IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MEDIA RESEARCH CENTER,	)	
Plaintiff,	)	
v.	)	Case No. 1:14-cv-379-GBL-IDD
SYLVIA BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF

Defendants briefly respond to plaintiff Media Research Center's (MRC's) Supplemental Brief, ECF No. 44, regarding the Supreme Court's rulings in *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). As this Court is well aware, defendants previously opposed MRC's preliminary injunction motion on jurisdictional grounds. *See* Defs.' Mem. in Opp'n to Pl's Mot. for Prelim. Inj. ("Defs.' Opp'n"), ECF No. 26. On July 3, 2014, the Court agreed with defendants and ruled that MRC lacks standing as to Count I of its Complaint. *See* Mem. Opinion & Order ("Opinion & Order"), ECF No. 42.[1] In particular, the Court held that "no 'case' or 'controversy' exists, because uncertainty over a regulatory interpretation and the mere possibility of fines do not suffice as Article III injury." *Id.* at 2. Notably absent from MRC's Supplemental Brief is *any* explanation as to how *Hobby Lobby* and *Wheaton* change this analysis. In fact, as explained below, the Supreme Court's recent rulings are entirely irrelevant to the question of MRC's standing.

[1] The Court stayed its ruling to allow for this supplemental briefing. *See* Order, ECF No. 43.

As this Court recognized in its Opinion and Order, MRC has availed itself of a regulatory accommodation—designed to address the religious concerns of non-profit religious organizations that object to contraceptive coverage—that relieves it of any obligation to take any action to which it has a religious objection. *See* Opinion & Order at 6 ("MRC alleges that the Mandate exempts MRC from any requirement to abide by its terms. The Government has not challenged MRC's self-exemption, and MRC presents nothing to suggest that a challenge is likely in the future."). Whatever MRC's objection to the contraceptive coverage requirement may be, MRC has chosen to take advantage of that accommodation. There is no dispute that MRC has determined that it is eligible for an accommodation and has executed the required self-certification. There is also no dispute that MRC has now done everything that the regulations require in order to avail itself of an accommodation. Defendants have not disputed MRC's status as an eligible organization, and have not suggested that they have any intent or reason to do so in the future. *See* Opinion & Order at 11. As a result, MRC has not shown that it faces a "certainly impending"—as opposed to a "merely possible"—injury-in-fact. *Id.* at 7. Nor is MRC "forced to choose between regulatory obligations and religious beliefs." *Id.* at 11 n.2.

This unique set of facts distinguishes this case from *Hobby Lobby* and *Wheaton*, as well as all of the other cases in which employers—for-profit and non-profit alike—have challenged the contraceptive coverage requirement. For-profit companies are not eligible for the accommodation under the terms of the regulations, and are required by the regulations to provide coverage for contraceptive services to which they have a religious objection. *See Hobby Lobby*, 2014 WL 2921709, at *5. And while non-profits with religious objections like Wheaton College are eligible for the same accommodations that MRC has taken advantage of, which allows them to opt out of providing contraceptive coverage, the plaintiffs in all other such cases have asserted

religious objections to the accommodations themselves. *See Wheaton*, 2014 WL 3020426, at *1 (Sotomayor, J., dissenting). MRC is simply mistaken when it says that "*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." Pl.'s Supp. Br. at 6. To the contrary, it was Wheaton College's religious objection to the accommodations—not the act of sending a letter to the government—that was the source of its standing (which, in any event, the government did not challenge). Wheaton College alleged that it could not comply with the self-certification requirement without violating its sincere religious beliefs. In contrast, MRC has no such religious objection to the accommodations, and in fact seeks an advisory opinion confirming that it is in compliance with the regulations.

In its supplemental brief, MRC fails to offer any explanation of how *Hobby Lobby* and *Wheaton* affect the standing analysis in this case. In fact, the plaintiffs' standing was not at issue in *Hobby Lobby* and *Wheaton*. Contrary to MRC's argument, there *is* a "meaningful difference, from a standing perspective," between MRC and Wheaton College. Pl.'s Supp. Br. at 7. The fundamental difference is that Wheaton College (and Hobby Lobby) has a religious objection to what the law requires of it, while MRC does not. Instead, MRC seeks confirmation that it is eligible for the accommodation because it is concerned that, at some undefined time in the future, the government might decide that MRC does not actually qualify as an eligible organization, at which point the government might seek to impose penalties for the organization's failure to comply with the contraceptive coverage requirement. But as the Court has observed, MRC's speculative fear of enforcement at some uncertain time in the future is not a sufficient injury-in-fact to confer jurisdiction on this Court now. *See* Opinion & Order at 7-11.

Hobby Lobby and *Wheaton* do nothing to change the fact that MRC has failed to allege a "certainly impending" injury. *See id.* at 10.[2]

Respectfully submitted this 18th day of July, 2014,

STUART F. DELERY
Assistant Attorney General

DANA J. BOENTE
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Antonia Konkoly
ANTONIA KONKOLY
Assistant United States Attorney
Justin W. Williams U. S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3799 (direct)
(703) 299-3983 (fax)
antonia.konkoly@usdoj.gov

BENJAMIN L. BERWICK (MA Bar No. 679207)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W. Room 7306
Washington, D.C. 20530
Tel: (202) 305-8573

[2] In one sentence towards the end of its supplemental brief, MRC suggests that, "[i]f 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." Pl.'s Supp. Br. at 8. Defendants trust that MRC is not suggesting that it would make false allegations simply to establish standing. Given that MRC has already made it clear that it believes that it is eligible for an accommodation and that it has no religious objection to the accommodation, it is unclear how it could ever assert claims "identical" those in *Hobby Lobby* and *Wheaton*, as MRC is in a materially different position than the plaintiffs in those cases.

Fax: (202) 616-8470
Email: Benjamin.L.Berwick@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of electronic filing to the following:

C. Matthew Haynes
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5919
Fax: 703-647-5989
Email: matthew.haynes@leclairryan.com

David Alan Warrington
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-684-8007
Fax: 703-684-8075
Email: David.Warrington@leclairryan.com

Joseph M. Rainsbury
LeClair Ryan, PC (Roanoke)
1800 Wells Fargo Tower
Drawer 1200
Roanoke, VA 24006
(540) 510-3055
Fax: (540) 510-3053
Email: joseph.rainsbury@leclairryan.com

Laurin Howard Mills
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5903
Fax: 703-647-5953
Email: laurin.mills@leclairryan.com

Paris Ratliff Sorrell
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5934
Fax: 703-647-5984
Email: Paris.Sorrell@leclairryan.com

William Michael Holm
LeClairRyan PC (Alexandria)
2318 Mill Road
Suite 1100
Alexandria, VA 22314
703-647-5927
Fax: 703-684-8075
Email: michael.holm@leclairryan.com

/s/
Antonia Konkoly
Assistant United States Attorney
Attorney for the Defendants