 21, 2012). Unlike the grandfathering and religious employer exemptions, the government said that the "accommodation" would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." *Id.* at 16503.

As originally finalized, the rule required non-exempt religious organizations to execute and deliver EBSA Form 700 to their insurers, self-certifying that they are eligible for the accommodation. 78 Fed. Reg. at 39875; 45 C.F.R. § 147.131(c)(1). HHS imposed this requirement as part of its effort to ensure that beneficiaries of non-exempt employers' plans "will still benefit from separate payments for contraceptive services without cost sharing or other charge." 78 Fed. Reg. at 39874. Receipt of an executed EBSA Form 700 would

trigger an insurer's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. § 147.131(c)(2)(i)(B). Forcing the non-exempt employer to designate the insurer in this manner would ensure that employees of employers with religious objections receive these drugs for free "so long as they remain enrolled in the plan." *See* 45 C.F.R. § 147.131(c)(2)(i)(B).

The Augmented Accommodation. In *Little Sisters of the Poor*, the Supreme Court deemed the Form 700 self-certification insufficient to protect the Little Sisters' religious exercise and enjoined HHS from enforcing the Mandate against them, so long as they "inform[ed] the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services." 134 S. Ct. at 1022. The Court emphasized that the Little Sisters "need not use the form prescribed by the Government and need not send copies to third-party administrators." *Id*. Later, in *Wheaton College v. Burwell*, the Court reiterated that an injunction was warranted once the religious nonprofit organization notified HHS of its religious objection. 134 S. Ct. 2806, 2807 (2014).

In response to the decision in *Wheaton*, HHS published an interim final rule on August 22, 2014, providing another method for pushing the Mandate's obligations on to insurance issuers. Under the augmented rule, a religious objector can still send Form 700 to its insurer or it can send a separate form directly to HHS. If sent to HHS, the form must identify the religious organization's plan name and type, as well as the name and contact information "for any of the plan's . . . health insurance issuers." 29 C.F.R. § 2590.715-2713A(c)(1)(ii).

Receipt of this enhanced notice by HHS triggers an additional notice from HHS to the issuer, obligating the issuer to comply with the Mandate with respect to the plan's participants. 29 C.F.R. § 2590.715-2713A(c)(2).

HHS confirms that this "augmented" rule has the same goal as the old rule—"preserving participants' and beneficiaries' . . . access to coverage for the full range of Food and Drug Administration (FDA)-approved contraceptives." 79 Fed. Reg. at 51092. And it has the same effect as the old rule: "Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules [using Form 700], or provides notice to HHS in accordance with the August 2014 [Interim Final Rules], the obligations of insurers . . . regarding providing or arranging separate payments for contraceptives services are the same." *See* CCIIO Fact Sheet, *supra* n.2; *see also* 29 C.F.R. § 2590.715-2713A(c)(2)(i) (imposing same obligations on "issuer that receives a copy of the self-certification or [the] notification").

Ave Maria's Religious Exercise

Ave Maria's religious convictions forbid it from including contraception, sterilization, and abortifacient products in its employee healthcare plans. Towey Decl. [Dkt. 52-1] ¶ 68. It also "cannot participate in any scheme . . . to facilitate access to artificial contraception, sterilization, or abortion, or related education and counseling, without violating its deeply held beliefs, even if those items were paid for by an insurer or third party administrator and not by the University." *Id.* ¶ 38. But in order to comply with the Mandate under the augmented "accommodation," Ave Maria would need to execute the Form 700 self-certification and deliver it to its insurer or execute a separate notice to HHS that HHS would

then deliver to the insurer. *Id*. ¶¶ 55, 74-75. Delivery of either document would obligate the insurer to provide Ave Maria employees with payment for the same products and services it cannot provide directly. Regardless of the delivery method, Ave Maria would still be arranging for this coverage and facilitating payment by another entity. *Id*. ¶¶ 56-57. From Ave Maria's perspective, arranging for coverage and causing its insurer to provide payments for abortifacient and contraceptive products and services is no different than providing access directly. *Id*. Ave Maria would still be complicit in what it believes to be a grave moral wrong. *Id*. Simply put, Ave Maria is religiously opposed to any effort by the government, through whatever mechanism, to take over its healthcare plan for purposes of the Mandate. *Id*. ¶¶ 38, 52, 55-58.

It is also a part of Ave Maria's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. *Id* ¶ 40. Terminating Ave Maria's health plan would create significant hardship for its faculty and staff, *id*. ¶¶ 79-81, and would also result in serious competitive disadvantages in recruiting and retaining employees, *id*. ¶¶ 48-50. Ave Maria could also face regulatory action and lawsuits under ERISA. *Id*. ¶ 64; 29 U.S.C. § 1132.

ARGUMENT

In order to receive a preliminary injunction, Ave Maria need only show that

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000). "A substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain,

success." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005) (emphasis omitted). These standards are easily met here.

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

The Supreme Court's recent decision in *Burwell v. Hobby Lobby* establishes that Ave Maria is likely to succeed on the merits of its RFRA claims. *Hobby Lobby* confirms both that the Mandate imposes a substantial burden on Ave Maria's religious exercise and that the government failed to carry its burdens under strict scrutiny. Ave Maria is also likely to prevail on its claims that the Mandate violates the Establishment Clause.

A. The Mandate Violates RFRA.

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion," unless "in furtherance of a compelling government interest" and by the "least restrictive means" possible. 42 U.S.C. § 2000bb-1. The Mandate violates this protection.

1. The Mandate substantially burdens Ave Maria's religious exercise of refusing to facilitate access to abortifacient and contraception coverage.

The Mandate unquestionably imposes a substantial burden on Ave Maria's free exercise of religion: it must either (a) violate its beliefs by purchasing a plan that provides morally objectionable services to its employees; (b) violate its beliefs by executing and delivering the Form 700 self-certification or the enhanced HHS notice, making it morally complicit in the provision of objectionable services, or (c) violate the law and be subject to up to $17 million in fines per year.

Even without the Supreme Court's *Hobby Lobby* decision, this kind of direct government coercion to engage in an activity forbidden by one's religion is an obvious substantial burden under binding circuit precedent. *See Midrash Sephardi, Inc. v. Town of*

Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (concluding that a law imposes a substantial burden when it "requires participation in an activity prohibited by religion.");[10] *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1151 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (U.S. 2014) (Hartz, J., concurring) ("[L]aws requir[ing] a person to do something contrary to the person's religious beliefs . . . impose[ ] a substantial burden on free exercise, whatever the penalty imposed for violating the law."). Here, the Mandate requires Ave Maria to execute and deliver one of two forms, either of which will obligate its insurer to deliver abortifacient and contraceptive coverage to Ave Maria's employees. 45 C.F.R. § 147.131(c)(2)(i)(B). Ave Maria's moral complicity would be clear—without Ave Maria executing and delivering one of forms, the coverage would not be provided through its healthcare plan.

The government has argued that signing Form 700 should not burden Ave Maria's religion because the action of signing the form is a "*de minimis*" burden on Ave Maria, and because the burden on Ave Maria is too attenuated to the actual use of contraceptive coverage. Def.'s Mot. to Dismiss or for Summ. J., Dkt. 30 at 10-18. Presumably, the government will argue that the enhanced notice to HHS is also too attenuated. But the Supreme Court in *Hobby Lobby* squarely considered and rejected this type of argument.

[10] *Midrash* addressed RFRA's companion law—the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc—which uses a nearly identical standard. *See Knight v. Thompson*, 723 F.3d 1275, 1282 (11th Cir. 2013). Thus far, *see, e.g.*, Dkt. 30, the government has ignored binding circuit precedent on the meaning of "substantial burden," failing to cite *Midrash* or any other Eleventh Circuit precedent.

The plaintiffs in *Hobby Lobby* were family-owned businesses required to directly provide the Mandate coverage, without the "accommodation" that is available to nonprofits. The government argued "that the connection between what the objecting parties must do (provide [the] coverage)" and "the end that they find to be morally wrong (destruction of an embryo)" was "simply too attenuated" to impose a substantial burden on religion. *Hobby Lobby*, 134 S. Ct. at 2777. The Court, however, concluded that this argument "dodges the question that RFRA presents" and "instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778.

The Court also noted that this "too attenuated" argument "is not easy to square with" the exemption for religious employers. *Hobby Lobby*, 134 S. Ct. at 2777 n.33. If the harm truly were "too attenuated," there would have been no reason for the government to exempt "religious employers" at all. But the government *did* exempt "religious employers," specifically because of their religious objection, *see id*., and without requiring them to sign and deliver EBSA Form 700 or give notice to HHS. 45 C.F.R. § 147.131(a). The exemption for religious employers "would be hard to understand if the plaintiffs' objections here were not substantial." *Hobby Lobby*, 134 S. Ct. at 2777 n.33

The question of "substantial burden" is not whether the plaintiffs' claimed *religious exercise* is substantial, as the government's "attenuation" argument implies, but rather whether the burden itself—*i.e.*, the pressure on the plaintiffs to violate their beliefs—is substantial. On this question, the Court quickly concluded that "[b]ecause the contraceptive mandate forces [the plaintiffs] to pay an enormous sum of money . . . if they insist on

providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id*. at 2779; *see also EWTN*, 756 F.3d at 1340 (Pryor, J., concurring) ("If that is not a substantial burden on the free exercise of religion, then it is hard to imagine what would be.").

The Court further explained that it could not second-guess the religious plaintiffs' sincere answer to a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating commission of an immoral act by another." *Id.* at 2778. The plaintiffs' sincere determination that providing the coverage would be morally wrong—regardless of whether "an employee chose to take advantage of the coverage," *id*. at 2777—was their decision to make, and theirs alone, *id*. at 2779 ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial."). The Court explicitly criticized the government for "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question, . . . in effect tell[ing] the plaintiffs that their beliefs are flawed." *Hobby Lobby*, 134 S. Ct. at 2778; *see also EWTN*, 756 F.3d at 1340 (Pryor, J., concurring) ("It is neither our duty nor the duty of the United States to tell the [plaintiff] that its undisputed belief is flawed.").

The same analysis applies here. The government has never disputed that Ave Maria sincerely believes, as a religious matter, that it may not sign Form 700. *See* Dkt. 30. And the "augmented" rule changes nothing. Now instead of just signing Form 700 and delivering it to its insurer to trigger the coverage obligation, Ave Maria has the additional option of signing a different form with its insurer's name and contact information for

delivery to HHS, which will then deliver to the insurer the form triggering the coverage obligation. And in either instance, Ave Maria's plan would be the vehicle for carrying out the government's scheme.

Merely giving Ave Maria another way to accomplish what violates its conscience does not alter the analysis. Ave Maria believes that the compliance "demanded by the HHS regulations lies on the forbidden side of the line" and, as in *Hobby Lobby*, "it is not for [the government] to say that [its] religious beliefs are mistaken or insubstantial," *Hobby Lobby*, 134 S. Ct. at 2779; *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (noting that where religious objector "drew a line, . . . it is not for us to say that the line he drew was an unreasonable one"). As the Supreme Court explained, this Court's "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' . . . and there is no dispute that it does." *Id.* at 716 (citations omitted). The Court's role is instead limited to determining whether the Mandate places substantial pressure on Ave Maria to violate its beliefs. Because Ave Maria will face the same fines as in *Hobby Lobby*—$100 per day for each employee—the Mandate's burden is plainly "substantial." As stated by the Supreme Court, "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Hobby Lobby*, 134 S. Ct. at 2759.

The Supreme Court's reliance on the accommodation in *Hobby Lobby* is not an indication that it satisfies RFRA, either as originally promulgated or later augmented. The Court in *Hobby Lobby* assumed without deciding that the government had a compelling interest in imposing the Mandate, despite the substantial burden it imposed on the plaintiffs' free exercise. Thus, the Court had to address whether the Mandate was the least

restrictive means for meeting the compelling interest. 134 S. Ct. at 2779. The Court held it was not, because "[t]here are other ways in which Congress or HHS could equally ensure that every woman has cost-free access . . . to all FDA-approved contraceptives." *Id*. at 2759. Specifically, the Court noted that HHS had already offered the accommodation to nonprofit religious organizations and had no explanation for "why the same system cannot be made available when the owners of for-profit corporations have similar religious objections." *Id*. Significantly, all nine justices of the Court were careful to note that "[w]e do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims." *Id*. at 2782; *see also id.* at 2803 (Ginsburg, J., dissenting). Indeed, the Court specifically noted that it had already enjoined enforcement of the accommodation against the Little Sisters of the Poor. *Id*. at 2782 n.39; *see also id*. at 2763 n.9. In sum, although the question of the accommodation's validity under RFRA was left open, its existence showed that HHS had not even attempted to identify means less restrictive than the Mandate to accomplish its goals. It was this failure under the accommodation to treat for-profit and nonprofit religious organizations equally—not the accommodation's own validity—that contributed to the Mandate's demise in *Hobby Lobby*. *See id*. at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.").

Three days after its opinion in *Hobby Lobby*, the Court confirmed that the accommodation's status under RFRA was still an open question when it enjoined its

enforcement against a second religious nonprofit organization, Wheaton College. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014). As it previously had done in *Little Sisters*, the Court held that a simple notice to HHS of Wheaton College's religious objections, without delivery of Form 700 to the insurer, was sufficient to warrant a stay of the Mandate pending final resolution on the merits. *Id*. at 2807.

In the *Little Sisters* case, which is now back in the Tenth Circuit Court of Appeals, HHS has seized on language from the Supreme Court's *Wheaton* order that "[n]othing in this order precludes the Government from relying on [the simplified] notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Wheaton Coll.*, 134 S. Ct. at 2807, quoted in Suppl. Br. for the Gov't at 2, *Little Sisters v. Burwell*, No. 13-1540 (10th Cir. Sept. 8, 2014). Contrary to HHS's assumptions, this language does not suggest that the notice requirement in HHS's augmented rule satisfies RFRA. The Court's statement in *Wheaton* was made in response to HHS's claim that insurers are independently "required by federal law to provide full contraceptive coverage regardless whether the applicant completes EBSA Form 700." *Id*. Wheaton's response to this argument was that the issuers' obligations were in fact "dependent on their receipt of notice that the applicant objects to the contraceptive coverage requirement." *Id*. But the Court simply noted that HHS was already aware of Wheaton's objection and, thus, that "[n]othing in the [Court's] order preclude[d] the Government from relying" on that straightforward notice of Wheaton's religious objection. *Id*. Significantly, however, HHS did not move to enforce any independent requirement on the insurers to make the coverage flow without Wheaton's participation. Instead, HHS promulgated the augmented rule,

which merely recasts the enjoined Form 700 requirement in a continued attempt to force religious nonprofits to participate in facilitating coverage through their private healthcare plans.

Under the "new" rule, instead of delivering a form directly to its insurer, Ave Maria would have to give HHS the insurer's name and contact information so that HHS could deliver the form. 29 C.F.R. § 2590.715-2713A(c). But regardless of how the paper is pushed, the substance of the original and augmented rules is the same: under both, the government's scheme for creating free contraception and abortifacient coverage turns on Ave Maria's willingness to sign off on it and allow its plan to facilitate it, something that its religious convictions forbid. Towey Decl. [Dkt. 52-1] ¶¶ 38, 52, 55-58.

If Ave Maria signs either form, the objectionable drugs will flow. If it does not sign, they will not. And if Ave Maria does sign, there is a significant possibility that it will not only have facilitated access to the coverage, but also that it will be paying for it. The Affordable Care Act imposes a "medical loss ratio" on issuers, providing that if total claims are less than 85% of total premiums, the difference must be refunded to the plan sponsor so that the insurer's gross margins are capped at 15%. 42 U.S.C. § 300gg-18(b)(1)(A)(i) and (b)(1)(B). HHS has expressly stated that it intends to issue "guidance that an issuer of group health insurance coverage that makes payments for contraceptive services under these final regulations may treat those payments as an adjustment to claims costs for purposes of medical loss ratio . . . calculations." 78 Fed. Reg. at 39878. This adjustment would "compensate[]for any increase in incurred claims associated with *making payments* for contraceptive services." *Id*. (emphasis added). Thus, this rule would allow the insurer

to shift the cost of the contraception coverage back to Ave Maria via a reduction in rebate. This further confirms that the accommodation is nothing more than shell game to hide the reality that contraception coverage is still being provided by Ave Maria through its own healthcare plan.

This fact is further underscored by the lack of authority for imposing a separate "payment" requirement on issuers. The Affordable Care Act provides only that "issuers offering group . . . health insurance coverage" must "provide *coverage*" for a wide range of preventive health services, including contraception. 42 U.S.C. § 300gg-13(a) (emphasis added). And although HHS carefully uses the word "payments" as a cover when referring to the accommodation, the regulations overall make clear that these "payments" are the same thing as "coverage" under the plan. *See, e.g.*, 78 Fed. Reg. 39870-01, 39875 (July 2, 2013) (rejecting initial proposal to require insurers to issue separate contraception-only policies); *id*. at 39876 (requiring that "payments" be made in ways that meet "minimum standards for consumer protection, which would ordinarily accompany coverage"); 45 C.F.R. § 147.131(c)(2)(B)(ii) (providing that "issuer must provide payments for contraceptive services in a manner that is consistent with the requirements" for providing coverage under the Affordable Care Act); 78 Fed. Reg. at 39876 (allowing insurer to limit provision of contraception through the plan's network of providers); 29 C.F.R. § 2590.715-2713A(e) (providing that if employer's eligibility claim is later deemed false, issuer will not be liable for failure to provide "coverage" as long as it has been making the "payments").

Moreover, as supposed authority for imposing a separate "payment" requirement, HHS cites only to broad provisions like 29 U.S.C. § 1135 that give the Secretary of the Department of Labor general authority to "prescribe such regulations as he finds necessary and appropriate to carry out the provisions of this subchapter." *See* 78 Fed. Reg. at 39894 (listing § 1135 as authority for the "payment" regulation). But the Affordable Care Act makes provision only for "coverage" and not "payments." Holding that Section 1135 authorizes an entirely new "payment" scheme would mean that the government could make insurers bear the cost of *all* of the preventive care required by the Affordable Care Act. That cannot be true. The reality is that the accommodation still requires "coverage" under Ave Maria's plan, regardless of what HHS calls it or how it obscures the ways in which both the responsibility and—under the "medical loss ratio"—even the costs continue to fall on Ave Maria. The scheme is nothing more than a confused attempt to obscure that Ave Maria is still being forced to provide the coverage despite its religious objection. *See EWTN*, 756 F.3d 1339 (11th Cir. 2014) (Pryor, J., concurring) (characterizing the argument that the supposed "independent obligation [on insurers] does not constitute a substantial burden on the plaintiffs' exercise of religion" as "rubbish" and "wholly unpersuasive").

While the *Wheaton* Court stated that its order did not preclude HHS from enforcing any independent obligation owed by insurers, it was clear that Wheaton College could not be forced to participate in the government's scheme. It follows that the augmented rule, which blatantly reinstates exactly what the *Wheaton* Court enjoined, is not an accommodation sufficient to satisfy RFRA. For Ave Maria, signing either form will set in motion a delivery of contraceptive and abortifacient products and services to which it

strenuously objects through its private healthcare plan. The forms are not innocuous; rather, they are legally operative forms that trigger the insurer's obligation to pay for the objectionable coverage. For Ave Maria, the act of triggering the provision of these services and allowing them to flow through its healthcare plan makes it complicit with evil. Ave Maria cannot designate, authorize, obligate, or facilitate another party to provide the same drugs that it cannot provide itself. Towey Decl. [Dkt. 22-1] ¶¶ 38, 52, 55-58. Under the authority of *Little Sisters*, *Hobby Lobby*, *Wheaton*, and *EWTN*, it is clear that Ave Maria is entitled to a preliminary injunction.

2. The Mandate Cannot Satisfy Strict Scrutiny.

Because the Mandate substantially burdens Ave Maria's religious exercise, "the burden [of strict scrutiny] is placed squarely on the [g]overnment." *Gonzalez v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (citing RFRA at 42 U.S.C. § 2000bb-1(b)). Under RFRA, a burdened party "is entitled to an exemption" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Hobby Lobby*, 134 S. Ct. at 2761 (quoting 42 U.S.C. § 2000bb-1(b)). Further, *Hobby Lobby* makes clear that this analysis must be conducted with respect "to the person—the particular claimant." *Id.* at 2779 (quoting *O Centro*, 546 U.S. at 430-31); *see also Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) ("In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening *these* claimants." (emphasis in original)). The government bears the burden on strict scrutiny, even at the preliminary

injunction stage. *O Centro*, 546 U.S. at 429. No court to reach strict scrutiny has held that the Mandate can withstand it. This case is no different.

Compelling Interest. The government has identified its compelling interests in imposing the Mandate as "public health" and "gender equality." Dkt. No. 30 at 18-19. But the Court in *Hobby Lobby* rejected those interests as being "couched in very broad terms," whereas RFRA requires a "more focused" inquiry that "loo[ks] beyond broadly formulated interests." *Hobby Lobby*, 134 S. Ct. at 2779 (citing *O Centro*, 546 U.S. at 430-431). Specifically, RFRA "'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430-31). In *O Centro*, even the government's obviously compelling interest in enforcing the nation's drug laws faltered when applied to the specific circumstances of that case. *Id*. Here, RFRA "requires [the court] . . . to look to the marginal interest in enforcing the contraceptive mandate in [this] case[]." *Hobby Lobby*, 134 S. Ct. at 2779. (citing *O Centro*, 546 U.S. at 431).

The government cannot explain why application of *this* Mandate to *this* religious organization is necessary. In fact, it has essentially admitted that it has no interest in enforcing the Mandate against Ave Maria. Specifically, the government has made a regulatory finding that a complete exemption for houses of worship "does not undermine the governmental interests furthered by the contraceptive coverage requirement" because "[h]ouses of worship . . . are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874. But Ave Maria—whose

guiding purpose as a Canon-recognized Catholic university is "[t]o educate students in the principles and truths of the Catholic Faith," Towey Decl. [Dkt. 22-1] ¶¶ 9-10, 12, 14—occupies precisely the same position. It also is far "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874. Its trustees are required to be "practicing Catholics in good standing with the Church" whose "public writings and statements exhibit faithful adherence" to the Church. *Id*. ¶ 15. Approximately 90% of all full-time staff are practicing Catholics. *Id*. ¶ 17. The University President "personally interview[s] *all* candidates recommended for full-time employment—even if the prospective employee is not Catholic—to ensure they will embrace and advance the University's Catholic mission." *Id*. ¶ 18. In the past, he has vetoed recommendations to hire based on his conclusion that "the particular candidates would be incompatible with the University's Catholic mission." *Id*. ¶ 19. Finally, at the University's annual Mass held at the beginning of each school year, "all professors who teach disciplines pertaining to faith and morals must make a public Profession of Faith and take an Oath of Fidelity, in the presence of the Ordinary [of the Diocese of Venice]." *Id*. ¶ 22. The University president himself was required to make such public declarations at his inauguration, *id*. ¶ 23, all as part of the University's wide-ranging effort to ensure that Ave Maria remains true to the mission and teachings of the Catholic Church, including Church teachings concerning the sanctity of life and the purpose of procreation. *Id*. ¶¶ 34, 37; *see generally*, *id*. ¶¶ 9-33. If exempting houses of worship does not interfere with the government's alleged compelling interests because houses of worship are "more likely than other employers" to hire co-religionists, then an exemption for Ave Maria—which

carefully screens for employees who will exemplify and promote its religious views—certainly cannot interfere with the government's interests either. The government simply cannot bear its burden of proof "*to the person*" as demanded by RFRA. *O Centro*, 546 U.S. at 430-31 (emphasis added).

This conclusion is bolstered by Congress's treatment of the preventive services mandate in the Affordable Care Act. The statutory text indicates that the Mandate was less important to Congress than other goals. The Act did not expressly include contraceptive coverage; it left the determination of which women's preventive services should be included to HHS. *Hobby Lobby*, 134 S. Ct. at 2762. Further, Congress specified that, whatever those preventive services might entail, grandfathered plans covering millions of Americans would not have to comply. *Id.* at 39-40; 42 U.S.C. § 18011. As the unanimous Supreme Court has stated, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted). Applying that rule to the Mandate, the government's interests "cannot be compelling because the [Mandate] presently does not apply to tens of millions of people." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013); *Korte*, 735 F.3d at 686; *see also Hobby Lobby*, 134 S. Ct. at 2780 ("As we have noted, many employees . . . may have no contraceptive coverage without cost sharing at all.").[11]

[11] Defendants have asserted that, over time, employers will switch out of their "grandfathered" plans. Dkt. 30 at 21. But in *Hobby Lobby* the Supreme Court emphasized that "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Even more damning to the government's case, Congress saw fit to override the grandfathering exemption for those requirements of the Affordable Care Act that it deemed most important—but the Mandate was not among them. "Grandfathered plans are required 'to comply with a subset of the Affordable Care Act's health reform provisions' that provide what HHS has described as 'particularly significant protections.'" *Id*. (quoting 75 Fed. Reg. 34538-01, 34540 (2010)); *see also* 42 U.S.C. § 18011(a)(4) (listing exceptions to grandfathering). "***But the contraceptive mandate is expressly excluded from this subset***." *Id*. (emphasis added) (citing 75 Fed. Reg. 34540 (2010) ("[G]randfathered health plans are not required to comply with certain other requirements of the Affordable Care Act; for example, the requirement that preventive health services be covered without any cost sharing.")). Where a statute has expressly refused to treat a provision as even "particularly significant," the government is foreclosed from arguing that its interest in that provision is compelling.

Least Restrictive Means. Since the government cannot meet its burden under the compelling interest prong, the Court need not address the least restrictive means prong of RFRA. But even if it does, the government cannot meet its burden there either.

"The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780 (citing *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). It is not enough to show that a proposed less restrictive means is merely less "convenien[t]" or "efficien[t]." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534, 2540 (2014). Rather, the government must show that the proposed means is not "viable," *Hobby Lobby*, 134 S. Ct. at 2780, based on a showing of actual evidence, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816,

826 (2000). In sum, "the government must demonstrate that alternative measures . . . would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540. Here, the latest addition to the Mandate—the augmented accommodation—disproves the governments' prior claims in litigation across the country that EBSA Form 700 was the least restrictive means of distributing contraceptives. *See, e.g.*, Gov't Opp. Emerg. Mot. for Inj. Pend. App. at 18 n.3, *Little Sisters v. Sebelius*, No. 13-1540 (10th Cir. Dec. 30, 2013) ("The government believes that . . . the regulatory scheme to which they object . . . is the least restrictive means" of furthering its interests).

In fact, there are many ways Defendants could "promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte*, 735 F.3d at 686. The government bears the burden of showing why it cannot make use of these solutions, just as it has recently offered a new solution in response to the *Wheaton College* order that it claimed was not available before July. *Hobby Lobby*, 134 S. Ct. at 2782 n.41 (citing Br. of United States as *Amicus Curiae* in *Holt v. Hobbs*, No. 13-6827 at 10). As the Supreme Court recognized in *Hobby Lobby*, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing" such contraceptives directly. *Hobby Lobby*, 134 S. Ct. at 1780. One obvious way to do this would be simply to allow any employee who wants contraceptive coverage to purchase a policy with that coverage on the government-run exchanges. Considering Ave Maria's religious hiring requirements and the quality of its insurance plan, the government is highly unlikely to show that such employees even exist, but if they do, the government-run exchanges presumably provide coverage the government deems sufficient. And if the government believes coverage on

the government exchanges is too expensive, it is of course entirely free to subsidize those policies for any such employee, as it already does for employees whose employer-provided coverage is considered unaffordable or considered inadequate. *See* 26 U.S.C. § 36B(c)(2)(C)(i)-(ii) (employee not ineligible for tax credit where "the employee's required contribution [to an employer plan] exceeds 9.5 percent of the applicable taxpayer's household income" or the employer plan fails "minimum value" by covering "less than 60 percent" of the costs of covered benefits); *see also* 42 U.S.C. § 18071(f)(2) (applying same metric to cost-sharing subsidies).[12] Alternatively, the government already spends hundreds of millions a year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods . . . and services." 42 C.F.R. § 59.5(a)(1).[13] There is no legitimate reason why the government could not use a pre-existing program like this to redress genuine economic barriers to contraceptive access. *See, e.g.*, 42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family"); *see also, e.g.*, *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting programs like Title X and the government's lack of proof that providing contraceptives would "entail logistical and administrative obstacles

[12] This could be done in a number of ways. For example, even though employees with access to employer health plans that meet the "minimum essential coverage" standard are not eligible for subsidies, the government could redefine "minimum essential coverage" under 26 U.S.C. § 36B(c)(2)(B)(ii) to exclude plans that do not cover contraception. Alternatively, it could add compliance with the Mandate to the list of minimum standards necessary for satisfying "minimum essential coverage" under 26 U.S.C. § 36B(c)(2)(C).

[13] *See also, e.g.*, RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

Other less restrictive means could include providing a tax credit to employees who purchase contraceptives with their own funds or empowering willing actors—for instance, physicians, pharmaceutical companies, or various public interest groups—to deliver the drugs and sponsor education about them.

The government cannot credibly object to accepting any of these proposals on the ground that they would impose new costs on the government or require changes to existing programs. The so-called accommodation was itself a change to an existing regulatory program, created as a potential less restrictive means that imposed "new" costs on the government. *See* 78 Fed. Reg. at 39884 (providing for issuers to be reimbursed costs plus "a margin to ensure that [they] receive appropriate compensation for providing the contraceptive coverage" for employees of religious organizations eligible for the accommodation); *see also* 45 C.F.R. § 156.50(d)(3).

Further, *Hobby Lobby* itself directly forecloses any argument that an acceptable less restrictive means cannot require increased expenses or "establishing new government programs . . . or fundamentally altering existing ones." Dkt. 30 at 23-24. There, the Court stated: "[W]e see nothing in RFRA that supports this argument, and drawing the line between the 'creation of an entirely new program' and the modification of an existing program (which RFRA surely allows) would be fraught with problems." *Hobby Lobby*, 134 S. Ct. at 2781. The Court also noted that while "cost may be an important factor in the least-restrictive-means analysis," RFRA "may in some circumstances require the

Government to expend additional funds to accommodate citizens' religious beliefs." *Id*. Indeed, the Court emphasized that "[i]f, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal." *Id*. "It seems likely . . . that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA." *Id*. That is particularly true in Ave Maria's case, given the undisputedly religious nature of the institution and its hiring practices.

Finally, while *Hobby Lobby* found that the "accommodation" was a less restrictive means than being directly forced to provide and pay for objectionable coverage, nothing in *Hobby Lobby* blessed the accommodation as *the* least restrictive means. To the contrary, the Supreme Court was clear that it did not "decide today whether [the accommodation] complies with RFRA for purposes of all religious claims," and it disclaimed even being "permitted to address" the accommodation's viability. *Hobby Lobby*, 134 S. Ct. at 2782 & n.40. There, "the plaintiffs ha[d] not criticized [the accommodation] with a specific objection that has been considered in detail by the courts in this litigation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). The opposite is true here. Furthermore, if the Supreme Court had ruled otherwise, then surely it would not have expressly *reaffirmed* its decision to grant emergency relief to the Little Sisters of the Poor. *Hobby Lobby*, 134 S. Ct. at 2763 n.9 (citing *Little Sisters*, 134 S. Ct. 1022). The Little Sisters challenged the same accommodation as Ave Maria. *Id.* And just days after the *Hobby Lobby* decision, the

Supreme Court once again granted extraordinary relief to another religious ministry—this time, Wheaton College—which also presented the same claim as Ave Maria does here. *Wheaton*, 134 S. Ct. at 2808.

In sum, there is no reason to think that the existing accommodation is *the* least restrictive means for truly accommodating religious organizations with objections to providing contraceptive services, and it is the government's burden to prove that none of the other proposed less restrictive means are not viable. For all the aforementioned reasons, it is unlikely to meet this burden.

B. The Mandate Violates the Religion Clauses.

The Mandate violates both the Free Exercise Clause and the Establishment Clause by impermissibly discriminating among religious institutions engaged in the same religious exercise. Some favored "religious employers" are exempt from the Mandate and the accommodation. Yet others like Ave Maria, who wish to engage in the exact same religious exercise as "religious employers," are forced to comply or pay massive penalties.

These results are irrational. As noted *supra*, the Government's only reason for distinguishing between exempt churches and non-exempt religious non-profits like Ave Maria is its assumption that churches are "more likely" to hire employees that share their faith. 78 Fed. Reg. at 39874. But the same could be said with respect to Ave Maria, where approximately 90% of full-time employees are practicing Catholics, Towey Decl. [Dkt. 22-1] ¶ 17, and all full-time employees are required to embrace and advance the University's Catholic mission as a condition of their employment. *Id*. ¶¶ 18-19. Indeed, in parallel litigation, the government has conceded there is "no evidence" to support Defendants'

speculation that employees of religious organizations like Ave Maria "are more likely not to object to the use of contraceptives." *See* Baxter Decl. ¶ 5, Ex. D at 34:9-24.

When the government adopts a rule that makes "explicit and deliberate distinctions between different religious organizations," it must meet strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246-47 & n.23 (1982). The Mandate—which gives exemptions to some religious organizations but not to others engaged in the exact same religious exercise—cannot do so.

In *Larson*, the Supreme Court invalidated a Minnesota law that imposed disclosure requirements on religious organizations that did not "receive[ ] more than half of their total contributions from members or affiliated organizations." 456 U.S. at 231-32. The law thus exempted established, self-supported churches, while targeting churches that relied on outside donations. *Id*. at 246 n.23. This was an "explicit and deliberate distinction[] between different religious organizations," one that failed strict scrutiny and violated the Establishment Clause. *Id*. at 246 n.23, 255.

The distinction drawn among religious organizations here is even less defensible than in *Larson*. Rather than creating its own criteria for the religious employer exemption, HHS borrowed the strict rules that the IRS uses for the completely unrelated purpose of determining which religious organizations are exempt from reporting their income. Only religious organizations that are institutional churches or are controlled by an institutional church qualify for this narrow IRS exemption. *See* 26 C.F.R. § 1.6033-2 (stating that exempt religious organizations should, *inter alia*, have officers "appoint[ed] or remove[ed]" by a church). And under the IRS rules, an exempt organization must not

"normally receive[] more than 50 percent of its support" from non-church sources—a qualification that closely parallels the criteria condemned in *Larson*. *Compare* 26 C.F.R. § 1.6033-2(h)(2)-(4) with *Larson*, 456 U.S. at 230 (law "impos[ed] . . . requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers"). Consider the case of ministry conducted by the operating divisions of churches, their integrated auxiliaries, and associations or conventions of churches. As long as that ministry is unincorporated, it remains exempt from the mandate. Once that ministry incorporates itself for any of numerous reasons, it becomes subject to the mandate, no matter how closely tied it remains to the exempt church.

These rules dramatically disadvantage universities like Ave Maria, who share the exact same religious beliefs and seek to engage in the exact same religious exercise as tens of thousands of exempt churches. Although Catholic colleges like Ave Maria often remain closely associated with the Roman Catholic Church and adhere strongly to its teaching, they are unlikely to have the kinds of close financial and administrative ties to a formal church that the IRS reporting rules require. The IRS's strict rules may be justified in the income-reporting context, but they are completely unjustified as a limitation on the exercise of religious liberty, as Defendants seek to use them here. The Mandate thus engages in "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). Because, for

the reasons set forth in Part I.C above, the government cannot satisfy strict scrutiny, this discrimination violates the Religion Clauses.

II. The Other Preliminary Injunction Factors are Satisfied.

Irreparable Injury. Without an injunction, Ave Maria will suffer injury to its free exercise interest. "[I]t is well established that [the] loss of the First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006) (quotation omitted). The analysis is identical for RFRA, since "RFRA protects First Amendment free-exercise rights[.]" *Korte*, 735 F.3d at 666.

Balance of Harms. The measure of the third factor is whether "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party." *Siegel*, 234 F.3d at 1176. Ave Maria will lose First Amendment freedoms and face ruinous fines without an injunction. The government can point to no damage that will occur to *it* under an injunction.

Public Interest. In a RFRA case, "there is a strong public interest in the free exercise of religion even where that interest may conflict with" another statutory scheme. *O Centro Espirita v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd* 546 U.S. 418 (2006). Simply put, "[t]he public has no interest in enforcing an unconstitutional [regulation]." *KH Outdoor*, 458 F.3d at 1272.

CONCLUSION

Ave Maria respectfully requests that the Court enter a preliminary injunction against defendants during the pendency of this lawsuit, enjoining them from enforcing the

substantive requirements of the Mandate imposed by 42 U.S.C. § 300gg-13(a)(4) and from assessing penalties, fines, or taking any other enforcement actions for noncompliance related thereto, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d, against Ave Maria and its group health plan issuer.

Dated: Sept. 12, 2014

Respectfully submitted,

/s/ *Eric S. Baxter*

Eric S. Baxter (admitted *pro hac vice*)
Diana M. Verm (admitted *pro hac vice*)
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Ste. 220
Washington, DC 20007
Tel.: (202) 955-0095
Fax: (202) 955-0090
Email: *ebaxter@gmail.com*

Louis D. D'Agostino
Florida Bar No. 776890
CHEFFY PASSIDOMO
821 Fifth Ave. South
Naples, FL 23104
Tel.: (239) 261-9300
Fax: (239) 261-9782
Email: *lddagostino@napleslaw.com*

Counsel for Plaintiff Ave Maria University
5050 Ave Maria Blvd.
Ave Maria, FL 34142

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2014, *Plaintiff Ave Maria University's Motion for Preliminary Injunction* was served on all counsel of record via the Court's electronic filing system.

/s/ *Eric S. Baxter*
Eric S. Baxter