IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION NETWORK; and the STATE OF ALABAMA, Plaintiffs, v. SYLVIA M. BURWELL, *et al.*, Defendants.	)	Case No. 1:13-cv-00521-CG-C

DEFENDANTS' OPPOSITION TO EWTN'S MOTION FOR INJUNCTION PENDING APPEAL

Defendants respectfully ask that the Court deny plaintiff Eternal Word Television Network's ("EWTN") motion for an injunction pending appeal. In order to obtain the relief that it seeks, EWTN must meet the same standard that applies to a request for preliminary injunctive relief under Federal Rule of Civil Procedure 65. *See United States v. Alabama*, 443 F. App'x 411, 419-20 (11th Cir. 2011); *see also cf. Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Specifically, EWTN must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of injunctive relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Alabama*, 443 F. App'x at 420. An

injunction is inappropriate if the plaintiff fails to establish any element in its favor. *Winter*, 555 U.S. at 20; *Alabama*, 443 F. App'x at 420. Because the Court has already determined that EWTN cannot prevail on the merits of any of the claims that it now intends to appeal—and, indeed, has dismissed those claims—an injunction pending appeal should not issue, as EWTN cannot establish a likelihood of success on the merits.

EWTN's only real merits argument is that courts in several other cases have granted injunctions with respect to similar litigants. *See* EWTN's Mot. for Inj. Pending Appeal 1-2 (ECF No. 64). But this Court was already aware of those decisions (which defendants respectfully submit were wrongly decided) when it determined that EWTN's claims fail as a matter of law. *See, e.g.*, EWTN's Response in Opp'n to Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. at 2 n.1 (ECF No. 50); EWTN's Response to Defs.' Notice of Supplemental Authority at 3 (ECF No. 60). Further, besides being unpersuasive as a legal argument, EWTN's accounting of similar cases conspicuously ignores that, of the two United States Courts of Appeals to consider similar arguments, both have sided with defendants. *See Mich. Catholic Conference & Family Servs. v. Burwell*, __ F.3d __, 2014 WL 2596753 (6th Cir. July 11, 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014).

EWTN's inability to establish likelihood of success on the merits is also fatal to its attempt to show irreparable harm, which is also a prerequisite to injunctive relief. To be sure, in the free speech context, the Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). However, assuming arguendo that same rule applies to a statutory claim under RFRA, EWTN has not shown that the challenged regulations violate its First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* In this respect, the merits and irreparable injury prongs of the injunction analysis merge together, and EWTN cannot show irreparable injury without also showing a likelihood of success on the merits, which it cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012); *see also Mich. Catholic Conf.*, 2014 WL 2596753 at *19 ("Because the appellants do not demonstrate a strong likelihood of success on the merits of their claims, they also do not demonstrate that they will suffer irreparable injury without the injunction."). Moreover, EWTN cannot point to "onerous penalties" as an irreparable injury, because the accommodation allows EWTN to opt out of providing contraceptive coverage without incurring any such fines.

As to the final two factors—the balance of equities and the public interest—"there is inherent harm to an agency in preventing it from enforcing regulations

that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998). Enjoining application of the preventive services coverage regulations to EWTN would undermine the government's ability to achieve Congress's goals of improving the health of women and newborn children and equalizing the coverage of preventive services for women and men.

It would also be contrary to the public interest to deny EWTN's employees (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Many of EWTN's employees may not share EWTN's religious beliefs. Those employees should not be deprived of the benefits of payments for the full range of FDA-approved contraceptive services, as prescribed by a health care provider, on the basis of their employers' religious objection to those services. Many women do not use contraceptive services when they are not covered by their health plan or when they require costly copayments, coinsurance, or deductibles. INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS ("IOM REP.") 19-20, 109, AR at 317-18, 407; 77 Fed. Reg. 8225, 8727 (Feb. 15, 2012), AR at 214; 78 Fed. Reg. at 39,870, 39,887 (July

2, 2013), AR at 19. As a result, in many cases, both women and developing fetuses suffer negative health consequences. *See* IOM REP. at 20, 102-04, AR at 318, 400-02; 77 Fed. Reg. at 8728, AR at 215. And women are put at a competitive disadvantage due to their lost productivity and the disproportionate financial burden they bear in regard to preventive health services. 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* IOM REP. at 20, AR at 318.

Enjoining defendants from enforcing, as to EWTN, the preventive services coverage regulations—the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,726, 41,733 (July 19, 2010), AR at 233; *see also* 77 Fed. Reg. at 8728, AR at 215—would thus inflict a very real harm on the public and, in particular, a readily identifiable group of individuals. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). EWTN employs approximately 350 people, Compl. ¶ 30, and the scope of its health plan additionally includes those employees' covered dependents. Accordingly, even assuming EWTN were likely to succeed on the merits (which the Court has already determined it is not), any potential harm to EWTN resulting from its offense at a third party providing payment for contraceptive services at no cost to, and with no administration by, EWTN would be outweighed by the significant harm an injunction would cause these employees and their families.

For the foregoing reasons, for the reasons stated in the Court's June 17, 2014 Order, and for the reasons stated in defendants' memoranda in support of their motion to dismiss or, in the alternative, for summary judgment, this Court should deny EWTN's motion for an injunction pending appeal.

Respectfully submitted this 18th day of June, 2014,

STUART F. DELERY
Assistant Attorney General

KENYEN R. BROWN
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS (VA Bar)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW, Room 7108
Washington, DC 20530
Tel: (202) 514-3367
Fax: (202) 616-8470
Email: bradley.p.humphreys@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS