

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

ETERNAL WORD TELEVISION  
NETWORK, INC.,

*Plaintiff,*

v.

2:12-cv-501-SLB

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

*Defendants.*

**PLAINTIFF’S RESPONSE TO DEFENDANTS’  
THIRTEENTH NOTICE  
OF SUPPLEMENTAL AUTHORITY**

RESPONSE TO THIRTEENTH NOTICE OF SUPPLEMENTAL AUTHORITY

Eternal Word Television Network (“EWTN”) submits this response to Defendants’ Thirteenth Notice of Supplemental Authority. *See* Dkt. 74.

**1. The Notice of Proposed Rulemaking**

On February 1, 2013, Defendants (“the government”) issued a Notice of Proposed Rulemaking (“NPRM”). *See* 78 Fed. Reg. 8456. In its most recent notice to the Court, the government argues that the NPRM demonstrates its intention to alter the Mandate in a manner that will protect EWTN’s rights, and it consequently asserts that EWTN’s pending lawsuit against the current Mandate should be dismissed for lack of standing and ripeness. *See* Dkt. 74 at 1-4. The government is mistaken.

As EWTN has already explained, the government’s proposed changes to the Mandate raise the issue of mootness, not standing or ripeness. *See* Dkt. 33, Plaintiff’s Opposition to Defendants’ Motion to Dismiss, at 19-20; *see also, e.g.*, Dkt. 29-1 at 25 (government assertion that, when rulemaking is complete, “plaintiff’s challenge to the current regulations likely will be moot”). With respect to mootness, the government bears the formidable burden of proving it is “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs.*, 528 U.S. 167, 189 (2000) (emphasis added); *see also, e.g., Sheely v. MRI Radiology Network, PA*, 505 F.3d 1173, 1184 (11th Cir. 2007) (noting “formidable . . . burden” of showing mootness).

The NPRM cannot possibly satisfy the government’s stringent mootness burden. *See* Dkt. 33 at 19-21. By its own terms, the NPRM merely proposes a future accommodation which may or may not come to fruition; it is not a final rule with the force of law. The government concedes this by stating candidly that “the NPRM does not technically bind defendants to a change in policy.” Dkt. 74 at 7 n.3. For purposes of mootness, that admission settles the matter: the NPRM cannot moot EWTN’s lawsuit. *See, e.g., CSI Aviation Servs., Inc. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 414 (D.C. Cir. 2011) (holding challenge to agency action not moot because “[t]he agency’s promised rulemaking has yet to occur, and [the plaintiff’s] exemption is merely temporary”); *see also, e.g., Knox v. SEIU*, 132 S. Ct. 2277, 2287 (2012) (holding that, “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot”).<sup>1</sup>

---

<sup>1</sup> The government relies heavily on its own assurance that the Mandate “will *never* be enforced against employers like plaintiffs.” Dkt. 74 at 2 (emphasis in original); *see also id.* at 3 (reciting “promise that [the government] will never enforce the current version of the challenged regulations against plaintiff.”). This certainty is newfound. Previously, the government claimed only “a *significant chance* that the amendments will alleviate” EWTN’s injuries, and that, when

Just as it cannot establish mootness, the NPRM can also have no effect on EWTN's standing. Standing is assessed as of the time a complaint was filed. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003); *see also* Dkt. 33 at 19 (explaining that "Defendants' argument is really about mootness"). EWTN's complaint in this matter was filed ten months before the NPRM was issued. Dkt. 13. The NPRM is therefore irrelevant to EWTN's standing.

Nor can the NPRM affect the ripeness of EWTN's lawsuit. An NPRM may undermine the ripeness of a challenge to a final agency rule by proposing a complete reversal of course that would fundamentally alter the existing challenge. *See, e.g., Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 388 (D.C. Cir. 2012) (pending challenge to final rule rendered unripe because government issued NPRM that would represent a "complete reversal of course" from prior rule and "likely moot" pending challenge). But, far from a complete reversal of course, the NPRM merely reiterates proposals the government sketched out nearly a year ago in the Advance Notice of Proposed Rulemaking (ANPRM). *Compare* 78 Fed. Reg. at 8463-64 (NPRM) *with* 77 Fed. Reg. 16501, 16506-07 (ANPRM). These warmed-over proposals continue to be inadequate for the same reasons that EWTN has already detailed at length in its opposition to the government's motion to dismiss. *See* Dkt. 33 at 18-31.

Most fundamentally, the NPRM confirms that EWTN will *not* be exempt from the Mandate. *See* 78 Fed. Reg. at 8474 (clarifying that existing exemption includes only organizations qualifying as churches and their integrated auxiliaries under the tax code); *see also* Dkt. 13, Amended Compl. ¶ 82 (explaining that EWTN does not qualify for exemption). By denying

---

the rulemaking is complete, "[EWTN's] challenge to the current regulations *likely will* be moot."<sup>1</sup> Dkt. 29-1 at 23, 25 (emphasis added). The promise the government relies upon occurred at oral argument in a different case in December 2012, a full nine months after the ANPRM and more than a year after the original Mandate. *See* Dkt. 74 at 3-4.

EWTN the exemption other religious groups receive, the NPRM continues to treat EWTN as a second-class religious organization and violate its rights under RFRA and the First Amendment.

Moreover, the NPRM fails even to articulate a concrete proposed rule with respect to self-insured organizations like EWTN. *See* 78 Fed. Reg. at 8474-76 (proposed rules). Instead, it only proposes for comment three alternative schemes, none of which would alleviate the Mandate's substantial burden on EWTN's religious exercise. *See* 78 Fed. Reg. at 8463-64 (preamble). Each of the proposals would require EWTN's third-party administrator to arrange for the objectionable drugs and services to be routed to EWTN's employees, as a direct consequence of their employment at EWTN. *See id.* Leaving aside the question of whether such a scheme is even legal,<sup>2</sup> it would still force EWTN to act as a conduit for contraception, sterilization, and abortion-causing drugs, contrary to its religious beliefs.

Nor does the NPRM explain how this coverage will be paid for if EWTN's administrator is not adequately compensated by, or does not participate in, a federally facilitated exchange. *See* 78 Fed. Reg. at 8463-64. The costs would inevitably be passed back to EWTN. Regardless, however, EWTN's objection to the Mandate is far broader than simply being forced to pay for contraceptive coverage. EWTN's Catholic faith forbids it from "participating in, paying for, training others to engage in, or otherwise supporting contraception, sterilization, or abortion." Dkt. 13 ¶ 3. In other words, even accepting the dubious proposition that an eventual final rule will solve the cost problem, the participation problem would still remain.

---

<sup>2</sup> Those questions are substantial. The portion of the ACA authorizing the Mandate does not grant HHS the power to regulate insurance companies in this manner. *See* 42 U.S.C. § 300gg-13(a)(4); *see also* The Becket Fund for Religious Liberty, *Comments on ANPRM* at 8-9 (Jun. 15, 2012), *available at* <http://www.becketfund.org/wp-content/uploads/2012/06/hhs-comments-on-anpr-final.pdf> (comments on the ANPRM by EWTN's counsel). An industry group criticized a similar proposal in the ANPRM because it would transform third-party administrators into insurers, thus running afoul of state laws. *See* Dkt. 33-3, Ex. A (comments from the Self-Insurance Institute of America).

The NPRM continues to require that EWTN, through its participation, accept the government's belief that the mandated drugs and services are valid health care. "EWTN does not believe that contraception, sterilization, or abortion are properly understood to constitute medicine, health care, or a means of providing for the well being of persons." Dkt. 13 ¶ 4. As long as the Mandate still compels EWTN to treat such services as health care, the conflict at hand is not resolved.

At bottom, what is proposed by the NPRM is no better than what was sketched out in the ANPRM: under either scenario, "the Mandate would still impose all of the foregoing harms on EWTN by coercing it to participate in the provision of items and services that violate EWTN's religious beliefs." Dkt. 13 ¶ 115.

## 2. *Conlon v. Sebelius*

The government also relies on *Conlon v. Sebelius*, which ruled the plaintiff did not have standing to challenge the Mandate. 12-CV-3932, 2013 WL 500835 (N.D. Ill. Feb. 8, 2013). But *Conlon* relies heavily on the now-reversed standing decision in *Belmont Abbey College v. Sebelius*. See 2013 WL 500835, at \*1-2, 4 (relying on *Belmont Abbey*, 878 F. Supp. 2d 25 (D.D.C. 2012)); but see *Belmont Abbey Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (reversing lower court decision on standing). Having concluded it had no jurisdiction, *Conlon* also opined in dicta about prudential ripeness. Its ripeness discussion, however, hinges on statements in the ANPRM—which are unavailing for the reasons described above—and on representations made at oral argument in that case, which are irrelevant here. See *id.* at \*5-6. *Conlon* is unpersuasive.

### 3. *Roman Catholic Diocese of Fort Worth v. Sebelius*

By contrast, the decision in *Roman Catholic Diocese of Fort Worth v. Sebelius*, 4:12-cv-00314 (N.D. Tex. Jan. 31, 2013), is persuasive.

First, *Fort Worth* correctly noted that “[the government’s] arguments concerning the potential for further amendments to the Mandate are irrelevant ... because ‘[s]tanding is determined as of the time that suit is filed.’” Op. 7. The same is true here. Like the *Fort Worth* plaintiff, EWTN had standing at the time its complaint was filed.

Second, *Fort Worth* recognized that the Mandate is a final rule, “[a]nd [that] because the Mandate is ‘on the books,’ there is nothing improper about subjecting it to the limitations of the United States Constitution and other applicable laws.” Op. 9. Indeed, even if the Mandate is later amended, “a prompt ruling on the merits of the Diocese’s claims should add clarity to the constitutional issues presented by the Mandate and, in that sense, ‘foster effective administration of the statute.’” Op. 9-10. The same is true here.

Finally, *Fort Worth* also noted that the plaintiff’s harms in planning for the imposition of the Mandate are not, as the government contends, self-inflicted. Op. 10-11. Instead, they flow from *the government’s* decision to promulgate the Mandate, a decision made a year before the effective date precisely because it takes time, effort and planning to implement major changes to employee insurance. *Id.* The government cannot now deny that EWTN would need time and resources to plan for the imposition of the Mandate.

\* \* \* \*

The authorities discussed in the government’s thirteenth notice fail to support its argument that EWTN’s case should be dismissed. The government’s motion to dismiss should be denied.

Dated: February 22, 2013

Respectfully submitted,

s/ S. Kyle Duncan

S. Kyle Duncan

Lori H. Windham

Eric N. Kniffin

THE BECKET FUND FOR RELIGIOUS LIBERTY

3000 K St. NW, Ste. 220

Washington, DC 20007

Tel.: (202) 955-0095

Fax: (202) 955-0090

*kduncan@becketfund.org*

*Counsel for Plaintiff EWTN*

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 22, 2013, I electronically filed the foregoing Response to Defendants' Thirteenth Notice of Supplemental Authority with the Clerk of the Court using CM/ECF, which transmitted Notices of Electronic Filing generated by CM/ECF to the following:

Jacek Pruski  
United States Department of Justice  
20 Massachusetts Avenue NW  
Washington, DC 20001

Eric R. Womack  
United States Department of Justice  
20 Massachusetts Avenue NW  
Washington, DC 20001

Joyce White Vance  
United States Attorney's Office  
1801 4th Avenue North  
Birmingham, AL 35203-2101

Respectfully submitted,

s/ S. Kyle Duncan

S. Kyle Duncan  
THE BECKET FUND FOR RELIGIOUS LIBERTY  
3000 K St. NW, Ste. 220  
Washington, DC 20007  
Tel.: (202) 955-0095  
Fax: (202) 955-0090