IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MEDIA RESEARCH CENTER, Plaintiff, v. KATHLEEN SEBELIUS, et al, Defendants.	)	Civil Action No. 1:14-cv-379 (GBL/IDD)

SUPPLEMENTAL BRIEF OF MEDIA RESEARCH CENTER IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff, Media Research Center ("MRC"), respectfully submits its Supplemental Brief in Support of its Motion for a Preliminary Injunction to address the impact of *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, 2014 WL 2921709 (June 30, 2014) and *Wheaton College v. Burwell*, No. 13A1284, 2014 WL 3020426 (July 3, 2014), on the issues presently pending in this case.

BACKGROUND

MRC has moved to enjoin enforcement of the Affordable Care Act's ("ACA") Contraception Mandate pending a ruling as to whether MRC qualifies for an exemption to that Mandate or that the Mandate is unenforceable against MRC on constitutional grounds. In the papers submitted in support of its Motion for a Preliminary Injunction (the "Motion") (DN 5), MRC referenced the then-pending *Hobby Lobby* decision and argued that one of the reasons that this Court should grant the requested injunction was because of the potential for *Hobby Lobby* to alter the legal landscape. Pls. Mem. in Supp. at n.2 (DN 6); Pls. Reply Mem. at 15 (DN 28).

On June 30, 2014, the Supreme Court handed down its decision in *Hobby Lobby* and held that the Contraception Mandate violates the Religious Freedom

Restoration Act ("RFRA") as applied to a closely held, for-profit corporation with sincerely held religious convictions against abortion or the use of birth control methods and drugs that operate after the point of conception.

Three days later, on July 3, 2014, in *Wheaton College*, the Supreme Court enjoined enforcement of the Contraception Mandate against Wheaton College, a non-profit entity, pending appeal. All Wheaton College was required to do to receive the injunction was to submit a letter to the Government stating that the college "holds itself out as religious" and has "religious objections" to providing coverage for contraceptive services. *Wheaton Coll. v. Burwell*, No. 13A1284, 2014 WL 3020426, at *1 (July 3, 2014). Declarations identical to those made by MRC in this case.

MRC is a tax exempt non-profit corporation governed by a seven member Board of Directors, whose mission is animated by its sincerely held religious beliefs. It is the not-for-profit analog to Hobby Lobby. *Hobby Lobby* and *Wheaton College* make two things perfectly clear – on the present record, where the existence and sincerity of MRC's religious beliefs have not been challenged – the Government cannot enforce the Contraception Mandate against MRC and MRC's Motion should be granted.

I. ***HOBBY LOBBY***

Hobby Lobby concerned a closely held, for-profit corporation that runs a nationwide chain of hobby-related stores. *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, 2014 WL 2921709, at *11 (June 30, 2014). It was undisputed that the owners of Hobby Lobby had sincerely held religious beliefs that were in conflict with providing insurance coverage for contraception and abortion services. *Id.* Hobby Lobby argued that the regulations implementing the Contraception Mandate substantially burdened Hobby Lobby's free exercise of religion and were not the least restrictive means of serving a compelling government interest, as required under RFRA. *Id.* at *23-25.

The essential holdings of *Hobby Lobby* are that: (1) closely held, for-profit corporations are "persons" capable of exercising the religious freedoms protected by the First Amendment (*Id.* at *14); and (2) forcing persons with sincerely held religious beliefs against abortions and abortifacients to comply with the Contraception Mandate is inconsistent with the free exercise of religion guaranteed by the First Amendment and the requirements of RFRA. *Id.* at *19 ("We have little trouble concluding that [the Contraception Mandate substantially burdens the free exercise of religion]"). The Court expressly declined to permit HHS to arrogate to itself "the authority to provide a binding national answer to" the religious objections to the Contraception Mandate raised by Hobby Lobby and others. *Id.* at *21.

In ruling that the regulations for for-profit organizations were not the least-restrictive means, the Court discussed the fact that HHS has regulations exempting certain not-for-profit organizations that hold themselves out as religious. *Id.* at *9, 24-25. Those are the same regulations under which MRC has sought shelter. While the Court discussed the not-for-profit regulations and exemption at some length, it made no holding as to whether Hobby Lobby would be exempt under those regulations or whether those regulations were constitutional or complied with RFRA. *Id.* at *25 ("We do not decide today whether an approach of this type complies with RFRA . . . ."). The Court made crystal clear, however, the fact that the Contraception Mandate could not be enforced against Hobby Lobby, regardless of the content of any new regulations, given the sincerely held religious beliefs of the owners of Hobby Lobby.

The unquestionable impact of *Hobby Lobby* is that the Government is now under judicial compulsion to craft new regulations that will exempt closely held, for-profit corporations with sincerely held religious beliefs against contraception or abortion from the Contraception Mandate. Those regulations will have to be at least

broad enough to encompass Hobby Lobby. The issue in future cases will necessarily be the sincerity of the organization's beliefs, and not whether the organization "holds itself out as religious," whatever that amorphous and completely undefined term means. It is an open question as to whether the Government will also broaden the scope of the regulations to encompass not-for-profits who may not "hold themselves out as religious," but nevertheless have sincerely held religious beliefs against compliance with the Contraception Mandate.

II. *WHEATON COLLEGE*

Three days after *Hobby Lobby* was decided, the Supreme Court enjoined the enforcement of the Contraception Mandate against Wheaton College pending appeal. Wheaton College is a non-profit Christian liberal arts college governed by a Board of Trustees that is not a church, convention or association of churches, or a religious order, which provides health insurance benefits to its employees and students. *Wheaton Coll. v. Burwell*, No. 1:13-cv-08910, 2014 WL 2826336, at *1 (N.D. Ill. June 23, 2014). Like MRC, it opposes abortion and abortifacient contraceptives on religious grounds. *Id.*

Wheaton College filed suit in the United States District Court for the Northern District of Illinois alleging that its religious beliefs would be unconstitutionally burdened by compliance with regulations promulgated pursuant to the ACA to implement the Contraception Mandate. *Id.* Wheaton College alleged that it should be completely exempt from the Mandate and that complying with the procedures necessary to obtain an "accommodation" would "make it morally complicit in the wrongful destruction of human life." *Id.* Wheaton College alleged that the Mandate violates the First Amendment and RFRA and that the regulations implementing the Contraception Mandate were enacted in violation of the Administrative Procedures Act.

Wheaton College requested that the Government be permanently enjoined from enforcing the Mandate against it. *Id.*

Relying on *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), the district court in *Wheaton College* denied the college's motion and held that the college had no chance of success on the merits based on the recent and binding Seventh Circuit precedent established in *Notre Dame*. *Wheaton Coll.*, 2014 WL 2826336, at *5. In so ruling, the district court acknowledged that the legal landscape could soon change once the Supreme Court ruled in *Hobby Lobby*. *Id.* at *5.

Wheaton College's situation differs from the situation facing MRC however because, in *Wheaton College*, the Government acknowledged that Wheaton College qualified for the accommodation for religious organizations. The dispute was whether Wheaton College could be constitutionally compelled to fill out the form to receive the accommodation. *See generally Wheaton Coll. v. Burwell*, No. 1:13-cv-08910, 2014 WL 2826336 (N.D. Ill. June 23, 2014). Here, by contrast, MRC filled out the form for the religious organization exemption and the issues are whether (1) MRC qualifies for the exemption; and (2) even if it does not, is enforcement of the Contraception Mandate against MRC inconsistent with the First Amendment? MRC, thus, sought a declaration that it was in compliance with ACA first, rather than force a decision on a constitutional question.

On June 30, 2014, moments after *Hobby Lobby* was handed down, the Supreme Court temporarily enjoined enforcement of ACA against Wheaton College. *Wheaton Coll. v. Burwell*, 573 U.S. ___, 2014 WL 2931263 (June 30, 2014).[1] On July

[1] The case has a tortured procedural history. Wheaton filed a motion for reconsideration in district court on June 24 and appealed to the Seventh Circuit on June 26, along with an emergency motion for a stay pending appeal. On June 29, Wheaton filed an emergency application with the Supreme Court. Whether the case was properly appealed is debatable. Regardless, the Supreme Court issued an injunction pending appeal in light of *Hobby Lobby*.

3, 2014, the Court issued an interim order enjoining the enforcement of the Contraception Mandate against Wheaton College pending appeal (presumably to the Seventh Circuit). *Wheaton Coll. v. Burwell*, No. 13A1284, 2014 WL 3020426 (July 3, 2014). The Court observed that "[t]he Circuit Courts have divided on whether to enjoin the requirement that religious nonprofit organizations use ESBA Form 700. Such division is a traditional ground for certiorari." *Id.* at *1. The Court ordered that "[i]f the applicant informs the Secretary of Health and Human Services in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Government is] enjoined from enforcing against the applicant the challenged provisions of the [ACA] and related regulations pending final disposition of appellate review." *Id.* Thus, *Wheaton College* presents a situation where the plaintiff has merely sent a letter to the Government, after being instructed to do so by the Supreme Court, noting its religious objections. That act was enough to create standing to challenge the Contraception Mandate and support the grant of an injunction.

III. THE IMPACT OF *HOBBY LOBBY* AND *WHEATON COLLEGE* ON THIS CASE

Hobby Lobby and MRC are similar in that they are organizations not affiliated with any particular religion or religious group, but whose owners/founders/boards have sincerely held religious beliefs against abortion and certain forms of contraception that they believe are a form of abortion because they terminate pregnancies after the point of fertilization. Hobby Lobby, as a for-profit corporation, had no exemption under which it could seek shelter. The essential holding of *Hobby Lobby* is that the Contraception Mandate cannot be enforced against Hobby Lobby because it is a closely held corporation whose owners hold sincerely held religious objections against the Mandate.

The Contraception Mandate failed to harmonize the goals of the ACA with Hobby Lobby's rights under the First Amendment and the requirements of RFRA. Accordingly, the Government is now compelled to promulgate new regulations that are at least broad enough to encompass Hobby Lobby and for-profit organizations like Hobby Lobby. The issue in those new regulations must be only the sincerity of the religious beliefs of the owners of those corporations, not whether they hold themselves out as religious.

A. *Wheaton College* Shows that MRC Has Standing

The stay granted to Wheaton College demonstrates that MRC has standing to pursue its declaratory judgment claim. There is no meaningful difference, from a standing perspective, between an organization sending a letter to the Government claiming that it holds itself out as religious and has religious objections to the Contraception Mandate, and filling out a prescribed Government form stating the same thing. The two organizations have made the same representations to the Government and are pursuing the identical objective.

Wheaton College refused to fill out the prescribed form to force the issue. MRC, by contrast, filled out the form and filed a declaratory judgment action. Regardless, MRC and Wheaton College have now made the same written representations to the Government. There is no reason why only one of the organizations should have standing. Frankly, the method chosen by MRC is a much more orderly way to proceed. As the cases cited by MRC in its Reply Brief make clear, there is no requirement that MRC put itself squarely in harm's way to have standing and receive a stay.

B. *Hobby Lobby* Changed the Legal Landscape

Hobby Lobby significantly changes the legal landscape and shows that the Contraception Mandate cannot be enforced against MRC, at least not on the present unchallenged record before this Court. That is the best possible reason to grant the requested injunction, even if the causes of action asserted in this case are not the same as asserted in *Hobby Lobby*. The Contraception Mandate cannot be enforced against closely held organizations with sincerely held religious beliefs against abortion and abortion-like contraceptive methods. There is no good reason to leave MRC in legal limbo on that point.

If this Court denies the requested injunction, MRC must amend its Complaint to assert causes of action identical to those in *Hobby Lobby* and in *Wheaton College* and rescind its certification under the eligible organization exemption to ensure standing; there is no good reason to make MRC pursue such meaningless formalities.

There is also a prudential reason for the Court not to make MRC pursue such formalities. There is no question that the Government is going to have to promulgate new regulations for for-profit corporations. It is, however, an open question as to whether the regulations for not-for-profits are broad enough to encompass the MRC's and Hobby Lobby's of the world. An expansive judicial interpretation of those regulations, which the *Hobby Lobby* majority insinuated might be consistent with RFRA, would provide much clarity and potentially save the Government and all other affected entities much time and money. This is the perfect case to make such an interpretation because MRC is closely analogous to Hobby Lobby.

CONCLUSION

MRC respectfully requests that the Court grant its Motion for a Preliminary Injunction.

Dated: July 11, 2014

Respectfully submitted:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 11th day of July, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system**,** which will send a notification of such filing to the following:

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