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 **EWTN'S RESPONSE IN OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND ITS REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND ITS MOTION EITHER TO EXPEDITE THE CASE OR FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Defendants' arguments paper over the fact that the Mandate would force EWTN—the most prominent Catholic media network in the world—to publicly facilitate contraceptive use in direct violation of its religious beliefs. Perhaps the most glaring flaw is Defendants' failure to grasp how their own system works. Defendants insist that the government form EWTN must execute—EBSA Form 700—does nothing more than notify others of EWTN's objection to the Mandate. This is patently false. On its face, the Form designates, authorizes, and obligates a third party to provide contraceptive payments to EWTN employees as part of EWTN's health plan. Knowing this, EWTN cannot execute the Form.

Defendants seem to think that an extra layer of paperwork should soothe EWTN's conscience. This is not just bad theology, it defies common sense. EWTN cannot deputize (and incentivize) a third party to sin on its behalf without violating EWTN's *raison d'être*: public witness to the Catholic faith. That Defendants so lightly dismiss this violation suggests that they not only fail to grasp how the Mandate works, but also the serious moral and legal issues at stake in this case.

ARGUMENT

I. Defendants' Motion Must Be Denied and EWTN's Granted.

A. The Mandate violates RFRA.

EWTN's faith forbids it from participating in Defendants' scheme to subsidize and promote the use of sterilization, contraceptives, and abortifacients. Dkt. 29-9 ¶ 19 (Warsaw Decl.); Dkt. 29-10 ¶¶ 11-54 (Haas Decl.). EWTN cannot provide these

services itself and cannot designate, authorize, incentivize, or obligate someone else to provide them. Dkt. 29-9 ¶¶ 47-51; Dkt. 29-10 ¶¶ 65. Yet Defendants insist that EWTN do so, on pain of millions of dollars in penalties. This violates RFRA.

Many courts have identified the framework for RFRA analysis. *See* EWTN Br. 20 n.4 (collecting cases).[1] First, a court must "identify the religious belief" at issue. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013). Second, it must "determine whether this belief is sincere." *Id*. Third, it must determine "whether the government places substantial pressure on the religious believer." *Id*; *accord Gonzales v. O Centro*, 546 U.S. 418, 430-33 (2006). Finally, if there is substantial pressure, Defendants must satisfy strict scrutiny. *Hobby Lobby*, 723 F.3d at 1143.

Defendants concede half of this test: they do not dispute the existence, religiosity, or sincerity of EWTN's religious beliefs. Thus, the only parts of the RFRA analysis that remain are whether the Mandate "places substantial pressure" on EWTN to violate their beliefs and whether the Mandate passes strict scrutiny.

1. The Mandate substantially burdens EWTN's beliefs.

A substantial burden exists when government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). As the Eleventh Circuit has held, a substantial burden

[1] Of the 20 non-profit cases that have reached the merits, courts—including the Supreme Court—have granted injunctions in 19. *See Little Sisters of the Poor v. Sebelius*, No. 13A691 (S. Ct. Jan. 24, 2014) (attached as Exhibit L); http://www.becketfund.org/hhsinformationcentral/ (listing all Mandate cases).

includes "pressure that tends to force adherents to forego religious precepts." *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). Defendants offer no binding contrary definition of "substantial burden." Indeed, they fail to cite even one Eleventh Circuit case in their brief, ignore *Midrash*'s definition of "substantial burden," and instead quote an erroneous "substantial burden" definition that *Midrash* explicitly rejected. *Id.* (declining to follow *CLUB v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003)); Opp.20.

If EWTN does not violate its religious beliefs, it faces over ten million dollars in penalties starting July 1, 2014. Dkt. 29-9 ¶¶ 56-58. The penalties applicable to EWTN are the same that constituted "substantial pressure" in all three federal appellate decisions to have reached the issue. *See Hobby Lobby*, 723 F.3d at 1140; *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013); *Gilardi v. HHS*, 733 F.3d 1208, 1217 (D.C. Cir. 2013) (Mandate "pressure[s] [objectors] to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties"). Given such draconian penalties, "there can be little doubt that the contraception mandate imposes a substantial burden on [EWTN's] religious exercise." *Korte*, 735 F.3d at 683.

To avoid this conclusion, Defendants offer two arguments: first, that the Form that it wants to force EWTN to sign and deliver is a mere "notice" that requires EWTN to say only what it would have otherwise said; second, that any burden is

too "attenuated." The first is a falsehood; the second has been repeatedly rejected as inappropriate (and unpersuasive) governmental theologizing.

i. Defendants are wrong about EBSA Form 700.

Defendants repeatedly assert that "EWTN need not do anything more than it did prior to the promulgation of the challenged regulations—that is, to inform its TPA that it objects to providing contraceptive coverage[.]" Opp.19-20; *see also id.* 10, 11, 17, & 22. They are wrong.

The form that Defendants are coercing EWTN to sign, EBSA Form 700, is not a mere notice to EWTN's TPA of its religious beliefs. Rather, it is a legal document that *on its face* (1) designates the TPA for a new role, (2) authorizes the TPA to provide previously forbidden contraceptive coverage, (3) creates new legal duties for the TPA, and (4) establishes new terms in EWTN's health care plan. Further, execution and delivery of the Form both (5) incentivizes the TPA's provision of the objectionable drugs and devices, and (6) bans EWTN from attempting to rescind the grant of coverage authority. Unless EWTN executes the Form, none of these six things happen.

Designation, *authorization*, and *obligation*. Receipt of an executed EBSA Form 700 triggers a TPA's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39875-76; *see* 45 C.F.R. 147.131(c)(2)(i)(B); 26 C.F.R. 54.9815–2713A(b)(2); Dkt. 29-3 at 3. According to the government, forcing EWTN to designate its TPA in this manner

"ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that EWTN employees receive these drugs "so long as they remain enrolled in [EWTN's] group health plan." *See* 26 C.F.R. 54.9815–2713A(d); 29 C.F.R. 2590.715–2713A(d); *see also* 45 C.F.R. 147.131(c)(2)(i)(B). As Defendants admitted in a parallel case, a TPA's "duty" to "become a plan administrator" and provide the mandated coverage "only arises . . . *by virtue of the fact that they receive the self-certification form from the employer*." *See* Exhibit M at 7 (Dkt. 54, Tr. of Hr'g, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (emphasis added)). As the government explained, "if [EWTN] completed [EBSA Form 700] and provided it to [EWTN's] TPA, the[] TPA would then be required to" provide the objectionable coverage. *Id.* at 5.

Establishing new terms in EWTN's health plan. Further, the contraceptive coverage form states that it is "an instrument under which the plan is operated." Dkt. 29-3 at 3. The Form thus overrides existing plan documents that exclude religiously objectionable services. *See* Ex. M at 12 (admitting that "technically, the contraceptive coverage is part of [the religious objector's health care] plan"); *see also id*. at 10-11 (admitting that, upon execution, contraceptive "services become available to employees by virtue of their participation in the religious [objector's]

plan"). Unless EWTN executes the Form, there is no statutory, regulatory, or contractual basis for providing contraceptive coverage against EWTN's wishes.[2]

Incentivizing. If, and only if, EWTN's TPA obtains EBSA Form 700 from EWTN, the TPA becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead. 45 C.F.R. 156.50. In the parallel non-profit case *Reaching Souls*, counsel for the government stated that if TPAs receive the Form, "they are eligible for reimbursement" and, without the Form, "[t]hey would not . . . be eligible." Dkt. 29-1 at 96. No form, no payment (and no bonus).

Gag rule. Finally, the regulations command EWTN that, after executing and delivering the Form, it "must not, directly or indirectly, seek to influence the third party administrator's decision" whether to provide the mandated coverage. *See* 26 C.F.R. 54.9815–2713A(b)(iii). Defendants have acknowledged in parallel litigation that this provision prohibits a religious organization from instructing a TPA not to provide the mandated coverage in its health plan. Dkt. 29-12 at 113-14; *accord* Ex. M at 15-16. Tellingly, the Mandate makes no provision for an employer to revoke EBSA Form 700 once executed and delivered. So signing and sending the Form is

[2] A divided panel in *Univ. of Notre Dame v. Sebelius*, __F.3d__, 2014 WL 687134, at *8 (7th Cir. Feb. 21, 2014), held that a TPA "must provide the [mandated] services no matter what," even without the Form. This was error. As Defendants have admitted, the regulations acknowledge that the Form is necessary to "ensure" TPAs have "legal authority" to provide contraceptives that are otherwise excluded from a self-insured plan. 78 Fed. Reg. at 39880.

a one-way street: once EWTN has delivered the Form authorizing its TPA to provide religiously objectionable drugs, it has no way to go back and prevent the TPA from acting on that authorization.

In sum, there is no reasonable way to describe EBSA Form 700 as merely a "notice." Rather, it is a "permission slip," one that EWTN cannot sign without violating its faith. *S. Nazarene Univ. v. Sebelius*, No. 13-cv-1015, 2013 WL 6804265, at *8 (W.D. Okla. Dec. 23, 2013); Dkt. 29-9 ¶¶ 47-51; Dkt. 29-10 ¶¶ 65. An example of *real* "notice" is the Supreme Court's solution in *Little Sisters of the Poor*: they "need not use the form prescribed by the Government and need not send copies to third party-administrators," but merely write Defendants a letter identifying the Little Sisters as an openly religious non-profit that religiously objects to participating in Defendants' scheme. *See* Ex. L. If all Defendants wanted was a notice, they would agree to similar relief here.

Defendants are similarly wrong that executing the Form is something EWTN "has done" or "would have to do voluntarily anyway even absent" the Mandate. Opp.22. EWTN not only has never executed and delivered a form designating, authorizing, obligating, or incentivizing its TPA to use its health plan for delivery of contraceptive and abortifacient drugs, it has strenuously resisted any such action. *Compare* Opp.11 *with* Dkt. 29-9 ¶ 20.

Defendants also repeatedly assert that EWTN's RFRA argument would "prevent anyone else from providing" contraceptive and abortifacient coverage to

its employees. Opp.20, 2. This is obviously false, given EWTN's long list of possible alternative delivery systems in its opening brief. EWTN Br.34-35. EWTN objects to Defendants' conscription of EWTN, nothing more.

ii. Defendants are wrong about attenuation.

Defendants' second argument is that the potential use of contraceptive or abortifacient drugs by EWTN employees is an "attenuated," indirect burden on EWTN, and that courts finding "a substantial burden uniformly involve a direct burden on the plaintiff[.]" Opp.26. This is an inaccurate statement of both law and fact. EWTN is not before this Court to object to what others *may* do, but to what Defendants say EWTN *must* do: participate as an integral part of Defendants' contraceptive delivery system. Dkt. 29-9 ¶ 48. [3] Moreover, even "compulsion [that is] indirect" is "nonetheless substantial" where, as here, the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718.

The "attenuation" issue is, at bottom, an argument about moral complicity. Such questions are religious, not legal, and Defendants have no authority to dictate when and whether EWTN's involvement in the scheme is "too attenuated" to implicate its religious obligations. *Hobby Lobby*, 723 F.3d at 1153-54. As *Hobby Lobby* instructed:

[3] This is also why Defendants' reliance on *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), is misplaced. In *Kaemmerling*, the plaintiff did not have a religious objection to what *he* was required to do, but to what others were doing.

> [I]t is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.

Id.; *Korte*, 735 F.3d at 685 (rejecting Defendants' "'attenuation' argument" because it asks a question which "[n]o civil authority can decide"); *Zubik v. Sebelius*, __F. Supp. 2d__, 2013 WL 6118696, at *14 (W.D. Pa. Nov. 21, 2013) ("Completion of the self-certification form would be akin to cooperating with/facilitating 'an evil' and would place the Diocese 'in a position of providing scandal' because 'it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching.'").

2. The Mandate fails strict scrutiny.

i. Defendants fail to assert a compelling interest.

Every case to reach the issue has rejected Defendants' strict scrutiny argument, and they offered no reason to change that track record here. The Mandate's myriad exemptions demonstrate that their interests, however important in the abstract, cannot be compelling here. *See O Centro,* 546 U.S. at 430-33. In *O Centro*, an exemption for a few hundred thousand Native Americans doomed the compelling interest argument. *Id.* at 433. Here, the government concedes that *tens of millions* of insurance plans are grandfathered. Dkt. 29-6 at 5. This is fatal to its defense.[4]

[4] Defendants bizarrely claim that the grandfathering clause is not an exemption from the Mandate. Opp.21. But Congress chose to apply portions of the ACA to even grandfathered plans—the two sections immediately preceding the preventive

The government also claims grandfathering is temporary, but "[g]randfathered plans may remain so indefinitely." *Hobby Lobby*, 723 F.3d at 1124. They may add new beneficiaries, change insurance issuers, and raise co-pays in step with medical inflation. 45 C.F.R. 147.140(a)(1)(i); (b); (g)(iv). And the grandfathering exemption, which includes the entire preventive care mandate, is far broader than the narrow exemption EWTN seeks. *See* 42 U.S.C. § 18011.

Next, the government tries to explain away its religious exemptions by claiming, without evidentiary support, that houses of worship are more likely to employ like-minded people than EWTN. Opp.31-32. But under strict scrutiny, "policies grounded on mere speculation . . . will not suffice." *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013).[5] Defendants also claim that if existing religious exemptions doom their case, they will be discouraged from making future exemptions. Nonsense. Congress mandated broad religious exemptions in RFRA, but HHS chose to create narrow exemptions via regulation. It is no answer to say that HHS might someday like to violate RFRA again.

ii. Defendants failed to use the least restrictive means.

EWTN proposed multiple less restrictive means. Defendants fail to rebut them. Their first argument is that the Affordable Care Act ("ACA") "build[s] on the

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services section, and the section after it. *See* 42 U.S.C. § 18011(a)(4)(A). Congress thus chose to treat mandated preventive services as a lesser-value goal.

[5] Defendants claim that the small employer exemption is irrelevant since small employers have tax incentives to encourage them to comply. Opp.23 n.6. This only shows that Defendants can use a carrot, rather than a stick, to promote their goals.

existing system of employment-based coverage." Opp.33; *id.* at 34. That is a puzzling response, since Defendants' primary argument in this case is that the Mandate is entirely separate from EWTN's health plan. *See, e.g.*, Opp.10-11. Defendants also claim lack of statutory authority for EWTN's alternatives, but it does not specify which ones. Courts may require the government to rely on different statutes, or different portions of statutes, as less restrictive means. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-18 (2000) (other portion of statute, with adequate publicity, was sufficient to achieve goals).

Defendants next claim that EWTN's alternatives impose "enormous administrative and financial cost[s]." Opp.33. They do not specify which alternatives they mean, nor what those costs are. They do not explain why those costs would be any greater, or more difficult to administer, than the convoluted user fee offset scheme by which the government plans to reimburse EWTN's TPA.

B. The Mandate violates EWTN's Free Speech rights.

Defendants offer just two relevant arguments regarding EWTN's free speech claim: first, that the Mandate "do[es] not 'compel speech'; and, second, that it does not "limit what EWTN may say." Opp.40. Both assertions are indefensible.

Compelled Speech. As detailed above, Defendants seek to force EWTN to sign and deliver EBSA Form 700 to its TPA to deliver the message that the TPA is *authorized* and *obligated* to offer objectionable services to EWTN's plan participants. Both these changes to the TPA's duties *directly* result from the

message EWTN is being compelled to deliver. This forces EWTN to speak in a manner that, as a matter of faith, it cannot. Dkt. 29-9 ¶¶ 19-23; Dkt. 29-10 ¶¶ 58, 68. Thus, Defendants must show why they may massively penalize EWTN for declining to speak through the government's Form. *See Playboy Entm't*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). They fail to do so.

To the extent that Defendants suggest that the Mandate does not "compel speech" because it permissibly regulates non-ideological conduct, they are wrong. "The right against compelled speech is not, and cannot be, restricted to ideological messages." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957 (D.C. Cir. 2013). Further, courts allow only regulations that determine what affected parties "must *do* . . . not what they may or may not *say*." *Rumsfeld v. FAIR*, 547 U.S. 47, 60 (2006) (emphases original). Here, forced speech *is* the essential act required. Such "direct regulation of speech . . . plainly violate[s] the First Amendment." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013). Simply put, Defendants cannot "force[] [EWTN] . . . to be an instrument for fostering public adherence to an ideological point of view" that is "repugnant to [its] moral [and] religious . . . beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707-08, 715 (1977). Yet that is what the Mandate demands.

It is no answer that EWTN may tell its fellow Catholics that the words Defendants force it to utter are "words without belief" or are a "gesture barren of

meaning." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943); Opp.40. It was similarly no answer in *Wooley* that "plaintiffs could have 'place[d] on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess [the state message they were forced to speak] and that they violently disagree with the connotations of that'" message. *Frudden v. Pilling*, __F.3d__, 2014 WL 575957, at *5 (9th Cir. Feb. 14, 2014) (quoting *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting)). Government may not force citizens to speak out of both sides of their mouths. *Agency for Int'l Dev.*, 133 S. Ct. at 2331 (grantees could express contrary beliefs "only at the price of evident hypocrisy").

Compelled Silence. Defendants are wrong that the Mandate "do[es] not limit what EWTN may say"—and they've admitted as much in parallel cases. Under 26 C.F.R. 54.9815-2713A(b)(iii), EWTN "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." Counsel for Defendants conceded that this means that accommodated entities like EWTN cannot say anything "that would cause the TPA to . . . forgo providing this coverage," and cannot say "something like, Don't do this or we're going to fire you." Dkt. 29-12 at 112-13; *accord* Ex. M at 15-16. Thus, as another Mandate case held, the gag rule "imposes a content-based limit on [EWTN] that directly burdens, chills, and inhibits [its] free speech." *Roman Catholic Archbishop of Wash. v. Sebelius*, __F. Supp. 2d__, 2013 WL 6729515, at *37 (D.D.C. Dec. 20, 2013).

Nor does it matter that EWTN may tell everyone *but* its TPA that it does not want the TPA to provide the coverage. A ban on "speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999). "Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech." *Id.*; *accord Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1182 (11th Cir. 2009) (generally, "government may not . . . prevent[] [a] speaker[']s access to [its] audience").

Each violation—compelled speech and compelled silence—triggers strict scrutiny, *TBS, Inc. v. FCC*, 512 U.S. 622, 642 (1994), which the Mandate fails for the reasons discussed above.[6]

C. The Mandate violates EWTN's Establishment Clause rights.

Defendants facially discriminate among religious believers who have the same beliefs and engage in the same religious conduct. They do so based solely on the *government's* speculation about the religious beliefs of an organization's employees. 78 Fed. Reg. at 39874; *accord* Dkt. 29-13 at 5 (admitting the government lacked any basis for its religious speculation). Defendants' response hinges on the discredited notion that the government may prefer some religious

[6] Further, even if the Mandate's speech requirements were "unrelated to the content of speech," they would still be "subject to an intermediate level of scrutiny," which they would fail due to the same infirmities that cause them to fail strict scrutiny. *TBS*, 512 U.S. at 642.

institutions over others, so long as the discrimination is based on their internal structure and assumed religiosity, rather than denomination. Opp.37-39.

In *Colorado Christian University v. Weaver*, the Tenth Circuit considered the university's challenge to state regulations that provided scholarships for students to attend any college, secular or religious, unless the state deemed it "pervasively sectarian." 534 F.3d 1245, 1250 (10th Cir. 2008) (McConnell, J.). Just like Defendants here, the state argued there was no Establishment Clause violation because the law only discriminated based on "types of institutions," not "types of religions." *Id*. at 1259. The Tenth Circuit deemed this a "wholly artificial distinction," holding that "when the state passes laws that facially regulate religious issues, it must treat . . . religious institutions without discrimination or preference." *Id*. at 1257, 1259; *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (rejecting the idea that a law's "disparate impact among *religious organizations* is constitutionally permissible when such distinctions result from application of secular criteria") (emphasis added). Defendants cannot escape this conclusion. It makes no sense that the practice *Weaver* rejected—discrimination among religious institutions based on their "degree of religiosity," 534 F.3d at 1259—is forbidden concerning student scholarships but permissible when deciding which religious institutions may be forced to either shut down or violate their faith.

Defendants' reliance on *Gillette v. United States*, Opp.37, is entirely mistaken. 401 U.S. 437 (1971). *Gillette* granted military conscientious-objector status based

on the *nature of the conscientious objection*. *Id.* at 442 n.5 (exempting those who object to "war in any form," not to those who object to only "a particular war"). The exemption was therefore available to all sincere objectors—regardless of their faith—who asserted the same objection. *Id.* at 450-51. This equal treatment is precisely what the Mandate lacks, because it discriminates among institutions that engage in the exact same activity based on exactly the same religious objections.

D. The Mandate violates EWTN's Free Exercise rights.

Defendants claim that the Mandate does not violate the Free Exercise Clause because it is "neutral and generally applicable." Opp.34. It is neither.

The Mandate is not neutral because it expressly discriminates among religious objectors, creating a three-tiered system in which some are exempt (churches and "integrated auxiliaries"), some must comply with the "accommodation" and gag rule at issue here (non-exempt religious non-profits), and some receive no protection at all (religious believers who earn profits).

This open discrimination among religious institutions fails even "the minimum requirement of neutrality" which requires that a law *not* discriminate on its face. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Midrash*, 366 F.3d 1238 (the First Amendment limits "government action that specifically targets religion or religious conduct for distinctive treatment").[7]

[7] Defendants cite *Lukumi* to argue that the Free Exercise Clause is not invoked because the Mandate does not target "*only*" religious conduct. Opp.35. But this oversimplification would excuse all but the most blatant attacks on religion. *Lukumi* warned against this reading, noting that the "explicit[ ] target[ing]" made it

Nor is the Mandate generally applicable. The Mandate favors secular over religious values by granting broad secular exemptions for grandfathered and small-employer plans, while denying religious exemptions for non-church religious organizations. *Midrash*, 366 F.3d at 1235 (failure to permit secular groups but exclude religious groups violates neutrality and general applicability); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (government cannot decide "that secular motivations are more important than religious motivations."). These broad secular-value exemptions severely undermine the government's claimed interest. *See supra* at Section I(A)(2)(i); *see also Zubik*, 2013 WL 6118696, at *29 ("If there is no compelling governmental interest to apply the contraceptive mandate to . . . 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to . . . nonprofit, religious affiliated/related entities"). Defendants nowhere explain *why* they can accept secular reasons for exempting millions, but refuse the modest religious exemption sought here.

Further, the "religious employer" exemption is wholly discretionary. 45 C.F.R. 147.131(a) (agency "may" establish exemption). Defendants have already

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"an easy [case]" and "that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion)." *Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., concurring); *see also id*. at 564 (Souter, J., concurring) ("[T]his is far from a representative free-exercise case."); *Weaver*, 534 F.3d at 1259-60 ("[T]he constitutional requirement is of government *neutrality*, through the application of 'generally applicable law[s],' not just of governmental avoidance of bigotry.")

revised the exemption once, simply in response to public comment, 78 Fed. Reg. 39873-74, and—underscoring its discretionary nature—enacted the exemption only via footnote on an HHS website. *See* Dkt. 29-3 at 3. And it favors secular motivations for grandfathered and small-employer exemptions, while eschewing exemptions for non-church religious organizations. *Cf. Fraternal Order*, 170 F.3d at 365. Adding discriminatory exemptions to the law emphasizes, not ameliorates, their invidiousness. *Lukumi*, 508 U.S. at 542 ("categories of selection are of paramount concern"); *Fraternal Order*, 170 F.3d at 365 (the "concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption").[8]

E. The Mandate violates EWTN's right to expressive association.

Defendants make a one-paragraph argument against EWTN's expressive association claim, arguing that the right is only infringed via forced acceptance of unwanted members. Opp.41. But unconstitutional burdens on expressive association "take many forms," just "one of which" is a "regulation that forces the group to accept members it does not desire." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). The appropriate inquiry is whether an association is expressive

[8] Defendants' claim that "every court" to consider a free exercise challenge "has rejected it," Opp.35, is misleading. The vast majority of courts have held the Mandate unlawful under RFRA and so have not reached the free exercise claim. Defendants make similarly misleading statements about other non-RFRA claims.

and, if so, whether the challenged law "impair[s] [EWTN's] expression." *Id.* at 648, 653. Courts must "give deference to" EWTN's views on both. *Id.* at 653.

EWTN exists to express the Catholic faith, including Catholic teaching about the sanctity of human life. Dkt. 29-9 ¶¶ 7-17. This expressiveness is evident not only in every one of the messages that EWTN transmits every day, but also in the message that EWTN sends as an institution, such as its daily masses at the on-site chapel. *Id.* at ¶ 8-11. Many of EWTN's employees choose to work at EWTN because they share and want to further its Catholic beliefs. *Id.* at ¶ 21.

But the Mandate impairs this expressive association by introducing a required term—coverage for sterilization, contraception, and abortifacients, both for employees and their dependents—into the relationship. That required term conflicts with EWTN's witness and would damage its association with its employees. *Id.* at ¶ 21. This impermissibly "intru[des] into the internal structure or affairs of" EWTN's association with its employees. *Dale*, 530 U.S. at 648.

F. The Mandate unconstitutionally discriminates.

As shown above, the Mandate's discrimination against EWTN violates the Establishment Clause. Such discrimination also violates the Fifth Amendment, subjecting the Mandate's religious classifications to strict scrutiny. *Midrash*, 366 F.3d at 1239 ("the Establishment Clause . . . and the Equal Protection Clause as applied to religion . . . [both] speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties

or benefits" (internal citation omitted)); *see also Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). But the classifications cannot survive even rational basis review: Defendants' discrimination among essentially identical religious organizations based on unfounded speculation about their employees' beliefs is flatly illegal. *Weaver*, 534 F.3d at 1259 (banning "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations"). Thus, summary judgment is inappropriate on Counts VII and VIII.

Related facts also establish that Defendants are not entitled to summary judgment on EWTN's "unbridled discretion" claim (Count XI). Creation of the discriminatory "religious employer" exemption in a website footnote, revised at agency whim, and extended only to institutional churches, is a perfect example of unbridled discretion. *See, e.g.*, Dkt. 29-3 at 3. Determining who may exercise First Amendment rights may not be left to the "unbridled discretion" of "a government official." *Bourgeois v. Peters*, 387 F.3d 1303, 1317 (11th Cir. 2004).

G. The Mandate violates the Administrative Procedure Act.

1. Defendants failed to follow notice-and-comment procedure.

Defendants failed to follow the APA's notice and comment requirements when they promulgated the HRSA guidelines. Congress gave HRSA the authority to enact "comprehensive guidelines" for women's preventive health. *See* 42 U.S.C.

§ 300gg-13 (a)(4).[9] This is a quintessential delegation of rulemaking authority. *See, e.g.*, *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169 (7th Cir. 1996) ("a rule promulgated pursuant to such a [Congressional] delegation" is "the clearest possible example of a legislative rule, as to which the notice and comment procedure . . . is mandatory.").

But instead of following the requirements of notice-and-comment rulemaking, 5 U.S.C. § 553, HRSA adopted the recommendations of a nongovernmental body—IOM—on HRSA's website. Dkt. 29-3. Defendants claim that "IOM determined that coverage, without cost-sharing, for these services is necessary[.]" Opp.14. This is false: HRSA never asked the IOM to make recommendations about "coverage decisions," which IOM noted "often consider a host of other issues, such as . . . ethical, legal, and social issues; and availability of alternatives." IOM Report at AR 304-05; *id.* at 300 (HRSA charge). HRSA nonetheless incorporated the IOM guidelines without change in a fully binding Interim Final Rule promulgated *the same day*. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. 147.130. Those guidelines exist on a website, and have never been published in the Federal Register, but are nonetheless binding on EWTN. Dkt. 29-3. This violates the APA.

[9] Defendants claim that the HRSA guidelines are not legislative rules subject to notice and comment. Opp.35. If this were correct, the landscape would change considerably. Such guidelines "are not entitled to the force of law.'" *Bradley v. Sebelius*, 621 F.3d 1330, 1338 (11th Cir. 2010). They also "do not deserve full *Chevron* deference," and are thus subject to more searching review. *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 858 n.7 (11th Cir. 2009).

That the rules incorporating these guidelines were later open to comment is irrelevant. Opp.42. There has never been an opportunity to comment on the guidelines *themselves*—the source of the requirement to cover all FDA-approved contraceptives. The religious employer accommodation was subject to comment, but even if that were enough (and it is not), "allowing post-promulgation comments to resolve any harm caused by a lack of notice and comment would render the notice and comment provision toothless." *United States v. Dean*, 604 F.3d 1275, 1280-81 (11th Cir. 2010). This requirement "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *Id.* (quotation marks omitted). Lack of involvement at that early stage prejudiced EWTN. *See* Dkt. 1 ¶¶ 57-58; *Dean*, 604 F.3d at 1280-81.

The government argues it is common for agencies to request assistance, and that Congress relied on outside bodies like the U.S. Preventive Services Task Force. Opp. at 43-45. This only demonstrates that when Congress intends to rely on third-party recommendations, it says so. Congress did not delegate this task to IOM, HRSA did. HRSA is free to seek scientific input, but cannot use that freedom to make an end-run around the APA. *See, e.g., Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 621 (D.C. Cir. 1980) (invalidating rule based on third-party recommendations because it was "exactly the kind of standard which especially needs . . . exposure to public and expert criticism."). In short, the

regulation has no substance without the HRSA guidelines, but those guidelines were not published in the Federal Register nor subjected to notice and comment. Thus, the Mandate must be vacated. *See* 5 U.S.C. § 706(2) (D).

2. The Mandate is arbitrary and capricious.

Agency action is arbitrary and capricious where it "entirely fail[s] to consider an important aspect of [a] problem [or] offer[s] an explanation for its decision that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Mandate is arbitrary and capricious because Defendants' explanation for limiting the religious employer exemption "runs counter to the evidence" that was before them and, indeed, was not based on any evidence at all. Defendants claim that it was acceptable to exempt certain religious groups, but not EWTN, because those groups "are more likely than other employers to employ people of the same faith who share the same objection. . . ." 78 Fed. Reg. 39874. That claim is unsupported. *See supra*, Section I(C).[10]

3. The Mandate violates governing law.

The Mandate violates the APA because it violates the ACA, 42 U.S.C. § 18023 (b)(1)(A), and the Weldon Amendment. The ACA forbids "requir[ing] a qualified health plan to provide coverage of [abortion services]," 42 U.S.C. § 18023

[10] Defendants also "failed to consider an important aspect of the problem." Secretary Sebelius discussed the content of the Final Rule the same day that the comment period closed, without taking the time to review—let alone consider—the over 400,000 comments submitted on the NPRM. *See* Dkt. 1 ¶¶ 99-102.

(b)(1)(A)(i), and Weldon Amendment prohibits federal agencies from discriminating against "health insurance plan[s]" because the plan "does not provide, pay for, provide coverage of, or refer for abortions."[11] Since there is no definition for "abortion" in the Weldon Amendment or the ACA, courts "give the term its ordinary meaning." *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Medical dictionaries show the "ordinary meaning" includes the termination of an embryo.[12] The Mandate requires EWTN's health plan to provide drugs and devices that the FDA admits can terminate an embryo, and the Mandate discriminates against EWTN's plan for failing to do so. Thus, some of the Mandate's required services qualify as "abortion" in contravention of the Weldon Amendment and the ACA and, thus, the APA.[13]

4. The Mandate exceeds statutory authority.

The Mandate violates statutory authority by imposing duties and costs on insurance companies, and setting up a scheme of administrative fee reductions, which were not authorized by the ACA. Defendants' sole response is that EWTN lacks standing. But, as with EWTN's other ACA and Weldon Amendment claims,

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[11] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1) & (2), 125 Stat. 786, 1111 (2011).

[12] *See, e.g.*, *Stedman's Medical Dictionary* 4 (28th ed. 2006) ("abortion" is the "[e]xpulsion from the uterus of an embryo or fetus [before] viability.").

[13] Defendants cite Representative Weldon's 2002 statements, but that sheds little light on Congress's intent in 2011. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 n. 15 (2002). Notably, the week-after pill, ella, was not available in 2002.

the regulations directly impact the relationship—and the contract—between EWTN and its TPA, and "interference with a party's contract rights" is "legal prejudice sufficient to confer standing." *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008).

II. Summary Judgment is Premature on EWTN's Intentional Discrimination Claims and Its APA Claims.

Defendants move for summary judgment on Counts III, IV, VII, VIII, and XII-XVI, which, in part, allege intentional discrimination via Defendants' decision to impose the Mandate on EWTN, and other factual matters that require factual development. Since discovery is needed on all these points, *see* EWTN's Rule 56(d) Mot., Defendants' motion for summary judgment on these claims is premature. *Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1064 (11th Cir. 2013) (per curiam) ("Summary judgment is premature when a party is not provided a reasonable opportunity to discover information essential to his opposition.").

CONCLUSION

For the above reasons, EWTN respectfully requests that this Court deny Defendants' motion to dismiss or, in the alternative, for summary judgment, and that it grant EWTN's motion for partial summary judgment or, in the alternative, for preliminary injunction. Further, in light of the impending July 1 deadline when EWTN will be forced to violate its faith or pay draconian penalties, EWTN requests that this Court grant its motion on an expedited basis or, alternatively, grant a preliminary injunction on those same claims.

Respectfully submitted this 28th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, the foregoing motion and memorandum was served via ECF.

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