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 Response in Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Reply Brief in Support of the State's Motion for Summary Judgment

As the State explained in its brief in support of summary judgment, its case against the contraception mandate follows a simple logical syllogism. *See* Doc. 28 at 1. To the extent the Mandate is valid, it preempts the operation of state insurance laws and the regulatory balance they create. The State seeks a judgment that the Mandate is *invalid* and that it does *not* preempt the State's contrary regulatory choices with respect to religious groups who conscientiously object to

the Mandate's terms. *See* Doc. 1 Counts I, II, V, IX, & XVII.

The United States has no real response to the State's claims or its motion for summary judgment. The United States has not challenged the State's standing to litigate these claims.[1] And the State's claims are obviously ripe because the Mandate is presently regulating insurers and insureds that would otherwise be regulated by state laws. The United States has not challenged the State's right to declaratory relief under Count XVII of the Complaint if, as the State argues, the Mandate violates federal law as applied to conscientious objectors. Nor has the United States argued that it needs discovery or factual development to address the State's right to relief. Instead, the United States has accepted as true, for example, the expert opinion of Professor DeBoer that the Mandate "conflict[s] with the State of Alabama's balancing of benefits, coverage, and costs in its public-policy based regulatory decision to impose few mandates on health plans in the state." Doc. 28-

[1] There are good reasons for the United States' concession. First, the question is academic because EWTN has standing to challenge the Mandate. *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services,* 648 F.3d 1235, 1243 (11th Cir. 2011) ("The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim—as is the case here—we need not address whether the remaining plaintiffs have standing."), overruled on other grounds by *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). Second, it is well-established that a state has standing to challenge a federal regulation, like this one, that unlawfully purports to preempt a state's own industry regulations. *See Wyoming v. United States*, 539 F.3d 1236 (10th Cir. 2008).

2 ¶7.

The United States argues *only* that the State is not due summary judgment because the Mandate is lawful. *See* Doc. 35 at 49 (arguing that "[b]ecause the challenged regulations are lawful, the State's claim—Count [X]VII—should be dismissed, or, alternatively, summary judgment should be entered in defendants' favor"). But the overwhelming majority of courts have rejected that argument. *See* Doc. 28 at 6 (collecting recent cases). Again, for the sake of brevity, the State will adopt and incorporate by reference the briefing of its co-plaintiff EWTN on Counts I, II, V, IX. The Mandate is plainly invalid as applied to conscientious objectors, and it does not lawfully preempt the State' contrary regulatory choices.

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. *See* Doc. 1 Count XVII.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, 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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