

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION
NETWORK, INC.,

and

STATE OF ALABAMA,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants

No. 1:13-cv-521

**State of Alabama's Brief in Support of Motion for Summary
Judgment**

The State's case against the contraception mandate follows a simple logical syllogism. The State has enacted a series of laws to regulate health-insurance plans and to protect the conscience rights of its residents. *See* Doc. 1 ¶¶ 37-41. The Mandate, to the extent it is valid, preempts the operation of those state laws and the regulatory balance they create. *See* U.S. CONST. ART. VI. The State seeks a declaratory judgment that, at least as applied to EWTN and religious employers like it, the contraception mandate is invalid such that it does

not preempt the State's contrary regulatory choices.

FACTS

1. The State of Alabama incorporates EWTN's statement of facts and adds these additional facts.

2. The State of Alabama regulates health insurance plans through a comprehensive system of laws, which require that plans cover certain services, such as mammograms, and not others, such as abortifacients. For example, all health policies providing coverage on an expense-incurred basis shall provide benefits for newborn children per Section 27-19-38. Every health insurance benefit plan which provides coverage for surgical services for a mastectomy must comply with Section 27-50-1, et seq. Every health insurance benefit plan that provides maternity coverage must comply with Section 27-48-1, et seq. Certain health benefit plans shall offer coverage for annual screening for the early detection of prostate cancer in men over age 40 per Section 27-58-1, et seq. Certain health benefit plans shall offer to cover chiropractic services per Section 27-59-1, et seq.

3. Such coverage mandates reflect a judgment about tradeoffs among benefits, coverage, and costs; a State must strike a balance

among the number and types of such mandates, the comprehensiveness of coverage, and the affordability of health insurance. *See* Exhibit B, Declaration of Michael Deboer, at ¶4. As part of its comprehensive regulation of insurance, the State of Alabama imposes the second least number of health insurance mandates of any State. *See* Exhibit A, Declaration of Andrew Brasher (attaching Victoria Craig Bunce, Council for Affordable Health Insurance, 2012 Health Insurance Mandates in the States, Executive Summary Tables 1 & 3 (April 9, 2013)).

4. Unlike several other States, the State of Alabama has chosen *not* to impose a contraception and sterilization mandate on state-regulated insurance plans. *See* Exhibit A, Declaration of Andrew Brasher (attaching 4 Compensation and Benefits § 56:32 (November 2013)); Exhibit B, Declaration of Michael Deboer, at ¶6. The pharmaceutical insurance coverage article of the Alabama Code expressly “do[es] not mandate that any type of benefits for pharmaceutical services, including without limitation, prescription drugs, be provided by a health insurance policy or an employee benefit plan.” ALA. CODE § 27-45-5.

5. The State's regulatory choices are consistent with the Alabama Constitution. The Alabama Constitution has provided for 200 years that "the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles." ALA. CONST. ART I, SEC. 3 (1901). Since 1998, the Alabama Constitution has also provided that "Government may burden a person's freedom of religion only if it 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." ALA. CONST. AMEND. 622. This language from the State's "RFRA" is the same as the language in the federal Religious Freedom Restoration Act.

6. In November 2012, the people amended the State's Constitution to add: "In order to preserve the freedom of all residents of Alabama to provide for their own health care, a law or rule shall not compel, directly or indirectly, any persons, employer, or health care provider to participate in any health care system." ALA. CONST. AMEND 864.

7. On March 26, 2013, the Attorney General of Alabama, Luther Strange, warned HHS that federal law required broader exceptions for non-for-profit and for-profit religious employers than provided in the Mandate that is the subject matter of this litigation. See Exhibit A, Declaration of Andrew Brasher (attaching Letter from Attorney General Luther Strange et al. to Secretary Kathleen Sebelius (March 26, 2013)). Specifically, Attorney General Strange explained that the mandate violates RFRA because “there is no compelling reason to refuse to extend to all religious-affiliated nonprofits the exception that is available to houses of worship.” *Id.* By finalizing the Mandate at issue in this litigation, the Secretary rejected the Attorney General’s legal position.

ARGUMENT

EWTN’s brief explains in great detail that the Mandate cannot be applied to religious employers who object to providing coverage for contraception, sterilization, and abortifacients for reasons of conscience. EWTN’s analysis under RFRA, in particular, comports with Attorney General Strange’s position as explained in his letter to Secretary Sebelius and has been accepted by the majority of courts to have

reached this issue. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Reaching Souls International, et. al., v. Sebelius, et al.*, Order Granting Preliminary Injunction (Doc. 67), No. 13-1092-D (W.D. Okla. Dec. 20, 2013) (addressing self-insured plans like EWTN). The State need not belabor the point. Accordingly, the State incorporates and expressly relies on ETWN's brief in support of summary judgment.

The State adds only that it is due additional declaratory relief in the light of EWTN's arguments. It is well-established that "[t]he States have a legally protected sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and enforce a legal code.'" *Wyoming v. United States*, 539 F.3d 1236 (10th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). States have long been the primary regulators of health insurance. *See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) ("[G]eneral health care regulation . . . historically has been a matter of local concern.").

See also Exhibit B, Declaration of Michael DeBoer, ¶4.

The Mandate and others like it, however, “apply uniformly across the country with no state opt-out” and “significantly intrude on states’ authority and discretion to regulate private health insurers.” Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 152 (2011). If lawful, the Mandate would preempt state law and trump the balance struck by the State’s regulation of health-insurance benefits by adding an additional unwanted requirement to health-insurance plans marketed in the State. The Mandate would also require religious employers such as EWTN to provide objectionable coverage to their employees, even though such a requirement is inconsistent with state constitutional law.

Accordingly, in addition to providing the relief requested by EWTN, the Court should declare that the Mandate does *not* preempt the Alabama Constitution, the Alabama insurance code, or any other provision of Alabama law insofar as it would require a religious employer to pay for, arrange, or otherwise provide insurance to cover services against the employer’s conscience.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sends notification to the following persons:

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