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No. 14-12696-CC

In the United States Court of Appeals for the Eleventh Circuit

ETERNAL WORD TELEVISION NETWORK, INC., an Alabama non-profit corporation,

Appellant,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services, United States Department of Health and Human Services, Thomas Perez, Secretary of the United States Department of Labor, United States Department of Labor, Jacob J. Lew, Secretary of the United States Department of the Treasury, and United States Department of the Treasury,

Appellees.

On Appeal from the United States District Court for the Southern District of Alabama

APPENDIX

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Appendix

Tab A, Docket Sheet

Tab 1, Dkt. 1, Complaint

Tab 1-2, Dkt. 1-2, FDA Birth Control Guide

Tab 1-4, Dkt. 1-4, HealthCare.gov Grandfathering Factsheet

Tab 1-6, Dkt. 1-6, White House Small Business Statement

Tab 29-2, Dkt. 29-2, Blomberg Affidavit

Tab 29-3, Dkt. 29-3. HRSA Guidelines

Tab 29-4, Dkt. 29-4, FDA Birth Control Guide

Tab 29-6, Dkt. 29-6, HealthCare.gov Grandfathering Factsheet

Tab 29-8, Dkt. 29-8, White House Small Business Statement

Tab 29-9, Dkt. 29-9, Declaration of Michael Warsaw

Tab 29-10, Dkt. 29-10, Declaration of John Haas

Tab 29-11, Dkt. 29-11, EBSA Form 700

Tab 29-12, Dkt. 29-12, Reaching Souls Transcript

Tab 29-13, Dkt. 29-13, Deposition Transcript of Gary Cohen

Tab 29-14, Dkt. 29-14, EWTN's Suggested Findings of Undisputed Fact

Tab 36-1, Dkt. 36-1, Government Response to EWTN's Suggested Findings of Undisputed Fact

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Tab 50-3, Dkt. 50-3, Archbishop of Washington Transcript

Tab 61, Dkt. 61, District Court Opinion & Order on Counts I, II, V, IX

Tab 65, Dkt. 65, District Court Order Regarding Entry of Judgment and Stay

Tab 66, Dkt. 66, District Court Final Judgment on Counts I, II, V, IX
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APPEAL,R26,STAYED

U.S. District Court Southern District of Alabama (Mobile) CIVIL DOCKET FOR CASE #: 1:13-cv-00521-CG-C

Eternal Word Television Network, Inc. et al v. U.S. Department

of Health and Human Services et al Assigned to: Judge Callie V. S. Granade

Referred to: Magistrate Judge William E. Cassady Case in other court: 11th Cir. USCA, 14–12696–CC

Cause: 42:1983 Civil Rights Act

Date Filed: 10/28/2013 Jury Demand: Plaintiff

Nature of Suit: 440 Civil Rights: Other Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
10/28/2013	1	COMPLAINT (Filing fee \$400 receipt number 1128–1502887, Online Credit Card Payment), filed by Eternal Word Television Network, Inc., State of Alabama against Kathleen Sebelius, United States Department of Health and Human Services, Thomas Perez, United States Department of Labor, Jacob Lew, and United States Department of the Treasury. (Attachments: #1 Exhibit A_HRSA Guidelines, #2 Exhibit B_FDA Birth Control Guide, #3 Exhibit C_Sebelius Press Release, #4 Exhibit D_HealthCare.gov Grandfathering Factsheet, #5 Exhibit E_Amendment to Grandfathering Regulation, #6 Exhibit F_White House Small Business Statement, #7 Summons_DOL, #8 Summons_HHS, #9 Summons_Lew, #10 Summons_Perez, #11 Summons_Sebelius, #12 Summons_Treasury, #13 Disclosure Statement) (Blomberg, Daniel) Modified on 10/28/2013 (mab). (Additional attachment(s) added on 10/29/2013: #14 Civil Cover Sheet) (mab). (Entered: 10/28/2013)
10/28/2013	2	MOTION for Daniel Blomberg to Appear Pro Hac Vice (Filing fee \$ 50, Receipt number 1128–1502952, Online Credit Card Payment.) by Eternal Word Television Network, Inc (Attachments: #1 PHV Application, #2 Certificate of Good Standing) (Blomberg, Daniel) (Entered: 10/28/2013)
10/28/2013	<u>3</u>	MOTION for S. Kyle Duncan to Appear Pro Hac Vice (Filing fee \$ 50, Receipt number 1128–1502977, Online Credit Card Payment.) by Eternal Word Television Network, Inc (Attachments: #1 PHV Application, #2 Certificate of Good Standing) (Duncan, Stuart) (Entered: 10/28/2013)
10/28/2013	4	MOTION for Lori H. Windham to Appear Pro Hac Vice (Filing fee \$ 50, Receipt number 1128–1502993, Online Credit Card Payment.) by Eternal Word Television Network, Inc (Attachments: #1 PHV Application, #2 Certificate of Good Standing) (Windham, Lori) (Entered: 10/28/2013)
10/28/2013	<u>5</u>	Local Rule 3.4 and blank Disclosure Statement form e-mailed to Plaintiff Eternal Word Television Network, Inc.; Disclosure Statement Due 11/4/2013. (mab) (Entered: 10/28/2013)
10/28/2013	<u>6</u>	Corporate Disclosure Statement filed by Plaintiff Eternal Word Television Network, Inc. (Attachment to Complaint) (mab) (Entered: 10/28/2013)
10/28/2013	7	Summonses Issued as to Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury, U.S. Attorney &U.S. Attorney General. (NOTE TO COUNSEL: The Summonses have been issued. Please print copies necessary for service.) (mab) (Entered: 10/28/2013)
10/28/2013	8	Service Notice issued 10/28/2013. Plaintiffs' Notice of Service Efforts due by 12/12/2013 pursuant to Local Rule 4.1(c). (Entered: 10/28/2013)
10/30/2013	2	ORDER on <u>6</u> Corporate Disclosure Statement filed by Eternal Word Television Network, Inc A review does not reveal any reason to believe that there are potential conflicts of interest that would require recusal in this action. Signed by Magistrate Judge William E. Cassady on 10/30/2013. (sdb) (Entered: 10/30/2013)

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10/30/2013	lase: 1	Order granting 3 MOTION for S. Kyle Duncan to Appear Pro Hac Vice; granting 2 MOTION for Daniel Blomberg to Appear Pro Hac Vice; granting 4 MOTION for Lori H. Windham to Appear Pro Hac Vice. Deadline set for Mr. Duncan to supplement his application with a certificate of good standing by 11/12/2013. Signed by Magistrate Judge William E. Cassady on 10/30/2013. copies to parties. (sdb) (Entered: 10/30/2013)
10/30/2013	11	Document endorsed NOTED by Judge Callie V. S. Granade: Corporate Disclosure Statement 6 filed by Eternal Word Television Network, Inc. (McDermott, Elizabeth) (Entered: 10/30/2013)
11/05/2013	<u>12</u>	Supplement to <u>3</u> Pro Hac Vice Application/Certificate of Good Standing from USDC New Orleans, LA (Duncan, Stuart) Modified on 11/6/2013 (mab). (Entered: 11/05/2013)
11/13/2013	<u>13</u>	Order, recognizing that Mr. Duncan has appropriately supplemented his motion as requested. (See Doc. 12). Signed by Magistrate Judge William E. Cassady on 11/13/2013. (adk) (Entered: 11/13/2013)
11/18/2013	<u>14</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc United States Department of Health and Human Services served on 10/31/2013, answer due 12/30/2013. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	<u>15</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc United States Department of the Treasury served on 11/5/2013, answer due 1/4/2014. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	<u>16</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc Kathleen Sebelius served on 10/31/2013, answer due 12/30/2013. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	<u>17</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc United States Department of Labor served on 11/5/2013, answer due 1/4/2014. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	<u>18</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc Jacob Lew served on 11/1/2013, answer due 12/31/2013. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	<u>19</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc Thomas Perez served on 10/31/2013, answer due 12/30/2013. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	<u>20</u>	SUMMONS Returned Executed by Eternal Word Television Network, Inc All Defendants. (Duncan, Stuart) (Entered: 11/18/2013)
11/18/2013	21	SUMMONS Returned Executed by Eternal Word Television Network, Inc All Defendants. (Duncan, Stuart) (Entered: 11/18/2013)
12/03/2013	22	NOTICE of Appearance by Bradley Philip Humphreys on behalf of Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury (Humphreys, Bradley) (Entered: 12/03/2013)
12/19/2013	<u>23</u>	Joint MOTION for Extension of Time to File Answer, <i>Extension of Briefing Length, and Adoption of Briefing Schedule</i> by Eternal Word Television Network, Inc (Attachments: # <u>1</u> Text of Proposed Order) (Blomberg, Daniel) (Entered: 12/19/2013)
12/20/2013	<u>24</u>	NOTICE of Endorsement by State of Alabama re: <u>23</u> Joint MOTION for Extension of Time to File Answer, <i>Extension of Briefing Length</i> , and Adoption of Briefing Schedule (Brasher, Andrew) (Entered: 12/20/2013)
12/20/2013	<u>25</u>	NOTICE of Endorsement by Jacob Lew, Kathleen Sebelius, United States Department of Labor, United States Department of Health and Human Services, Thomas Perez, United States Department of the Treasury re: 23 Joint MOTION for Extension of Time to File Answer, Extension of Briefing Length, and Adoption of Briefing Schedule (Humphreys, Bradley) (Entered: 12/20/2013)

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12/20/2013	lase: 1	ENDORSED ORDER granting 23 Joint Motion for Briefing Schedule, Extended Briefing Length, and Extension of Defendants' Deadline to Submit a Responsive Pleading. Briefing schedule is adopted, and Defendants' responsive pleading shall be filed no later than February 6, 2014. Signed by Judge Callie V. S. Granade on 12/20/2013. (mab) (Entered: 12/20/2013)
12/31/2013	<u>27</u>	MOTION for Summary Judgment by State of Alabama. (Attachments: #1 Text of Proposed Order) (Brasher, Andrew) (Entered: 12/31/2013)
12/31/2013	28	Brief filed by State of Alabama re <u>27</u> MOTION for Summary Judgment filed by State of Alabama. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Brasher, Andrew) (Entered: 12/31/2013)
12/31/2013	<u>29</u>	MOTION for Partial Summary Judgment &Either MOTION to Expedite Case or MOTION for Preliminary Injunction by Eternal Word Television Network, Inc. (Attachments: #_1 Text of Proposed Order, #_2 Affidavit Blomberg, #_3 Exhibit A_HRSA Guidelines, #_4 Exhibit B_FDA Birth Control Guide, #_5 Exhibit C_Sebelius Press Release, #_6 Exhibit D_Grandfathering Factsheet, #_7 Exhibit E_Grandfathering Reg Amendment, #_8 Exhibit F_White House Small Business Statement, #_9 Exhibit G_Warsaw Declaration, #_10 Exhibit H_Haas Declaration, #_11 Exhibit I_Self—Certification Form, #_12 Exhibit J_Reaching Souls Transcript, #_13 Exhibit K_Cohen Dep. Excerpt, #_14 Suggested Statement of Undisputed Facts) (Blomberg, Daniel). (Added MOTION to Expedite, MOTION for Preliminary Injunction on 1/2/2014) (tot). (Entered: 12/31/2013)
12/31/2013	<u>30</u>	Brief filed by Eternal Word Television Network, Inc. re <u>29</u> MOTION for Summary Judgment; <i>Memorandum in Support of Motion for Summary Judgment</i> . (Blomberg, Daniel) (Entered: 12/31/2013)
02/03/2014	31	PRELIMINARY SCHEDULING ORDER entered. Rule 26 Meeting Report due by 3/20/2014. Signed by Magistrate Judge William E. Cassady on 2/3/2014. (Attachment: #1 consent form) (mab) (Entered: 02/03/2014)
02/06/2014	<u>32</u>	Unopposed MOTION for Extension of Time to File <i>Responsive Pleading and to Amend Briefing Schedule</i> by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury. (Attachments: #1 Text of Proposed Order) (Humphreys, Bradley) (Entered: 02/06/2014)
02/10/2014	33	ENDORSED ORDER, GRANTING 32 Unopposed MOTION for Extension of Time and to Amend Briefing Schedule. The deadline for defendants to file their responsive pleading is extended to February 10, 2014. The deadline for defendants to file their response to the plaintiffs' motions for summary judgment is extended to February 10, 2014. The plaintiffs are to file their response to any motion to dismiss or motion for summary judgment and file their reply briefs regarding their motions for summary judgment by February 28, 2014. The defendants are to file their reply briefs by March 11, 2014. Signed by Judge Callie V. S. Granade on 2/10/2014. (mab) (Entered: 02/10/2014)
02/10/2014	<u>34</u>	MOTION to Dismiss <i>or, in the Alternative, for Summary Judgment</i> by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury. (Attachments: #1 Exhibit Defendants' Statement of Suggested Findings of Undisputed Facts and Conclusions of Law, #2 Text of Proposed Order) (Humphreys, Bradley) (Entered: 02/10/2014)
02/10/2014	<u>35</u>	Memorandum in Support re 34 MOTION to Dismiss <i>or, in the Alternative, for Summary Judgment</i> filed by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury. (Humphreys, Bradley) (Entered: 02/10/2014)
02/10/2014	<u>36</u>	Memorandum in Opposition re <u>29</u> MOTION for Summary Judgment MOTION to Expedite MOTION for Preliminary Injunction, <u>27</u> MOTION for Summary Judgment filed by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury. (Attachments: # <u>1</u> Exhibit Defendants' Response to EWTN's Statement of Suggested Undisputed Material Facts)

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02/11/2014	<u>37</u>	MOTION for Jennifer Lee to Appear Pro Hac Vice (Filing fee \$ 50, Receipt number 1128–1543217, Online Credit Card Payment.) by American Civil Liberties Union, American Civil Liberties Union of Alabama. (Attachments: #1 Pro Hac Vice Application, #2 Certificate of Good Standing) (Lee, Jennifer) (Entered: 02/11/2014)
02/11/2014	<u>38</u>	MOTION for Brigitte Amiri to Appear Pro Hac Vice (Filing fee \$ 50, Receipt number 1128–1543296, Online Credit Card Payment.) by American Civil Liberties Union, American Civil Liberties Union of Alabama. (Attachments: #1 Pro Hac Vice Application, #2 Certificate of Good Standing) (Amiri, Brigitte) (Entered: 02/11/2014)
02/11/2014	<u>39</u>	MOTION for Daniel Mach to Appear Pro Hac Vice (Filing fee \$ 50, Receipt number 1128–1543327, Online Credit Card Payment.) by American Civil Liberties Union, American Civil Liberties Union of Alabama. (Attachments: #1 Pro Hac Vice Application, #2 Certificate of Good Standing) (Mach, Daniel) (Entered: 02/11/2014)
02/11/2014	<u>40</u>	MOTION for Leave to File <i>Brief as Amici Curiae</i> by American Civil Liberties Union, American Civil Liberties Union of Alabama. (Attachments: #_1 Proposed Amicus Brief) (Marshall, Randall) (Entered: 02/11/2014)
02/11/2014	41	Corporate Disclosure Statement filed by Amicus Parties American Civil Liberties Union, American Civil Liberties Union of Alabama. (Marshall, Randall) (Entered: 02/11/2014)
02/11/2014	42	ENDORSED ORDER granting 40 Motion of American Civil Liberties Union and American Civil Liberties Union of Alabama for Leave to File Brief as Amici Curiae. Signed by Judge Callie V. S. Granade on 2/11/2014. (mab) (Entered: 02/11/2014)
02/11/2014	43	Brief of Amici Curiae filed by American Civil Liberties Union and American Civil Liberties Union of Alabama in Opposition to ETWN's <u>29</u> MOTION for Summary Judgment or for Preliminary Injunction, and in Support of Defendants' <u>34</u> MOTION to Dismiss or for Summary Judgment; referred to Judge Granade (mab) (Entered: 02/11/2014)
02/11/2014	44	Document endorsed NOTED by Judge Callie V. S. Granade: Corporate Disclosure Statement 41 filed by American Civil Liberties Union, American Civil Liberties Union of Alabama (McDermott, Elizabeth) (Entered: 02/11/2014)
02/11/2014	<u>45</u>	NOTICE by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury of Filing of Administrative Record (Attachments: #_1 Exhibit Index of Administrative Record) (Humphreys, Bradley) (Three CDs received and placed in RED FILE FOLDER) Modified on 2/12/2014 (mab). (Entered: 02/11/2014)
02/11/2014	46	ENDORSED ORDER granting 37 Motion to Appear Pro Hac Vice of Attorney Jennifer Lee; granting 38 Motion to Appear Pro Hac Vice of Attorney Brigitte Amiri; granting 39 Motion to Appear Pro Hac Vice of Attorney Daniel Mach. Signed by Judge Callie V. S. Granade on 2/11/2014. (mab) (Entered: 02/11/2014)
02/11/2014	47	Order, review of <u>41</u> Corporate Disclosure Statement filed by American Civil Liberties Union and American Civil Liberties Union of Alabama has not revealed any reason to believe that there are potential conflicts of interest that would require disqualification or recusal in this action. Signed by Magistrate Judge William E. Cassady on 2/11/2014. (mab) (Entered: 02/12/2014)
02/28/2014	48	RESPONSE to Motion re: <u>34</u> MOTION to Dismiss <i>or</i> , <i>in the Alternative, for Summary Judgment</i> , <u>27</u> MOTION for Summary Judgment filed by State of Alabama. (Brasher, Andrew) (Entered: 02/28/2014)
02/28/2014	49	REPLY to Response to Motion <u>29</u> for Partial Summary Judgment filed by Eternal Word Television Network, Inc (Attachments: # <u>1</u> Affidavit, # <u>2</u> Exhibit L, Little Sisters of the Poor Order, # <u>3</u> Exhibit M, Archbishop of Wash. Transcript, # <u>4</u>

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(Case: 1	4-12696 Date Filed: 08/04/2014 Page: 8 of 263 Exhibit Robertson & Collins Survey) (Blomberg, Daniel) (Entered: 02/28/2014)
02/28/2014	<u>50</u>	RESPONSE in Opposition re <u>34</u> MOTION to Dismiss <i>or, in the Alternative, for Summary Judgment</i> filed by Eternal Word Television Network, Inc (Attachments: # <u>1</u> Affidavit, # <u>2</u> Exhibit L, Little Sisters of the Poor Order, # <u>3</u> Exhibit M, Archbishop of Wash. Transcript, # <u>4</u> Exhibit N, Robertson & Collins Survey, # <u>5</u> Response to Defendants Proposed Statement of Undisputed Fact) (Blomberg, Daniel) (Entered: 02/28/2014)
02/28/2014	<u>51</u>	MOTION for Discovery <i>under Rule 56(d)</i> by Eternal Word Television Network, Inc (Attachments: # <u>1</u> Affidavit in support of Rule 56(d) Motion, # <u>2</u> Text of Proposed Order) (Blomberg, Daniel) (Entered: 02/28/2014)
03/07/2014	<u>52</u>	REPORT of Rule 26(f) Planning Meeting . (Blomberg, Daniel) (Entered: 03/07/2014)
03/11/2014	53	REPLY Brief filed by Defendants Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury re: 34 MOTION to Dismiss or, in the Alternative, for Summary Judgment Addressing EWTN's Claims filed by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury. (Humphreys, Bradley) (Entered: 03/11/2014)
03/18/2014	<u>54</u>	Order, the Court's Rule 16(b) Scheduling Order will be HELD IN ABEYANCE until after Judge Granade has ruled upon the pending motions. Signed by Magistrate Judge William E. Cassady on 3/18/2014. (mab) (Entered: 03/19/2014)
03/20/2014	<u>55</u>	Unopposed MOTION to Expedite <i>Consideration of Case and For Oral Argument</i> by Eternal Word Television Network, Inc (Attachments: # <u>1</u> Text of Proposed Order) (Blomberg, Daniel) (Entered: 03/20/2014)
05/01/2014	<u>56</u>	NOTICE by Eternal Word Television Network, Inc. of Supplemental Authority (Blomberg, Daniel) (Entered: 05/01/2014)
05/22/2014	<u>57</u>	NOTICE by Eternal Word Television Network, Inc. <i>Second Notice of Supplemental Authority</i> (Attachments: # <u>1</u> Affidavit) (Blomberg, Daniel) (Entered: 05/22/2014)
06/06/2014	<u>58</u>	NOTICE by Eternal Word Television Network, Inc. <i>Third Notice of Supplemental Authority</i> (Blomberg, Daniel) (Entered: 06/06/2014)
06/13/2014	<u>59</u>	NOTICE by Jacob Lew, Thomas Perez, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury of Supplemental Authority (Humphreys, Bradley) (Entered: 06/13/2014)
06/13/2014	<u>60</u>	RESPONSE to <u>59</u> Notice (Other) filed by Eternal Word Television Network, Inc (Blomberg, Daniel) (Entered: 06/13/2014)
06/17/2014	61	ORDER, GRANTING EWTN's motion to expedite summary judgment proceedings; DENYING EWTN's motion for summary judgment; and GRANTING Defendants' motion for summary judgment with respect to Counts I, II, V, and IX of the complaint. The court will address EWTN's motion for discovery under 56(d) and the remainder of the Defendants' dispositive motion in a separate order. Signed by Judge Callie V. S. Granade on 6/17/2014. (mab) (Entered: 06/17/2014)
06/17/2014	<u>62</u>	ORDER, Defendants' Motion to Dismiss (Doc. <u>34</u>) is DENIED with respect to Counts XII, XIII, XIV, XVI, XVII, and is GRANTED with respect to all remaining claims; Defendants' Motion for Summary Judgment is DENIED with respect to Counts XII, XIII, XIV, XVI, and XVII; EWTN's 56(d) motion (Doc. <u>51</u>) is DENIED AS MOOT. Signed by Judge Callie V. S. Granade on 6/17/2014. (mab) (Entered: 06/17/2014)
06/17/2014	<u>63</u>	Joint MOTION for Entry of Judgment under Rule 54(b) for Counts I, II, V, and IX, and for a stay of litigation with respect to the remaining counts by Eternal Word Television Network, Inc., State of Alabama. (Attachments: #1 Text of Proposed

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06/18/2014	<u>64</u>	MOTION for Preliminary Injunction <i>Pending Appeal</i> by Eternal Word Television Network, Inc (Attachments: # <u>1</u> Text of Proposed Order) (Blomberg, Daniel) (Entered: 06/18/2014)
06/18/2014	<u>65</u>	ORDER, certifying that the order of partial summary judgment dated June 17, 2014, (Doc. <u>61</u>), constitutes a final judgment as to Counts I, II, V, and IX. A separate final judgment as to those Counts will be entered on the docket. Remaining claims STAYED pending appeal of the partial summary judgment. Signed by Judge Callie V. S. Granade on 6/18/2014. (mab) (Entered: 06/18/2014)
06/18/2014		Case Stayed pursuant to <u>65</u> Order. (mab) (Entered: 06/18/2014)
06/18/2014	<u>66</u>	FINAL JUDGMENT entered in favor of United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury, Jacob Lew, Sylvia M. Burwell, Thomas Perez against Eternal Word Television Network, Inc. and State of Alabama. Counts I, II, V and IX of the Plaintiff's complaint are DISMISSED with prejudice. Costs are to be taxed against the plaintiffs. Signed by Judge Callie V. S. Granade on 6/18/2014. (mab) (Entered: 06/18/2014)
06/18/2014	<u>67</u>	Order re: <u>64</u> MOTION for Preliminary Injunction <i>Pending Appeal</i> filed by Eternal Word Television Network, Inc. Defendant's response due by 6/20/2014. Plaintiff's reply due by 6/23/2014. Signed by Judge Callie V. S. Granade on 6/18/2014. (mab) (Entered: 06/18/2014)
06/18/2014	<u>68</u>	NOTICE OF APPEAL as to <u>65</u> Judgment, <u>61</u> Order on Motion for Summary Judgment,, Order on Motion to Expedite, Order on Motion for Preliminary Injunction, Order on Motion to Dismiss, <u>66</u> Judgment, by Eternal Word Television Network, Inc (Filing fee \$505 receipt number 1128–1595729, Online Credit Card Payment.) (Blomberg, Daniel) (Note: No Hearings). (Entered: 06/18/2014)
06/18/2014	<u>69</u>	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: <u>65</u> Judgment, <u>61</u> Order on Motion for Summary Judgment,, Order on Motion to Expedite, Order on Motion for Preliminary Injunction, Order on Motion to Dismiss, <u>66</u> Judgment, <u>68</u> Notice of Appeal, Judge Appealed: Judge Granade, Court Reporter: No Hearings, Fee Paid: PAID (as to Claims I, II, V, IX), all other claims stayed (No Hearings.) (jal) (Entered: 06/18/2014)
06/18/2014	70	RESPONSE in Opposition re <u>64</u> MOTION for Preliminary Injunction <i>Pending Appeal</i> filed by Sylvia M. Burwell, Jacob Lew, Thomas Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of the Treasury. (Humphreys, Bradley) (Entered: 06/18/2014)
06/18/2014	71	NOTICE of Docketing Record on Appeal from USCA re <u>68</u> Notice of Appeal, filed by Eternal Word Television Network, Inc USCA Case Number 14–12696–CC (jal) (Entered: 06/19/2014)
06/19/2014		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Southern District of Alabama certifies that the record is complete for purposes of this appeal re: <u>68</u> Notice of Appeal,, Appeal No. 14–12696–CC. The record on appeal is available electronically with the exception of 1 Red Folder of CDs at doc. 45. (jal) (Entered: 06/19/2014)
06/19/2014	72	REPLY to Response to Motion <u>64</u> for Injunction Pending Appeal filed by Eternal Word Television Network, Inc (Blomberg, Daniel) (Entered: 06/19/2014)
06/19/2014	73	ORDER denying <u>64</u> Motion for Preliminary Injunction pending appeal. Signed by Judge Callie V. S. Granade on 6/19/2014. (mab) (Entered: 06/19/2014)

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION NETWORK, INC.,

and

STATE OF ALABAMA,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, United States Department of Health and Human Services, Thomas Perez, Secretary of the United States Department of Labor, United States Department of Labor, Jacob Lew, Secretary of the United States Department of the Treasury, and United States Department of the Treasury, and United States Department of the Treasury,

Defendants

CASE No. 13-cv-521

COMPLAINT (JURY TRIAL DEMANDED)

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COMPLAINT

Come now Plaintiffs Eternal Word Television Network, Inc., ("EWTN"), and the State of

Alabama, by and through their attorneys, and state as follows:

NATURE OF THE ACTION

1. This is a challenge to regulations (the "Mandate") issued under the Patient Protection

and Affordable Care Act which seek to encourage the use of contraception and sterilization by

requiring employer health insurance to cover these services for free. The mandated coverage

includes "emergency contraceptives" which cause early abortions.

2. Plaintiff EWTN was founded 32 years ago by a cloistered nun and has become the

largest Catholic media network in the world. In obedience to Catholic teaching, EWTN cannot

facilitate contraception, sterilization, or abortion. Indeed, EWTN believes these procedures—far

from constituting "health care" or "preventive services"—instead involve gravely immoral

practices, including the intentional destruction of innocent human life. Consequently, EWTN

cannot participate in the Mandate's scheme without violating its beliefs and publicly

contradicting its mission of "communicat[ing] the teachings and beauty of the Catholic Church."

3. EWTN qualifies for no exemption from the Mandate. While "religious employers"

are exempt, Defendants have limited that term only to churches, their integrated auxiliaries, and

religious orders.

4. The final version of the Mandate does offer EWTN—and other non-exempt

organizations—a so-called "accommodation." This is a mere fig leaf. It would still require

EWTN to play a central role in the government's scheme by "designating" a fiduciary to pay for

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the objectionable services on EWTN's behalf. This would do nothing to assuage EWTN's objections to the Mandate.

5. The so-called "accommodation" also continues to treat EWTN as a second-class religious organization, not entitled to the same religious freedom rights as the Church it exists to serve. It also creates administrative hurdles and other difficulties for EWTN, forcing it to seek out and contract with companies willing to provide the very drugs and services that EWTN

out and contract with companies withing to provide the very drags and services that Ev

speaks out against.

6. If EWTN does not compromise its religious convictions and comply with the

Mandate, however, it faces severe penalties that could exceed \$12 million per year.

7. The State of Alabama has a sovereign prerogative to regulate its insurance market in

accordance with its own law and policy, without being contradicted by unlawful federal

regulations. The Mandate imposes immediate and continuing burdens on the State of Alabama

and its citizens. The Mandate—if it were lawful—would preempt Alabama's comprehensive

body of regulation of the benefits that health insurance plans must provide.

8. Defendants have violated the Religious Freedom Restoration Act, as well as the Free

Exercise, Establishment, and Free Speech Clauses of the First Amendment of the United States

Constitution, the Due Process Clause of the Fifth Amendment, and the Administrative Procedure

Act. Plaintiffs therefore respectfully request declaratory and permanent injunctive relief.

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361.

This action arises under the Constitution and laws of the United States. This Court has

jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42

U.S.C. § 2000bb-1.

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10. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

IDENTIFICATION OF PARTIES

- 11. Plaintiff EWTN is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code and is principally located in Jefferson County, Alabama.
- 12. Plaintiff State of Alabama is a sovereign State of the United States of America by and through Attorney General Luther Strange, who may bring this action on behalf of the State. *See* Ala. Code § 36-15-12.
- 13. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing the challenged regulations.
- 14. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services (HHS). In this capacity, she has responsibility for the operation and management of HHS. Sebelius is sued in her official capacity only.
- 15. Defendant Department of Health and Human Services is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the challenged regulations.
- 16. Defendant Thomas Perez is the Secretary of the United States Department of Labor. In this capacity, he has responsibility for the operation and management of the Department of Labor. Perez is sued in his official capacity only.
- 17. Defendant Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the challenged regulations.

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18. Defendant Jacob Lew is the Secretary of the Department of the Treasury. In this capacity, he has responsibility for the operation and management of the Department. Lew is sued in his official capacity only.

19. Defendant Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the challenged regulations.

FACTUAL ALLEGATIONS

- I. EWTN's Religious Beliefs and Practices Related to Contraception, Sterilization, and Abortion.
- 20. In 1981, Mother M. Angelica, a cloistered nun of the Poor Clares of Perpetual Adoration order, founded EWTN on the property of Our Lady of Angels Monastery in Irondale, Alabama. Since then, EWTN has become the largest Catholic media network in the world, transmitting programming twenty-four hours a day in English, Spanish, German, and other language channels on over eleven full-time television feeds to more than 230 million homes in 144 countries and territories on more than 5,000 multichannel video programming distribution systems, two distinct twenty-four hour radio services broadcast worldwide on shortwave radio, satellite radio, direct over internet, and through more than 230 affiliated broadcast stations in the United States as well as other communications media, such as its principal website which receives approximately 3 million visits per month.
- 21. EWTN airs family and religious programming from a Catholic point of view that presents the teachings of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church. Additionally, it provides spiritual devotions based on Catholic religious practice, and airs daily live Masses and prayers. Providing more than 80% original programming, EWTN also offers talk shows, children's animation, teaching series, documentaries, and live

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coverage of Catholic Church events. EWTN also has an internal printing press, which it uses to mail out newsletters that feature Catholic teaching.

22. A deep devotion to the Catholic faith is central to EWTN's mission. In the network's own words:

Eternal Word Television Network is dedicated to the advancement of truth as defined by the Magisterium of the Roman Catholic Church. The mission of the Eternal Word Television Network is to serve the orthodox belief and teaching of the Church as proclaimed by the Supreme Pontiff and his predecessors. The goal of the Eternal Word Television Network is to provide the means by which the various organizations within the Church will have a nation-wide vehicle of expression. This will be provided for them without charge as long as their spirituality remains within the theological context of Mother Church. This is best evidenced by the acceptance of the Dogmas, Rules and Regulations of the Church in all matters, but especially as they relate to the topics on which their television presentation is based. As the Eternal Word Television Network exists to provide a media for orthodox endeavors, this mission statement should be viewed as the basis of or foundation for this essential spiritual growth ministry, not as an attempt to censor any organization or individual[.]

Indeed, above and beyond EWTN's religious programming, the network's religious centers themselves are visited daily by pilgrims who travel to worship at the daily Masses held at the chapel on EWTN's campus in Irondale, Alabama. The chapel is open every day from 6:00 AM to 9:00 PM. EWTN's principal campus houses an order of Franciscan friars near the EWTN chapel, who work closely with EWTN in a number of its activities, including celebrating Mass at the chapel.

- 23. The EWTN grounds highlight religious devotion and include an outdoor shrine, a Stations of the Cross devotional area, private prayer areas, and religious statues throughout.
- 24. Almost every room within EWTN buildings features religious images and icons, including crucifixes, depictions of the Pietà, paintings of saints, and Bible verses and prayers.

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25. This is also generally true of employee-controlled spaces. Employees are permitted to

decorate their own work places, and a large number have heavily adorned the spaces with

pictures of Catholic saints, prayers, and religious icons.

26. EWTN holds and actively professes religious beliefs that include traditional Christian

teachings on the sanctity of life. It believes and teaches that each human being bears the image

and likeness of God, and therefore that all human life is sacred and precious from the moment of

conception. EWTN therefore believes and teaches that abortion ends a human life and is a grave

sin.

27. EWTN's religious beliefs also include traditional Christian teaching on the nature and

purpose of human sexuality, beliefs which exclude the use of contraceptive drugs and devices as

well as voluntary sterilization methods. In particular, EWTN believes, in accordance with

traditional Catholic doctrine as articulated and confirmed by Pope Paul VI's 1968 encyclical

Humanae Vitae, that human sexuality has two primary purposes: to "most closely unit[e]

husband and wife" and "for the generation of new lives." Accordingly, EWTN believes and

actively professes, with the Catholic Church, that "[t]o use this divine gift destroying, even if

only partially, its meaning and its purpose is to contradict the nature both of man and of woman

and of their most intimate relationship, and therefore it is to contradict also the plan of God and

His Will." Therefore, EWTN believes and teaches that "any action which either before, at the

moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as

an end or as a means"—including contraception and sterilization—is a grave sin.

28. Furthermore, EWTN subscribes to authoritative Catholic teaching about the proper

nature and aims of health care and medical treatment. For instance, EWTN believes, in

accordance with Pope John Paul II's 1995 encyclical Evangelium Vitae, that "[c]ausing death'

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can never be considered a form of medical treatment," but rather "runs completely counter to the

health-care profession, which is meant to be an impassioned and unflinching affirmation of life."

EWTN likewise believes and teaches that sterilization and contraceptives are not properly

understood as health care, since pregnancy and the natural process of human reproduction are not

diseases to be cured.

29. On numerous occasions, EWTN has publicly proclaimed the foregoing moral

precepts as authentic and binding Catholic doctrine through its television, radio, and internet

transmissions. EWTN will continue to do so.

30. EWTN has approximately 350 employees.

31. As part of its commitment to Catholic social teaching, EWTN promotes the well-

being and health of its employees and their families. In furtherance of these beliefs, EWTN has

striven over the years to provide employee health coverage superior to coverage generally

available in the Alabama market.

32. Moreover, as part of its religious commitment to the authoritative teachings of the

Catholic Church, EWTN cannot facilitate access to health care insurance—or any form of

payment, whether or not denominated "insurance coverage"—that covers artificial contraception,

sterilization, or abortion, or related education and counseling, without violating its deeply held

religious beliefs and without publicly contradicting the same Catholic doctrine that EWTN

routinely proclaims through its television, radio, and internet transmissions.

33. EWTN ensures that its insurance plan does not cover or otherwise facilitate access to

drugs, devices, services or procedures inconsistent with its faith. In particular, EWTN has taken

great pains through the years to ensure that its insurance plans do not cover, or in any way

facilitate access to, sterilization, contraception, or abortion.

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34. EWTN cannot provide information or guidance to its employees about other locations

or means through which they can access artificial contraception, sterilization, abortion, or related

education and counseling, without violating its deeply held religious beliefs and without publicly

contradicting its own mission. Many of EWTN's employees choose to work at EWTN because

they share its religious beliefs and wish to help EWTN further its mission of sharing Catholic

teaching. EWTN would violate their implicit trust in the organization and detrimentally alter its

relationship with its employees if it were to violate its religious beliefs regarding abortion,

sterilization and contraception.

35. Furthermore, EWTN exists on donations from the public. EWTN does not generate

revenue from carriage fees and advertising, and indeed prohibits any form of commercial

advertising on its television services. Donors who give to EWTN do so with an understanding of

EWTN's mission and with the assurance that EWTN will continue to adhere to, disseminate, and

report reliable Catholic teachings on morality and practices, as its Mission Statement has

declared since its inception.

36. Therefore EWTN cannot operate in a manner known to be morally repugnant to its

donors and in ways that violate the implicit trust of the purpose of their donations.

II. The State of Alabama's regulation of health insurance plans

37. The State of Alabama regulates health insurance plans through a comprehensive

system of laws, which requires that plans cover certain services, such as mammograms, and not

others, such as abortifacients. For example, any health benefit plan that offers prescription drug

benefits must comply with Ala. Code Sections 27-1-21 and 27-1-22 and Section 27-45-1, et seq.,

which expressly provide that those plans do not have to cover any contraceptive or abortifacient

drugs and devices, or any counseling or education associated with them. All health policies

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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 forty per Section 27-58-1, *et seq*. Certain health benefit plans shall offer to cover chiropractic services per Section 27-59-1, *et seq*. These mandates strike an intentional balance between the cost and availability of health insurance; each new mandate requires a cost-benefit calculation because, in the aggregate, mandates drive up the cost of health insurance and make it less affordable.

- 38. The State of Alabama imposes the second least number of health insurance mandates of any State and has chosen not to impose a contraception mandate on otherwise heavily-regulated insurance plans. *See* 4 Compensation and Benefits § 56:32 (July 2012) (list of mandates in Alabama); Victoria Craig Bunce, 2011 Health Insurance Mandates in the States, Executive Summary, Tables 1 & 3. 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.
- 39. Alabama's government and people also have a long tradition of respect for religious freedom and the right to conscience. For the State's roughly 200-year history, Alabama's Constitution has declared—in every iteration—"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); Ala. Const. art. I, sec. 4 (1875); Ala. Const. art. I, sec. 4 (1865); Ala. Const. art I, sec. 6

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(1861); Ala. Const. art. I, sec. 6 (1819). And, in the 1998 election, Alabama voters ratified the Alabama Religious Freedom Amendment ("ARFA") to the Constitution, which tracks the language and intent of the federal RFRA. See Ala. Const., amend. 622. Alabama is one of only a dozen states that have enacted such a law, and it is the only state to have done so by an

amendment to its constitution.

40. In November 2012, the people of Alabama voted to adopt an amendment to the

Alabama Constitution to prohibit any person or employer, such as EWTN, from being compelled

to participate in a health care system. Amendment 864 to the Alabama Constitution provides in

relevant part: "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 person, employer, or

health care provider to participate in any health care system." Ala. Const. Amend. No. 864.

41. If lawful, the Mandate would displace Alabama's regulatory choice and strike a new

and different balance between the cost and availability of health insurance.

III. The Affordable Care Act and Preventive Care Mandate

42. In March 2010, Congress passed, and President Obama signed into law, the Patient

Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and

Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the

"Affordable Care Act."

43. The Affordable Care Act regulates the national health insurance market by directly

regulating "group health plans" and "health insurance issuers."

44. One provision of the Act mandates that any "group health plan" or "health insurance

issuer offering group or individual health insurance coverage" must "provide coverage" for

certain preventive care services. 42 U.S.C. § 300gg-13(a).

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- 45. The services required to be covered include medications, screenings, and counseling given an "A" or "B" rating by the United States Preventive Services Task Force; ¹ immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention; and "preventive care and screenings" specific to infants, children, adolescents, and women, as to be "provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(1)-(4).
- 46. The statute specifies that all of these services must be provided without "any cost sharing." 42 U.S.C. § 300gg-13(a).

The Interim Final Rule

- 47. On July 19, 2010, HHS², along with the Department of Treasury and the Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726, 41728 (2010). The interim final rule required providers of group health insurance to cover preventive services without cost sharing. 75 Fed. Reg. 41759 (2010).
- 48. The interim final rule was enacted without prior notice of rulemaking or opportunity for public comment, because Defendants determined for themselves that "it would be impracticable and contrary to the public interest to delay putting the provisions . . . in place until a full public notice and comment process was completed." 75 Fed. Reg. at 41730.

The list of services that currently have an "A" or "B" rating include medications like aspirin for preventing cardiovascular disease, vitamin D, and folic acid; screenings for a wide range of conditions such as depression, certain cancers and sexually-transmitted diseases, intimate partner violence, obesity, and osteoporitis; and various counseling services, including for breastfeeding, sexually-transmitted diseases, smoking, obesity, healthy dieting, cancer, and so forth. *See* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Aug. 25, 2013); *see also* 75 Fed. Reg. 41726, 41740 (2010).

For ease of reading, references to "HHS" in this Complaint refer to all Defendants, unless context indicates otherwise.

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49. Although Defendants suggested in the Interim Final Rule that they would solicit

public comments after implementation, they stressed that "provisions of the Affordable Care Act

protect significant rights" and therefore it was expedient that "participants, beneficiaries,

insureds, plan sponsors, and issuers have certainty about their rights and responsibilities." *Id*.

50. Defendants stated they would later "provide the public with an opportunity for

comment, but without delaying the effective date of the regulations," demonstrating their intent

to impose the regulations regardless of the legal flaws or general opposition that might be

manifest in public comments. Id.

51. In addition to reiterating the Affordable Care Act's preventive services coverage

requirements, the Interim Final Rule provided further guidance concerning the Act's restriction

on cost sharing.

52. The Interim Final Rule makes clear that "cost sharing" refers to "out-of-pocket"

expenses for plan participants and beneficiaries. 75 Fed. Reg. at 41730.

53. The Interim Final Rule acknowledges that, without cost sharing, expenses "previously

paid out-of-pocket" would "now be covered by group health plans and issuers" and that those

expenses would, in turn, result in "higher average premiums for all enrollees." Id.; see also id. at

41737 ("Such a transfer of costs could be expected to lead to an increase in premiums.")

54. In other words, the prohibition on cost-sharing was simply a way "to distribute the

cost of preventive services more equitably across the broad insured population." 75 Fed. Reg. at

41730.

55. After the Interim Final Rule was issued, a number of groups filed comments warning

of the potential conscience implications of requiring religious individuals and groups to cover

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certain kinds of services—specifically, contraception, sterilization, and abortion—in their health

care plans.

56. HHS directed a private health policy organization, the Institute of Medicine ("IOM"),

to make recommendations regarding which drugs, procedures, and services should be covered by

all health plans as preventive care for women. See http://www.hrsa.gov/womensguidelines

(attached as Exhibit A) (last visited Oct. 24, 2013).

57. In developing its guidelines, IOM invited a select number of groups to make

presentations on the preventive care that should be mandated by all health plans. These were the

Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), John

Santelli, the National Women's Law Center, National Women's Health Network, Planned

Parenthood Federation of America, and Sara Rosenbaum.

58. No religious groups or other groups that oppose government-mandated coverage of

contraception, sterilization, abortion, and related education and counseling were among the

invited presenters.

59. One year after the first interim final rule was published, on July 19, 2011, the IOM

published its preventive care guidelines for women. It recommended that the required preventive

services include sterilization procedures and "[a]ll Food and Drug Administration approved

contraceptive methods [and] sterilization procedures." Institute of Medicine, Clinical Preventive

Services for Women: Closing the Gaps, at 102-10 and Recommendations 5.5 (July 19, 2011).

60. FDA-approved contraceptive methods include birth-control pills; prescription

contraceptive devices, including IUDs; Plan B (also known as the "morning-after pill"); and

ulipristal (also known as "ella" or the "week-after pill"); and other drugs, devices, and

procedures.

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- 61. "Emergency contraceptives" such as Plan B, ella, and certain IUDs can cause the death of an embryo by preventing it from implanting in the wall of the uterus.
- 62. Indeed, the FDA's own Birth Control Guide states that both Plan B, ella, and certain IUDs can work by "preventing attachment (implantation) to the womb (uterus)." FDA, Office of Women's Health, Birth Control Guide at 11-12, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Oct. 24, 2013) (attached as Exhibit B).
- 63. EWTN has a sincere religious objection to providing coverage for emergency contraceptive drugs such as Plan B, ella, and certain IUDs since those drugs and devices risk preventing a human embryo, which they understand to include a fertilized egg before it implants in the uterus, from implanting in the wall of the uterus, thereby causing the death of a human person.
- 64. EWTN believes that artificially preventing the implantation of a human embryo constitutes an abortion.
- 65. EWTN believes that Plan B, ella, and certain IUDs can cause the death of the embryo, which EWTN believes to be a person.
- 66. Plan B, ella, and certain IUDs can prevent the implantation of a human embryo in the wall of the uterus.
 - 67. Thus, Plan B, ella, and certain IUDs can cause the death of the embryo.
- 68. On August 1, 2011, just thirteen days after the IOM published its recommendations, HRSA issued guidelines adopting the IOM recommendations in full. *See* Exhibit A, http://www.hrsa.gov/womensguidelines.

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The "Religious Employers" Exemption

69. That same day, HHS promulgated an additional Interim Final Rule. 76 Fed. Reg.

46621 (published Aug. 3, 2011).

70. This Second Interim Final Rule granted HRSA "discretion to exempt certain religious

employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg.

46621, 46623 (emphasis added). The term "religious employer" was restrictively defined as one

that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons

who share the religious tenets of the organization"; (3) "serves primarily persons who share the

religious tenets of the organization"; and (4) "is a nonprofit organization as described in section

6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as

amended." 76 Fed. Reg. at 46626.

71. The fourth of these requirements refers to "churches, their integrated auxiliaries, and

conventions or associations of churches" and the "exclusively religious activities of any religious

order." 26 U.S.C.A. § 6033.

72. Thus, the "religious employers" exemption was severely limited to formal churches

and religious orders whose purpose is to inculcate faith and who hire and serve primarily people

of their own faith tradition.

73. HRSA exercised its discretion to grant an exemption for religious employers via a

footnote on its website listing the Women's Preventive Services Guideline. The footnote states

that "guidelines concerning contraceptive methods and counseling described above do not apply

to women who are participants or beneficiaries in group health plans sponsored by religious

employers." See Exhibit A at n.**, http://www.hrsa.gov/womensguidelines.

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74. Although religious organizations like EWTN share the same religious beliefs and

concerns as objecting churches, their integrated auxiliaries, and objecting religious orders, HHS

deliberately ignored the regulation's impact on their religious liberty, stating that the exemption

sought only "to provide for a religious accommodation that respects the unique relationship

between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46621,

46623.

75. Thus, the vast majority of religious organizations with conscientious objections to

providing contraceptive or abortifacient services were excluded from the "religious employers"

exemption.

76. Like the original Interim Final Rule, the Second Interim Final Rule was made

effective immediately, without prior notice or opportunity for public comment.

77. Defendants acknowledged that "while a general notice of proposed rulemaking and

an opportunity for public comment is generally required before promulgation of regulations,"

they had "good cause" to conclude that public comment was "impracticable, unnecessary, or

contrary to the public interest" in this instance. 76 Fed. Reg. at 46624.

78. Upon information and belief, after the Second Interim Final Rule was put into effect,

over 100,000 comments were submitted opposing the narrow scope of the "religious employers"

exemption and protesting the contraception mandate's gross infringement on the rights of

religious individuals and organizations.

79. HHS did not take into account the concerns of religious organizations in the

comments submitted before the Second Interim Rule was issued.

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80. Instead the Second Interim Rule was unresponsive to the concerns, including claims of statutory and constitutional conscience rights, stated in the comments submitted by religious organizations.³

The Safe Harbor

- 81. The public outcry for a broader religious employers exemption continued for many months and, on January 20, 2012, HHS issued a press release acknowledging "the important concerns some have raised about religious liberty" and stating that religious objectors would be "provided an additional year . . . to comply with the new law." *See* Jan. 20, 2012 Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Oct. 24, 2013) (attached as Exhibit C).
- 82. On February 10, 2012, HHS formally announced a "safe harbor" for non-exempt non-profit religious organizations that objected to covering free contraceptive and abortifacient services.
- 83. Under the safe harbor, HHS agreed it would not take any enforcement action against an eligible organization during the safe harbor, which would remain in effect until the first plan year beginning after August 1, 2013.
- 84. HHS also indicated it would develop and propose changes to the regulations to accommodate the objections of non-exempt, non-profit religious organizations following August 1, 2013.

EWTN filed suit against this early version of the Mandate as a sole plaintiff in February 2012. The suit was dismissed without prejudice on ripeness grounds since the final Mandate had not yet been issued. *See EWTN v. Sebelius*, Case No. 2:12-cv-501, Dkt. No. 79 (N.D. Ala. March 25, 2013).

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85. Despite the safe harbor and HHS's accompanying promises, on February 15, 2012, HHS published a final rule "finalizing, without change," the contraception and abortifacient mandate and the narrow religious employers exemption. 77 Fed. Reg. 8725-01 (published Feb. 15, 2012).

The Advance Notice of Proposed Rulemaking

- 86. On March 21, 2012, HHS issued an Advance Notice of Proposed Rulemaking (ANPRM), presenting "questions and ideas" to "help shape" a discussion of how to "maintain the provision of contraceptive coverage without cost sharing," while accommodating the religious beliefs of non-exempt religious organizations. 77 Fed. Reg. 16501, 16503 (2012).
- 87. The ANPRM conceded that forcing religious organizations to "contract, arrange, or pay for" the objectionable contraceptive and abortifacient services would infringe the objecting employers' "religious liberty interests." *Id.* (emphasis added).
- 88. In vague terms, the ANPRM proposed that the "health insurance issuers" for objecting religious employers could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." *Id*.
- 89. For self-insured plans, the ANPRM suggested that third party plan administrators "assume this responsibility." *Id*.
- 90. For the first time, and contrary to the earlier definition of "cost sharing," Defendants suggested in the ANPRM that insurers and third party administrators could be prohibited from passing along their costs to the objecting religious organizations via increased premiums. *See id.*
- 91. "[A]pproximately 200,000 comments" were submitted in response to the ANPRM, 78 Fed. Reg. 8456, 8459, largely reiterating previous comments that the ANPRM's proposals would not resolve conscientious objections because the objecting religious organizations, by

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providing a health care plan in the first instance, would still be coerced to arrange for and

facilitate access to abortifacient services.

The Notice of Proposed Rulemaking

92. On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM)

purportedly addressing the comments submitted in response to the ANPRM. 78 Fed. Reg. 8456

(published Feb. 6, 2013). The NPRM proposed two changes to the then-existing regulations. 78

Fed. Reg. 8456, 8458-59. First, it proposed revising the religious employers exemption by

eliminating the requirements that religious employers have the purpose of inculcating religious

values and that they primarily employ and serve only persons of the same faith. 78 Fed. Reg. at

8461.

93. Under this proposal a "religious employer" would be one "that is organized and

operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal

Revenue] Code." 78 Fed. Reg. at 8461. HHS emphasized, however, that this proposal "would not

expand the universe of employer plans that would qualify for the exemption beyond that which

was intended in the 2012 final rules." 78 Fed. Reg. 8456, 8461.

94. In other words, religious organizations like EWTN that are not formal churches or

religious orders would continue to be excluded from the exemption.

95. Second, the NPRM reiterated HHS's intention to "accommodate" non-exempt non-

profit religious organizations by requiring their insurers and third party administrators to provide

plan participants and beneficiaries with free access to contraceptive and abortifacient drugs and

services.

96. The proposed "accommodation" did not resolve the concerns of religious

organizations like EWTN because it would continue to force them to deliberately provide health

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insurance that would trigger access to contraceptives, abortion-inducing drugs, and related education and counseling.

- 97. In issuing the NPRM, HHS requested comments from the public by April 8, 2013. 78 Fed. Reg. 8457.
- 98. "[O]ver 400,000 comments" were submitted in response to the NPRM, 78 Fed. Reg. 39870, 39871, with religious organizations again overwhelmingly decrying the proposed accommodation as a gross violation of their religious liberty because it would conscript their health care plans as the main cog in the government's scheme for expanding access to contraceptive and abortifacient services.
- 99. EWTN submitted comments on the NPRM that stated many of the same objections stated in this complaint.
- 100. On April 8, 2013, the same day the notice-and-comment period ended, Defendant Secretary Sebelius answered questions about the contraceptive and abortifacient services requirement in a presentation at Harvard University.
 - 101. In her remarks, Secretary Sebelius stated:

We have just completed the open comment period for the so-called accommodation, and by August 1st of this year, every employer will be covered by the law with one exception. Churches and church dioceses as employers are exempted from this benefit. But Catholic hospitals, Catholic universities, other religious entities will be providing coverage to their employees starting August 1st. . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the benefit package.

See The Forum at Harvard School of Public Health, A Conversation with Kathleen Sebelius, U.S. Secretary of Health and Human Services, Apr. 8, 2013, available at http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (from 51:20 to 53:56) (last visited Oct. 24, 2013) (emphases added).

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102. It is clear from the timing of these remarks that Defendants gave no consideration to

the comments submitted in response to the NPRM's proposed "accommodation."

The Mandate

103. On June 28, 2013, Defendants issued a final rule (the "Mandate"), which ignores the

objections repeatedly raised by religious organizations—including objections raised by EWTN—

and continues to co-opt objecting religious employers into the government's scheme of

expanding free access to contraception, sterilization, and abortifacient drugs and devices. 78 Fed.

Reg. 39870.

104. Under the Mandate, the discretionary "religious employers" exemption, which is still

implemented via footnote HRSA website, Ex. on the see A,

http://www.hrsa.gov/womensguidelines, remains limited to formal churches and religious orders

"organized and operate[d]" as nonprofit entities and "referred to in section 6033(a)(3)(A)(i) or

(iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 39874.

105. All other religious organizations, including EWTN, are excluded from the exemption.

106. The Mandate creates a separate "accommodation" for certain non-exempt religious

organizations. 78 Fed. Reg. at 39874.

107. An organization is eligible for the accommodation if it (1) "opposes providing

coverage for some or all of the contraceptive services required"; (2) "is organized and operates

as a non-profit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies

that it satisfies the first three criteria." 78 Fed. Reg. at 39874.

108. The self-certification must be executed "prior to the beginning of the first plan year to

which the accommodation is to apply." 78 Fed. Reg. at 39875.

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109. The Final Rule extends the current safe harbor through the end of 2013. 78 Fed. Reg.

at 39889.

110. Thus, an eligible organization would need to execute the self-certification prior to its

first plan year that begins on or after January 1, 2014, and deliver it to the organization's insurer

or, if the organization has a self-insured plan, to the plan's third party administrator. 78 Fed. Reg.

at 39875.

By the terms of the accommodation, EWTN will be required to execute the self-111.

certification and deliver it to its plan's third party administrator before July 1, 2014.

112. The self-certification must instruct the third party administrator of its "obligations set

forth in the[] final regulations," and by delivering this self-certification to its third party

administrator, EWTN would "designat[e]" the third party administrator as the "plan

administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of

ERISA." 78 Fed. Reg. at 39879. This triggers the third party administrator's obligation to make

"separate payments for contraceptive services directly for plan participants and beneficiaries."

Id. at 39875-76.

EWTN would have to identify its employees to its third party administrator for the 113.

distinct purpose of enabling the government's scheme of facilitating free access to contraceptive

and abortifacient services and related education and counseling.

The insurer's and third party administrator's obligation to make direct payments for 114.

contraceptive and abortion services would continue only "for so long as the participant or

beneficiary remains enrolled in the plan." 78 Fed. Reg. at 39876.

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115. Thus, EWTN would have to coordinate with its third party administrator regarding

when it was adding or removing employees and beneficiaries from its healthcare plan and, as a

result, from the contraceptive and abortifacient services payment scheme.

116. The third party administrators would be required to notify plan participants and

beneficiaries of the contraceptive payment benefit "contemporaneous with (to the extent

possible) but separate from any application materials distributed in connection with enrollment"

in a group health plan. 78 Fed. Reg. at 39876.

117. This would also require EWTN to coordinate the notices with its third-party

administrator.

118. The third-party administrators would be required to provide the contraceptive benefits

"in a manner consistent" with the provision of other covered services. 78 Fed. Reg. at 39876-77.

119. Therefore, any payment or coverage disputes presumably would be resolved under

the terms of EWTN's existing plan documents.

120. Under the accommodation, issuers "may not impose any cost-sharing requirements

(such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other

charge, or any portion thereof, directly or indirectly, on the eligible organization." 78 Fed. Reg.

at 39896 (emphasis added).

121. For all other preventive services, including non-contraceptive preventive services for

women, only cost-sharing (i.e., out-of-pocket expense) is prohibited. There is no restriction on

passing along costs via premiums or other charges.

122. Defendants state that they "continue to believe, and have evidence to support," that

providing payments for contraceptive and abortifacient services will be "cost neutral for issuers,"

because "[s]everal studies have estimated that the costs of providing contraceptive coverage are

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balanced by cost savings from lower pregnancy-related costs and from improvements in

women's health." 78 Fed. Reg. at 39877.

123. On information and belief, the studies Defendants rely upon to support this claim are

severely flawed.

124. Further, Defendants acknowledge "there is no obligation for a third party

administrator to enter into or remain in a contract with the eligible organization if it objects to

any of these responsibilities." 78 Fed. Reg. at 39880.

125. Thus, the burden remains on the objecting religious organization to find a third party

administrator that will agree to provide free access to the same contraceptive and abortifacient

services the religious organization cannot directly provide.

126. EWTN's religious beliefs preclude it from soliciting, contracting with, or designating

a third party to provide these services, whether expressly or impliedly.

127. Moreover, the Mandate requires that, even if the third party administrator consents,

the religious organization—via its self-certification—must expressly designate the third party

administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for

the purpose of providing payments for contraceptive services for participants and beneficiaries."

78 Fed. Reg. at 39879.

128. The self-certification must specifically notify the third party administrator of its

"obligations set forth in the[] final regulations, and will be treated as a designation of the third

party administrator(s) as plan administrator and claims administrator for contraceptive benefits

pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39879.

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Because the designation makes the third-party administrator a plan administrator with 129.

fiduciary duties, the payments for contraceptive and abortifacient services would be payments

made under the objecting religious organization's plan.

130. Because EWTN would be required to identify and designate a third-party

administrator willing to administer the contraceptive and abortifacient services, EWTN's

religious beliefs preclude it from complying with the accommodation.

131. The Final Rule sets forth complex means through which a third party administrator

may seek to recover its costs incurred in making payments for contraceptive and abortifacient

services.

132. The third party administrator must identify an issuer who participates in the federal

exchanges established under the Affordable Care Act and who would be willing to make

payments on behalf of the third party administrator.

133. Cooperating issuers would then be authorized to obtain refunds from the user fees

they have paid to participate in the federal exchange as a means of being reimbursed for making

payments for contraceptive and abortifacient services on behalf of the third party administrator.

Issuers would be required to pay a portion of the refund back to the third party 134.

administrator to compensate it for any administrative expenses it has incurred.

These machinations, ostensibly employed to shift the *cost* of the Mandate, are 135.

severely flawed.

136. There is no way to ensure that the cost of administering the contraceptive and

abortifacient services would not be passed on to EWTN through future increases to the third

party administrator's fees.

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137. Moreover, taking the user fees intended for funding the federal exchanges and using

them to provide contraceptive and abortifacient services to employees not participating in the

federal exchanges would violate the statute authorizing the user fees. See 78 Fed. Reg. at 15412;

31 U.S.C. § 9701.

138. In sum, for both insured and self-insured organizations, the accommodation is

nothing more than a shell game that attempts to disguise the religious organization's role as the

central cog in the government's scheme for expanding access to and the use of contraceptive and

abortifacient services and related education and counseling.

139. Despite the accommodation's convoluted machinations, the religious organization's

health insurance continues to serve as the trigger for creating access to free contraceptive and

abortifacient services.

140. EWTN cannot participate in or facilitate the government's scheme in this manner

without violating its religious convictions.

EWTN's Health Care Plan and Religious Objection

141. The plan year for EWTN's healthcare plan begins on July 1 of each year.

142. EWTN's employee health care plan is self-insured.

143. Thus, beginning on or about July 1, 2014, EWTN faces the choice either of including

free coverage for contraceptive and abortifacient services, and related education and counseling,

in its employee healthcare plan or else of "designating" its third party administrator as its agent

to provide free coverage for exactly the same services.

144. EWTN's religious convictions equally forbid it from choosing either one of these

options. That is, EWTN cannot include free coverage for contraceptive and abortifacient

services, and related education and counseling, in its employee healthcare plans. Nor can EWTN

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"designate" its third party administrator as a plan administrator with obligations to provide free

access to the same services.

145. From EWTN's perspective, "designating" its third party administrator as its agent to

provide access to contraceptive and abortifacient services is no different than directly providing

that access.

146. EWTN is not eligible for the religious employers exemption because it is not an

organization "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal

Revenue Code of 1986, as amended." 76 Fed. Reg. 46621, 46626.

147. Nor does EWTN's employee healthcare plan meet the definition of a "grandfathered"

plan.

Thus, EWTN's employee healthcare plans do not include the notices required to 148.

claim grandfathered status.

The Mandate imposes government pressure and coercion on EWTN to change or 149.

violate its religious beliefs.

150. Because EWTN refuses to comply with the Mandate and refuses to designate its third

party administrator to carry out the Mandate, it faces crippling fines of \$100 each day, "for each

individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1).

151. Dropping its employee insurance is not a realistic option, however, because doing so

would place EWTN at a severe competitive disadvantage in its efforts to recruit and retain

employees.

EWTN would also face fines of \$2000 per year for each of its employees for 152.

dropping its insurance plans.

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153. Although the government has recently announced that it will postpone implementing

the annual fine of \$2000 per employee for organizations that drop their insurance altogether, the

postponement is only for one year, until 2015. This postponement does not delay the crippling

daily fines under 26 U.S.C. § 4980D.

154. EWTN's Catholic faith compels it to promote the spiritual and physical well-being of

its employees by providing them with generous health services.

155. It would violate EWTN's sincere religious beliefs to drop coverage for its employees

and force them to buy insurance that is not only less generous, but also covers contraceptive and

abortifacient drugs and devices.

The Government Cannot Satisfy Its Burden Under Strict Scrutiny

156. The government lacks any compelling interest in coercing EWTN to facilitate access

to contraceptive and abortifacient services.

The required contraceptive and abortifacient drugs, devices, and related services are 157.

already widely available at little cost.

158. There are multiple ways in which the government could provide access without co-

opting religious employers and their insurance plans in violation of their religious beliefs.

159. For example, it could pay for the objectionable services through its existing network

of family planning services funded under Title X, through direct government payments, or

through tax deductions, refunds, or credits.

160. The government could also simply exempt all religious organizations, just as it has

already exempted nonprofit religious employers referred to in Section 6033(a)(3)(A)(i) or (iii) of

the Internal Revenue Code.

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The government could also use its own newly established healthcare exchanges to

provide the additional insurance coverage it believes is needed, rather than forcing EWTN to do

so.

161.

162. HHS claims that its "religious employers" exemption does not undermine its

compelling interest in making contraceptive and abortifacient services available for free to

women because "houses of worship and their integrated auxiliaries that object to contraceptive

coverage on religious grounds are more likely than other employers to employ people who are of

the same faith and/or adhere to the same objection, and who would therefore be less likely than

other people to use contraceptive services, even if such services were covered under their plan."

78 Fed. Reg. at 39887.

163. Because of EWTN's express mission of promoting the sanctity of life, opposing

abortion, and promoting God's purpose for human sexuality, EWTN's employees are just as

likely as—if not more likely than—employees of many exempt organizations to adhere to the

same values with respect to use of the objectionable drugs, devices, and services.

164. In one form or another, the government also provides exemptions for grandfathered

plans, 42 U.S.C. § 18011; 75 Fed. Reg. 41,726, 41,731 (2010), small employers with fewer than

50 employees, 26 U.S.C. § 4980H(c)(2)(A), and certain religious denominations, 26 U.S.C.

§§ 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized

religious sect or division" that conscientiously objects to acceptance of public or private

insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members

of "health care sharing ministry" that meets certain criteria).

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- 165. These broad exemptions further demonstrate that the government has no compelling interest in refusing to include religious organizations like EWTN within its religious employers exemption.
- 166. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.
- Indeed, HHS has predicted that a majority of large employers, employing more than 167. 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of medium-sized employers with between 50 and 100 employees may do likewise. 75 Fed. Reg. Reg. 34538 (June 17. 2010); see also 75 Fed. 34540, 34552 Tbl.3: http://web.archive.org/web/20130620171510/http://www.healthcare.gov/news/factsheets/2010/0 6/keeping-the-health-plan-you-have-grandfathered.html at 4-5 (archived version) (last visited Oct. 24, 2013) (attached Exhibit D); as https://www.cms.gov/CCIIO/Resources/Files/factsheet grandfather amendment.html (noting that amendment to regulations "will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the grandfathering regulation") (last visited Oct. 24, 2013) (attached as Exhibit E).
- 168. Further, the government recently admitted that exempted small businesses constitute 96% of all businesses United the in the States. See http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf at 1 (stating that "5.8 million out of the 6 million total firms" in the U.S. are exempt from the Mandate under the small employer exemption) (last visited Oct. 24, 2013) (attached as Exhibit F).

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169. According to the government's own estimates, "nearly 34 million workers" are

employed by small businesses exempt from the Mandate. See id.

170. The government's recent decision to postpone the employer mandate—i.e., the annual

fine of \$2000 per employee for not offering any insurance—also demonstrates that there is no

compelling interest in coercing universal compliance with the Mandate concerning contraceptive

and abortifacient services, since employers can now simply drop their insurance without any

penalty, at least for one additional year.

171. These broad exemptions also demonstrate that the Mandate is not a generally

applicable law entitled to judicial deference, but rather is constitutionally flawed.

172. The government's willingness to exempt various secular organizations and postpone

the employer mandate, while adamantly refusing to provide anything but the narrowest of

exemptions for religious organizations also shows that the Mandate is not neutral, but rather

discriminates against religious organizations because of their religious commitment to promoting

the sanctity of life and God's vision for human sexuality.

173. Indeed, the Mandate was promulgated by government officials, and supported by

non-governmental organizations, who strongly oppose religious teachings and beliefs regarding

human life, marriage, and family.

174. Defendant Sebelius, for example, has long been a staunch supporter of abortion rights

and a vocal critic of religious teachings and beliefs regarding abortion and contraception.

175. On October 5, 2011, six days after the comment period for the original interim final

rule ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America.

She told the assembled crowd that "we are in a war."

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176. She further criticized individuals and entities whose beliefs differed from those held by her and others at the fundraiser, stating: "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much."

177. Consequently, on information and belief, EWTN alleges that the purpose of the Mandate, including the restrictively narrow scope of the religious employers exemption, is to discriminate against religious organizations that oppose contraception and abortion.

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CLAIMS

COUNT I Violation of the Religious Freedom Restoration Act

- 178. Plaintiffs incorporate by reference all preceding paragraphs.
- 179. EWTN's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to contraception, sterilization, abortion, or related education and counseling. EWTN's compliance with these beliefs is a religious exercise.
- 180. The Mandate creates government-imposed coercive pressure on EWTN to change or violate its religious beliefs.
 - 181. The Mandate chills EWTN's religious exercise.
 - 182. The Mandate exposes EWTN to substantial fines for its religious exercise.
- 183. The Mandate exposes EWTN to substantial competitive disadvantages, in that it will no longer be permitted to offer health insurance.
 - 184. The Mandate imposes a substantial burden on EWTN's religious exercise.
 - 185. The Mandate furthers no compelling governmental interest.
 - 186. The Mandate is not narrowly tailored to any compelling governmental interest.
- 187. The Mandate is not the least restrictive means of furthering Defendants' stated interests.
- 188. The Mandate and Defendants' threatened enforcement of the Final Mandate violate EWTN's rights secured to it by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.
- 189. Absent injunctive and declaratory relief against the Defendants, EWTN has been and will continue to be harmed.

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COUNT II

Violation of the First Amendment to the United States Constitution Free Exercise Clause Substantial Burden

- 190. Plaintiffs incorporate by reference all preceding paragraphs.
- 191. EWTN's sincerely held religious beliefs prohibit it from providing coverage for contraception, sterilization, abortion, or related education and counseling. EWTN's compliance with these beliefs is a religious exercise.
 - 192. Neither the Affordable Care Act nor the Mandate is neutral.
 - 193. Neither the Affordable Care Act nor the Mandate is generally applicable.
- 194. Defendants have created categorical exemptions and individualized exemptions to the Mandate.
 - 195. The Mandate furthers no compelling governmental interest.
- 196. The Mandate is not the least restrictive means of furthering Defendants' stated interests.
- 197. The Mandate creates government-imposed coercive pressure on EWTN to change or violate its religious beliefs.
 - 198. The Mandate chills EWTN's religious exercise.
 - 199. The Mandate exposes EWTN to substantial fines for its religious exercise.
- 200. The Mandate exposes EWTN to substantial competitive disadvantages, in that it will no longer be permitted to offer health insurance.
 - 201. The Mandate imposes a substantial burden on EWTN's religious exercise.
 - 202. The Mandate is not narrowly tailored to any compelling governmental interest.

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203. The Mandate and Defendants' threatened enforcement of the Mandate violate

EWTN's rights secured to it by the Free Exercise Clause of the First Amendment to the United

States Constitution.

Absent injunctive and declaratory relief against the Mandate, EWTN has been and 204.

will continue to be harmed.

COUNT III

Violation of the First Amendment to the United States Constitution

Free Exercise Clause

Intentional Discrimination

205. Plaintiffs incorporate by reference all preceding paragraphs.

206. EWTN's sincerely held religious beliefs prohibit it from providing coverage for

contraception, sterilization, abortion, or related education and counseling. EWTN's compliance

with these beliefs is a religious exercise.

Despite being informed in detail of these beliefs beforehand, Defendants designed the 207.

Mandate and the religious exemption to the Mandate to target religious organizations such as

EWTN because of their religious beliefs.

208. Defendants promulgated both the Mandate and the religious exemption to the

Mandate in order to suppress the religious exercise of EWTN and others.

209. The Mandate and Defendants' threatened enforcement of the Mandate thus violate

EWTN's rights secured to it by the Free Exercise Clause of the First Amendment of the United

States Constitution.

Absent injunctive and declaratory relief against the Mandate, EWTN has been and 210.

will continue to be harmed.

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COUNT IV

Violation of the First Amendment to the United States Constitution Free Exercise Clause Discrimination Among Religions

- 211. Plaintiffs incorporate by reference all preceding paragraphs.
- 212. The Free Exercise Clause and Establishment Clause of the First Amendment mandate the equal treatment of all religious faiths and institutions without discrimination or preference.
 - 213. This mandate of equal treatment protects organizations as well as individuals.
- 214. The Mandate's narrow exemption for "religious employers" but not others discriminates among religions on the basis of religious views or religious status.
- 215. The Mandate and Defendants' threatened enforcement of the Mandate thus violate EWTN's rights secured to it by the Free Exercise Clause of the First Amendment of the United States Constitution.
- 216. Absent injunctive and declaratory relief against the Mandate, EWTN has been and will continue to be harmed.

COUNT V

Violation of the First Amendment to the United States Constitution Establishment Clause Selective Burden/Denominational Preference (*Larson v. Valente*)

- 217. Plaintiffs incorporate by reference all preceding paragraphs.
- 218. By design, Defendants imposed the Mandate on some religious organizations but not on others, resulting in a selective burden on EWTN.
- 219. The Mandate and Defendants' threatened enforcement of the Mandate therefore violate EWTN's rights secured to it by the Establishment Clause of the First Amendment to the United States Constitution.

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220. Absent injunctive and declaratory relief against the Mandate, EWTN has been and

will continue to be harmed.

COUNT VI

Interference in Matters of Internal Religious Governance Free Exercise Clause and Establishment Clause

221. Plaintiffs incorporate by reference all preceding paragraphs.

222. The Free Exercise Clause and the Establishment Clause protect the freedom of

religious organizations to decide for themselves, free from state interference, matters of internal

governance as well as those of faith and doctrine.

223. Under these Clauses, the Government may not interfere with a religious

organization's internal decisions concerning the organization's religious structure, leadership, or

doctrine.

224. Under these Clauses, the Government may not interfere with a religious

organization's internal decision if that interference would affect the faith and mission of the

organization itself.

225. EWTN has made an internal decision, dictated by its Catholic faith, that the health

plans it makes available to its employees may not subsidize, provide, or facilitate access to

abortifacient drugs, devices, or related services.

The Mandate interferes with EWTN's internal decisions concerning its structure and 226.

mission by requiring it to subsidize, provide, and facilitate practices that directly conflict with its

Catholic beliefs.

227. The Mandate's interference with EWTN's internal decisions affects its faith and

mission by requiring it to subsidize, provide, and facilitate practices that directly conflict with its

religious beliefs.

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- 228. Because the Mandate interferes with EWTN's internal decision making in a manner that affects its faith and mission, it violates the Establishment Clause and Free Exercise Clause of the First Amendment.
 - 229. Plaintiffs have no adequate remedy at law.
- 230. Absent injunctive and declaratory relief against the Mandate, EWTN has been and will continue to be harmed.

COUNT VII

Religious Discrimination Violation of the First and Fifth Amendments to the United States Constitution Establishment Clause and Due Process

- 231. Plaintiffs incorporate by reference all preceding paragraphs.
- 232. By design, Defendants imposed the Mandate on some religious organizations but not on others, resulting in discrimination among religious objectors.
 - 233. Religious liberty is a fundamental right.
- 234. The "religious employer" exemption protects many religious objectors, but not EWTN.
 - 235. The "accommodation" provides no meaningful protection for EWTN.
- 236. The Mandate and Defendants' threatened enforcement of the Mandate therefore violate EWTN's rights secured to it by the Establishment Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.
- 237. Absent injunctive and declaratory relief against the Mandate, EWTN has been and will continue to be harmed.

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COUNT VIII

Violation of the Fifth Amendment to the United States Constitution Due Process and Equal Protection

- 238. Plaintiffs incorporate by reference all preceding paragraphs.
- 239. The Due Process Clause of the Fifth Amendment mandates the equal treatment of all religious faiths and institutions without discrimination or preference.
 - 240. This mandate of equal treatment protects organizations as well as individuals.
- 241. The Mandate's narrow exemption for "religious employers" but not others discriminates among religions on the basis of religious views or religious status.
- 242. The Mandate and Defendants' threatened enforcement of the Mandate thus violate EWTN's rights secured to it by the Fifth Amendment of the United States Constitution.
- 243. Absent injunctive and declaratory relief against the Mandate, EWTN has been and will continue to be harmed.

COUNT IX

Violation of the First Amendment to the United States Constitution Freedom of Speech Compelled Speech

- 244. Plaintiffs incorporate by reference all preceding paragraphs.
- 245. EWTN teaches, and expresses daily to millions of people around the world, that contraception, sterilization, and abortion violate its religious beliefs.
- 246. The Mandate would compel EWTN to facilitate activities that EWTN teaches are violations of its religious beliefs.
- 247. The Mandate would compel EWTN to facilitate access to education and counseling related to contraception, sterilization, and abortion.
- 248. Defendants' actions thus violate EWTN's right to be free from compelled speech as secured to it by the First Amendment of the United States Constitution.

- 249. The Mandate's compelled speech requirement is not narrowly tailored to a compelling governmental interest.
- 250. Absent injunctive and declaratory relief against the Mandate, EWTN has been and will continue to be harmed.

COUNT X

Violation of the First Amendment to the United States Constitution Freedom of Speech Expressive Association

- 251. Plaintiffs incorporate by reference all preceding paragraphs.
- 252. EWTN teaches, and expresses daily to millions of people around the world, that contraception, sterilization, and abortion violate its religious beliefs.
- 253. The Mandate would compel EWTN to facilitate activities that EWTN teaches are violations of EWTN religious beliefs.
- 254. The Mandate would compel EWTN to facilitate access to government-dictated education and counseling related to contraception, sterilization, and abortion.
- 255. Defendants' actions thus violate EWTN's right of expressive association as secured to it by the First Amendment of the United States Constitution.
- 256. Absent injunctive and declaratory relief against the Mandate, EWTN has been and will continue to be harmed.

COUNT XI

Violation of the First Amendment to the United States Constitution Free Exercise Clause and Freedom of Speech Unbridled Discretion

257. Plaintiffs incorporate by reference all preceding paragraphs.

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258. By stating that HRSA "may" grant an exemption to certain religious groups, the

Mandate vests HRSA with unbridled discretion over which organizations can have its First

Amendment interests accommodated.

259. Defendants have exercised unbridled discretion in a discriminatory manner by

granting an exemption for a narrowly defined group of "religious employers" but not for other

religious organizations like EWTN.

260. Defendants have further exercised unbridled discretion by indiscriminately waiving

enforcement of some provisions of the Affordable Care Act while refusing to waive enforcement

of the Mandate, despite its conflict with the free exercise of religion.

261. Defendants' actions therefore violate EWTN's right not to be subjected to a system of

unbridled discretion when engaging in speech or when engaging in religious exercise, as secured

to it by the First Amendment of the United States Constitution.

262. Absent injunctive and declaratory relief against the Mandate, EWTN has been and

will continue to be harmed.

COUNT XII

Violation of the Administrative Procedure Act Lack of Good Cause and Improper Delegation

263. Plaintiffs incorporate by reference all preceding paragraphs.

264. The Affordable Care Act expressly delegates to HRSA, an agency within Defendant

HHS, the authority to establish guidelines concerning the "preventive care" that a group health

plan and health insurance issuer must provide.

Given this express delegation, Defendants were required to engage in formal notice-265.

and-comment rulemaking in a manner prescribed by law before issuing the guidelines that group

health plans and insurers must cover. Proposed regulations were required to be published in the

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Federal Register and interested persons were required to be given an opportunity to participate in the rulemaking through the submission of written data, views, or arguments.

Defendants promulgated the "preventive care" guidelines without engaging in formal 266. notice-and-comment rulemaking in a manner prescribed by law. Defendants, instead, wholly delegated their responsibilities for issuing preventive care guidelines to a non-governmental

entity, the IOM.

- The IOM did not permit or provide for the broad public comment otherwise required 267. under the APA concerning the guidelines that it would recommend. The dissent to the IOM report noted both that the IOM conducted its review in an unacceptably short time frame, and that the review process lacked transparency.
- Within two weeks of the IOM issuing its guidelines, Defendant HHS issued a press 268. release announcing that the IOM's guidelines were required under the Affordable Care Act.
- 269. Defendants have never explained why they failed to enact these "preventive care" guidelines through notice-and-comment rulemaking, as required by the APA.
- 270. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute "good cause."
- 271. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by completing a meaningful "consideration of the relevant matter presented."
- 272. Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule or the NPRM, including comments by EWTN.
- 273. Therefore, Defendants have taken agency action not in accordance with procedures required by law, and Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

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274. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT XIII

Violation of the Administrative Procedure Act Arbitrary and Capricious Action

- 275. Plaintiffs incorporate by reference all preceding paragraphs.
- 276. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the Mandate on EWTN and similar organizations.
- 277. Defendants' explanation for its decision not to exempt EWTN and similar religious organizations from the Mandate runs counter to the evidence submitted by religious organizations during the comment period.
- 278. Defendant Secretary Sebelius, in remarks made at Harvard University on April 8, 2013, essentially admitted that Defendants completely disregarded the religious liberty concerns submitted by thousands of religious organizations and individuals.
- 279. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rules fail to consider the full extent of their implications and they do not take into consideration the evidence against them.
- 280. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT XIV

Violation of the Administrative Procedure Act Agency Action Without Statutory Authority

- 281. Plaintiffs incorporate by reference all preceding paragraphs.
- 282. Defendant's authority to enact regulations under the Affordable Care Act is limited to the authority expressly granted them by Congress.

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283. Defendants lack statutory authority to include contraceptive and abortifacient services

among the "preventative care" services that a group health plan and health insurance issuer must

provide.

284. Defendants lack statutory authority to coerce insurance issuers and third party

administrators to pay for contraceptive and abortifacient services for individuals with whom they

have no contractual or fiduciary relationship, and in violation of their contractual agreements

with EWTN.

285. Defendants lack statutory authority to prevent insurance issuers and third party

administrators from passing on the costs of providing contraceptive and abortifacient services via

higher premiums or other charges that are not "cost sharing."

286. Defendants lack statutory authority to allow user fees from the federal exchanges to

be used to purchase contraceptive and abortifacient services for employees not participating in

the exchanges.

289.

287. Because the Mandate's "accommodation" for non-exempt, nonprofit religious

organizations lacks legal authority, it is arbitrary and capricious and provides no legitimate

protection of objecting organizations' First Amendment rights.

288. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and

will continue to be harmed.

COUNT XV

Violation of the Administrative Procedure Act Agency Action Not in Accordance with Law

Weldon Amendment

Religious Freedom Restoration Act
First Amendment to the United States Constitution

Plaintiffs incorporate by reference all preceding paragraphs.

- 290. The Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110-329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008).
- 291. The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."
- 292. The Mandate requires issuers, including EWTN, to provide coverage of all Federal Drug Administration-approved contraceptives.
 - 293. Some FDA-approved contraceptives cause abortions.
 - 294. As set forth above, the Mandate violates RFRA and the First Amendment.
- 295. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.
- 296. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT XVI Violation of the Administrative Procedure Act Agency Action Not in Accordance with Law Affordable Care Act

- 297. Plaintiffs incorporate by reference all preceding paragraphs.
- 298. The Mandate is contrary to the provisions of the Affordable Care Act.
- 299. Section 1303(b)(1)(A) of the Affordable Care Act states that "nothing in this title"—
 i.e., title I of the Act, which includes the provision dealing with "preventive services"—"shall be

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construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."

- 300. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.
- 301. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.
- 302. The Mandate requires issuers, including EWTN, to provide coverage of all Federal Drug Administration-approved contraceptives.
 - 303. Some FDA-approved contraceptives cause abortions.
- 304. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.
- 305. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT XVII **Declaration that Mandate Does Not Preempt Alabama Law**

- 306. Plaintiffs incorporate by reference all proceeding paragraphs.
- 307. The Mandate is unlawful because it violates the First and Fifth Amendments, the Religious Freedom Restoration Act, and the Administrative Procedure Act as identified in the foregoing counts.
- 308. Alabama law provides that health insurance plans, employers, and employees may refuse to participate in health insurance systems and may refuse to provide coverage for contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling.

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309. Alabama laws that are contrary to the Mandate, including Ala. Code § 27-45-5 and Ala. Const. Amend. No. 864, are valid and enforceable despite the Supremacy Clause of the United States Constitution because the Mandate is unlawful and does not preempt or displace Alabama law.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that the Court:

- Declare that the Mandate and Defendants' enforcement of the Mandate against a. EWTN violate the Religious Freedom Restoration Act;
- Declare that the Mandate and Defendants' enforcement of the Mandate against b. EWTN violate the First Amendment to the United States Constitution:
- Declare that the Mandate and Defendants' enforcement of the Mandate against c. EWTN violate the Fifth Amendment of the United States Constitution;
- d. Declare that the Mandate was issued in violation of the Administrative Procedure Act;
- Declare that the Mandate does not preempt or displace Alabama law; e.
- f. Issue a permanent injunction prohibiting Defendants from enforcing the Mandate against EWTN and other religious organizations that object to providing insurance coverage for contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling;
- Award Plaintiffs the costs of this action and reasonable attorney's fees; and g.
- Award such other and further relief as it deems equitable and just. h.

JURY DEMAND

The Plaintiffs request a trial by jury on all issues so triable.

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Respectfully submitted this 28th day of October, 2013.

/s/ S. Kyle Duncan

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EXHIBIT B



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Home For Consumers Consumer Information by Audience For Women

For Consumers

Birth Control: Medicines To Help You

Introduction

If you do not want to get pregnant, there are many birth control options to choose from. No one product is best for everyone. The only sure way to avoid pregnancy and sexually transmitted infections (STIs or STDs) is not to have any sexual contact (abstinence). This guide lists FDA-approved products for birth control. Talk to your doctor, nurse, or pharmacist about the best method for you.

There are different kinds of medicines and devices for birth control:

Barrier Methods
Hormonal Methods
Emergency Contraception
Implanted Devices
Permanent Methods

Some things to think about when you choose birth control:

- · Your health.
- How often you have sex.
- · How many sexual partners you have.
- If you want to have children in the future.
- If you will need a prescription or if you can buy the method over-the-counter.
- The number of pregnancies expected per 100 women who use a method for one year. For comparison, about 85 out of 100 sexually active women who do not use any birth control can expect to become pregnant in a year.
- This booklet lists pregnancy rates of **typical use**. Typical use shows how effective the different methods are during actual use (including sometimes using a method in a way that is not correct or no consistent).
- For more information on the chance of getting pregnant while using a method, please see Trussell,J. (2011). "Contraceptive failure in the United States." Contraception 83(5):397-404. ¹ № ²

Tell your doctor, nurse, or pharmacist if you:

- Smoke.
- Have liver disease.
- Have blood clots.
- Have family members who have had blood clots.
- Are taking any other medicines, like antibiotics.
- Are taking any herbal products, like St. John's Wort.

To avoid pregnancy:

- No matter which method you choose, it is important to follow all of the directions carefully. If you don't, you raise your chance of getting pregnant.
- The best way to avoid pregnancy and sexually transmitted infections (STIs) is to practice total abstinence (do not have any sexual contact).

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BARRIER METHODS: Block sperm from reaching the egg

Male Condom



What is it?

• A thin film sheath placed over the erect penis.

How do I use it?

- Put it on the erect penis right before sex.
- Pull out before the penis softens.
- Hold the condom against the base of the penis before pulling out.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter or online.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, 18 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions (If you are allergic to latex, you can try condoms made of polyurethane).

Does it protect me from sexually transmitted infections (STIs)?

• Yes. Except for abstinence, latex condoms are the best protection against HIV/AIDS and other STIs.

Female Condom



What is it?

· A thin, lubricated pouch that is put into the vagina. It is created from man-made materials. It is not made with natural rubber latex.

How do I use it?

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- Put the female Case: 11-12696 vacinate Filed: 08/04/2014 Page: 62 of 263
- Follow the directions on the package to be sure the penis stays within the condom during sex and does not move alongside the condom.
- Use it only once and then throw it away.

How do I get it?

- · You do not need a prescription.
- You can buy it over-the-counter or online.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 21 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions

Does it protect me from sexually transmitted infections (STIs)?

- Yes.
- Natural rubber latex condoms for men are highly effective at preventing sexually transmitted infections, including HIV/AIDS, if used correctly. If you are not going to use a male condom, you can use the female condom to help protect yourself and your partner.

Diaphragm with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

- A dome-shaped flexible disk with a flexible rim.
- Made from latex rubber or silicone.
- It covers the cervix.

How do I use it?

- You need to put spermicidal jelly on the inside of the diaphragm before putting it into the vagina.
- You must put the diaphragm into the vagina before having sex.
- You must leave the diaphragm in place at least 6 hours after having sex.
- It can be left in place for up to 24 hours. You need to use more spermicide every time you have sex.

How do I get it?

- · You need a prescription.
- A doctor or nurse will need to do an exam to find the right size diaphragm for you.
- You should have the diaphragm checked after childbirth or if you lose more than 15 pounds. You might need a different size.

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Chance of getting pregnant with typical tise (Number of pregnanties ax pected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 12 may get pregnant.

Some Risks

- Irritation, allergic reactions, and urinary tract infection.
- If you keep it in place longer than 24 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Sponge with spermide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

• A disk-shaped polyurethane device with the spermicide nonoxynol-9.

How do I use it?

- Put it into the vagina before you have sex.
- Protects for up to 24 hours.
- You do not need to use more spermicide each time you have sex.
- You must leave the sponge in place for at least 6 hours after having sex.
- You must take the sponge out within 30 hours after you put it in. Throw it away after you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)O

- Out of 100 women who use this method, 12 to 24 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the sponge may not fit as well.

Some Risks

- Irritation
- Allergic reactions
- Some women may have a hard time taking the sponge out.
- If you keep it in place longer than 24-30 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Cervical Cap with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

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What is it?

• A soft latex or silicone cup with a round rim, which fits snugly around the cervix.

How do I use it?

- You need to put spermicidal jelly inside the cap before you use it.
- You must put the cap in the vagina before you have sex.
- You must leave the cap in place for at least 6 hours after having sex.
- You may leave the cap in for up to 48 hours.
- You do NOT need to use more spermicide each time you have sex.

How do I get it?

• You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 17 to 23 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the cap may not fit as well.

Some Risks

- Irritation, allergic reactions, and abnormal Pap test.
- You may find it hard to put in.
- If you keep it in place longer than 48 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No

Spermicide Alone

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

• A foam, cream, jelly, film, or tablet that you put into the vagina.

How do I use it?

- You need to put spermicide into the vagina 5 to 90 minutes before you have sex.
- You usually need to leave it in place at least 6 to 8 hours after sex; do not douche or rinse the vaginal

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for at least 6 hours after-12696 Date Filed: 08/04/2014 Page: 65 of 263

• Instructions can be different for each type of spermicide. Read the label before you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 28 may get pregnant.
- Different studies show different rates of effectiveness.

Some Risks

- Irritation
- Allergic reactions
- Urinary tract infection
- If you are also using a medicine for a vaginal yeast infection, the spermicide might not work as well.

Does it protect me from sexually transmitted infections (STIs)? No.

HORMONAL METHODS: Prevent Pregnancy by interfering with ovulation and possibly fertilization of the egg

Oral Contraceptives (Combined Pill) "The Pill"



What is it?

- A pill that has two hormones (estrogen and progestin) to stop the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom

How do I get it?

You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

- Changes in your cycle (period)
- Nausea
- Breast tenderness
- Headache

Less Common Serious Side Effects

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- It is not common about 1 Ame Wolfnen water taked the bill develop High brook of pressure.
- It is rare, but some women will have blood clots, heart attacks, or strokes.

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Progestin-only)

"The Mini Pill"



What is it?

- A pill that has only one hormone, a progestin.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- Less often, it stops the ovaries from releasing eggs.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

- · Irregular bleeding
- Headache
- · Breast tenderness
- Nausea
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Extended/Continuous Use) "Pill"



What is it?

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- A pill that has two normanies (estrogenta hid proges 04/201 stop PAGO varies 46A releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.
- These pills are designed so women have fewer or no periods.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Risks are similar to other oral contraceptives with estrogen and progestin.
- You may have more light bleeding and spotting between periods than with 21 or 24 day oral contraceptives.
- It may be harder to know if you become pregnant, since you will likely have fewer periods or no periods.

Does it protect me from sexually transmitted infections (STIs)? No.

Patch



What is it?

- This is a skin patch you can wear on the lower abdomen, buttocks, or upper arm or back.
- It has two hormones (estrogen and progestin) that stop the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put on a new patch and take off the old patch once a week for 3 weeks (21 total days).
- Don't put on a patch during the fourth week. Your menstrual period should start during this patch-free week.
- If the patch comes loose or falls off, you may need to use another method of birth control, like a condom.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Risks

- It will expose you to higher levels of estrogen compared to most combined oral contraceptives.
- It is not known if serious risks, such as blood clots and strokes, are greater with the patch because o

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Does it protect me from sexually transmitted infections (STIs)? No.

Vaginal Contraceptive Ring



What is it?

- It is a flexible ring that is about 2 inches around.
- It releases two hormones (progestin and estrogen) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put the ring into your vagina.
- Keep the ring in your vagina for 3 weeks and then take it out for 1 week. Your menstrual period should start during this ring-free week.
- If the ring falls out and stays out for more than 3 hours, replace it but use another method of birth control, like a condom, until the ring has been in place for 7 days in a row.
- Read the directions and talk to your doctor, nurse or pharmacist about what to do.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Vaginal discharge, discomfort in the vagina, and mild irritation.
- Other risks are similar to oral contraceptives (combined pill).

Does it protect me from sexually transmitted infections (STIs)? No.

Shot/Injection



What is it?

A shot of the hormone progestin, either in the muscle or under the skin.

How does it work?

- The shot stops the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps the sperm from getting to the egg.

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How do I get it? Case: 14-12696 Date Filed: 08/04/2014 Page: 69 of 263

You need one shot every 3 months from a healthcare provider.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, including women who don't get the shot on time, 6 may get pregnant.

Some Risks

- You may lose bone density if you get the shot for more than 2 years in a row.
- Bleeding between periods
- Headaches
- · Weight gain
- Nervousness
- Abdominal discomfort

Does it protect me from sexually transmitted infections (STIs)? No.

EMERGENCY CONTRACEPTION: May be used if you did not use birth control or if your regular birth control fails. It should not be used as a regular form of birth control

Plan B, Plan B One- Step and Next Choice (Levonorgestrel)



What is it?

- These are pills with the hormone progestin.
- · They help prevent pregnancy after birth control failure or unprotected sex.

How does it work?

- It works mainly by stopping the release of an egg from the ovary. It may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the womb (uterus).
- For the best chance for it to work, you should start taking the pill(s) as soon as possible after unprotected sex.
- · You should take emergency contraception within three days after having unprotected sex.

How do I get it?

- You can buy **Plan B One-Step** over-the-counter. You do not need a prescription.
- You can buy Plan B and Next Choice over-the-counter if you are age 17 years or older. If you are younger than age 17, you need a prescription.

Chance of getting pregnant

• Seven out of every 8 women who would have gotten pregnant will not become pregnant after taking Plan B, Plan B One-Step, or Next Choice.

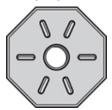
Some Risks

Nausea, vomiting, abdominal pain, fatigue and headache

Does it protect me from sexually transmitted infections (STIs)? No.

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Ella (ulipristal acetate)



What is it?

- A pill that blocks the hormone progesterone.
- It helps prevent pregnancy after birth control failure or unprotected sex.
- It works mainly by stopping or delaying the ovaries from releasing an egg. It may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation).

How do I use it?

- For the best chance for it to work, you should take the pill as soon as possible after unprotected sex.
- You should take Ella within five days after unprotected sex.

How do I get it?

· You need a prescription.

Chance of getting pregnant

 Six or 7 out of every 10 women who would have gotten pregnant will not become pregnant after taking ella.

Some Risks

- Headache
- Nausea
- Abdominal pain
- Menstrual pain
- Tiredness
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

IMPLANTED DEVICES: Inserted/implanted into the body and can be kept in place for several years

Copper IUD



What is it?

• A T-shaped device containing copper that is put into the uterus by a healthcare provider.

How does it work?

- The IUD prevents sperm from reaching the egg, from fertilizing the egg, and may prevent the egg fron attaching (implanting) in the womb (uterus).
- It does not stop the ovaries from making an egg each month.
- The Copper IUD can be used for up to 10 years.

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How do I get it?

• A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Cramps
- · Irregular bleeding

Uncommon Risks

- · Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus.
- · Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

IUD with progestin



What is it?

A T-shaped device containing a progestin that is put into the uterus by a healthcare provider.

How does it work?

- It may thicken the mucus of your cervix, which makes it harder for sperm to get to the egg, and also thins the lining of your uterus.
- After a doctor or other healthcare provider puts in the IUD, it can be used for up to 3 to 5 years, depending on the type.
- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- · Irregular bleeding
- No periods
- Abdominal/pelvic pain
- Ovarian cysts

Uncommon Risks

- · Pelvic inflammatory disease
- Infertility

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Rare Risk Case: 14-12696 Date Filed: 08/04/2014 Page: 72 of 263

- IUD is stuck in the uterus or found outside the uterus
- Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Implantable Rod



What is it?

- A thin, matchstick-sized rod that contains the hormone progestin.
- It is put under the skin on the inside of your upper arm.

How does it work?

- It stops the ovaries from releasing eggs.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- It can be used for up to 3 years.

How do I get it?

 After giving you local anesthesia, a doctor or nurse will put it under the skin of your arm with a specia needle.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- changes in bleeding patterns
- · weight gain
- breast and abdominal pain

Does it protect me from sexually transmitted infections (STIs)? No.

PERMANENT METHODS: For people who are sure they never want to have a child or do not want any more children.

Sterilization Surgery for Men (Vasectomy)

This method is for men who are sure they never want to have a child or do not want any more children. It you are thinking about reversal, vasectomy may not be right for you. Sometimes it is possible to reverse the operation, but there are no guarantees. Reversal involves complicated surgery that might not work.

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What is it?

- This is a surgery a man has only once.
- · It is permanent

How does it work?

- A surgery blocks a man's vas deferens (the tubes that carry sperm from the testes to other glands).
- Semen (the fluid that comes out of a man's penis) never has any sperm in it.
- It takes about three months to clear sperm out of a man's system. You need to use another form of birth control until a test shows there are no longer any sperm in the seminal fluid.

How do I get it?

- A man needs to have surgery.
- · Local anesthesia is used.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women whose partner has had a vasectomy, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- Infection

Does it protect me from sexually transmitted infections (STIs)? No.

The success of reversal surgery depends on:

- The length of time since the vasectomy was performed.
- Whether or not antibodies to sperm have developed.
- The method used for vasectomy
- · Length and location of the segments of vas deferens that were removed or blocked.

Sterilization Surgery for Women Surgical Implant (also called trans-abdominal surgical sterilization)



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What is it?

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• A device is placed on the outside of each fallopian tube.

How does it work?

- One way is by tying and cutting the tubes this is called tubal ligation. The fallopian tubes also can be sealed using an instrument with an electrical current. They also can be closed with clips, clamps, or rings. Sometimes, a small piece of the tube is removed.
- The woman's fallopian tubes are blocked so the egg and sperm can't meet in the fallopian tube. This stops you from getting pregnant.
- This is a surgery a woman has only once.
- It is permanent.

How do I get it?

- This is a surgery you ask for.
- You will need general anesthesia.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- · Infection or other complications after surgery
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)? No.

Sterilization Implant for Women (Transcervical Surgical Sterilization Implant)



What is it?

- Small flexible, metal coil that is put into the fallopian tubes through the vagina.
- The device works by causing scar tissue to form around the coil. This blocks the fallopian tubes and stops you from getting pregnant.

How does it work?

- The device is put inside the fallopian tube with a special catheter.
- You need to use another birth control method during the first 3 months. You will need an X-ray to make sure the device is in the right place.
- It is permanent.

How do I get it?

The devices are placed into the tubes using a camera placed in the uterus.

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- Once the tubes and found 1260 devices a reilers educated 4000 stance (755 is for 63 s needed.
- You may need local anesthesia.
- Since it is inserted through the vagina, you do not need an incision (cutting).

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- · Mild to moderate pain after insertion
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)? No.

To Learn More:

This guide should not be used in place of talking to your doctor or reading the label for your product. The product and risk information may change.

To get the most recent information for your birth control go to:

Drugs:

http://www.accessdata.fda.gov/scripts/cder/drugsatfda⁴ (type in the name of your drug)

http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm⁵ (type in the name of your device)

Updated May 2013

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Links on this page:

1. http://www.kupferkette.info/downloads/contraceptive-failure-in-the-united-states-

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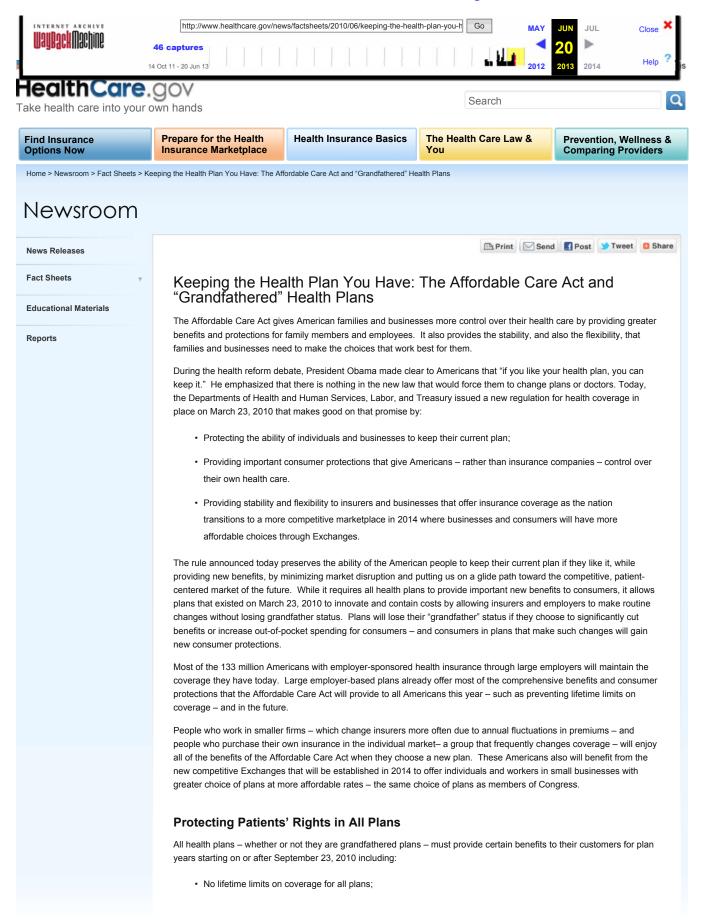
- 2. http://www.fda.gov/AboutFDA/AboutThisWebsite/WebsitePolicies/Disclaimers/default.htm
- 3. javascript:void(0);/*1343680975526*/
- 4. http://www.accessdata.fda.gov/scripts/cder/drugsatfda
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- No rescissions of coverage when people get sick and have previously made an unintentional mistake on their application;
- · Extension of parents' coverage to young adults under 26 years old; and the

For the vast majority of Americans who get their health insurance through employers, additional benefits will be offered, irrespective of whether their plan is grandfathered, including:

- · No coverage exclusions for children with pre-existing conditions; and
- No "restricted" annual limits (e.g., annual dollar-amount limits on coverage below standards to be set in future regulations).

Additional Consumer Protections Apply to Non-Grandfathered Plans

Grandfathered health plans will be able to make routine changes to their policies and maintain their status. These routine changes include cost adjustments to keep pace with medical inflation, adding new benefits, making modest adjustments to existing benefits, voluntarily adopting new consumer protections under the new law, or making changes to comply with State or other Federal laws. Premium changes are not taken into account when determining whether or not a plan is grandfathered.

Plans will lose their grandfathered status if they choose to make significant changes that reduce benefits or increase costs to consumers. If a plan loses its grandfathered status, then consumers in these plans will gain additional new benefits including:

- · Coverage of recommended prevention services with no cost sharing; and
- · Patient protections such as guaranteed access to OB-GYNs and pediatricians.

Under the Affordable Care Act, these requirements are applicable to all new plans, and existing plans that choose to make the following changes that would cause them to lose their grandfathered status.

Compared to their polices in effect on March 23, 2010, grandfathered plans:

- Cannot Significantly Cut or Reduce Benefits. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.
- Cannot Raise Co-Insurance Charges. Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.
- Cannot Significantly Raise Co-Payment Charges. Frequently, plans require patients to pay a fixed-dollar
 amount for doctor's office visits and other services. Compared with the copayments in effect on March 23, 2010,
 grandfathered plans will be able to increase those co-pays by no more than the greater of \$5 (adjusted annually
 for medical inflation) or a percentage equal to medical inflation plus 15 percentage points. For example, if a
 plan raises its copayment from \$30 to \$50 over the next 2 years, it will lose its grandfathered status.
- Cannot Significantly Raise Deductibles. Many plans require patients to pay the first bills they receive each year (for example, the first \$500, \$1,000, or \$1,500 a year). Compared with the deductible required as of March 23, 2010, grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points. In recent years, medical costs have risen an average of 4-to-5% so this formula would allow deductibles to go up, for example, by 19-20% between 2010 and 2011, or by 23-25% between 2010 and 2012. For a family with a \$1,000 annual deductible, this would mean if they had a hike of \$190 or \$200 from 2010 to 2011, their plan could then increase the deductible again by another \$50 the following year.
- Cannot Significantly Lower Employer Contributions. Many employers pay a portion of their employees'
 premium for insurance and this is usually deducted from their paychecks. Grandfathered plans cannot decrease
 the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own
 share and increase the workers' share of premium from 15% to 25%).
- Cannot Add or Tighten an Annual Limit on What the Insurer Pays. Some insurers cap the amount that they
 will pay for covered services each year. If they want to retain their status as grandfathered plans, plans cannot
 tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar
 limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at
 least as high as the lifetime limit (which is more protective of high-cost enrollees).

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May Change Insurance Companies. An employer with a group health plan can switch plan administrators as
well as buy insurance from a different insurance company without losing grandfathered status--provided the
plan does not make any of the above six changes to its cost or benefits structure.*

* Previously, one way an employer group health plan could lose its grandfather status was to change issuers--switch from one insurance company to another. The original regulation allowed only self-funded plans to change third-party administrators without necessarily losing their grandfathered plan status. On November 15, the regulation was amended to allow all group health plans to switch insurance companies and shop for the same coverage at a lower cost while maintaining their grandfathered status, as long as the structure of the coverage doesn't violate one of the other rules for maintaining grandfathered plan status.

Protecting Against Abuse of Grandfathered Health Plan Status

To prevent health plans from using the grandfather rule to avoid providing important consumer protections, the regulation provides for:

- Promoting transparency by requiring a plan to disclose to consumers every time it distributes materials whether
 the plan believes that it is a grandfathered plan and therefore is not subject to some of the additional consumer
 protections of the Affordable Care Act. This allows consumers to understand the benefits of staying in a
 grandfathered plan or switching to a new plan. The plan must also provide contact information for enrollees to
 have their questions and complaints addressed;
- Revoking a plan's grandfathered status if it forces consumers to switch to another grandfathered plan that,
 compared to the current plan, has less benefits or higher cost sharing as a means of avoiding new consumer protections; or
- Revoking a plan's grandfathered status if it is bought by or merges with another plan simply to avoid complying
 with the law.

Projected Impact on Consumers and Plans

Large Employer Plans

The 133 million Americans with employer-sponsored health insurance through large employers (100 or more workers) —who make up the vast majority of those with private health insurance today—will not see major changes to their coverage as a result of this regulation. This regulation affirms that most of these plans will remain grandfathered – more than three-quarters of firms in 2011 – based on the way they changed cost sharing from 2008-2009. Most of these plans already offer the patient protections applied to grandfathered plans such as no pre-existing condition exclusions for children and no rescissions of coverage when a person gets sick. In addition, they are likely to already give their workers and families protections like a choice of OB-GYN and pediatrician and access to emergency rooms in other states without prior authorization. Based on past patterns of behavior, it is expected that large employers will continue to make adjustments to the health plans they offer from year to year so that, by the time the health insurance Exchanges are established in 2014, fewer – but still most – large employer plans will have grandfather status. However, the assumed market changes depend on the choices large employers make in the future.

Small Business Plans

The roughly 43 million people insured through small businesses will likely transition from their current plan to one with the new protections over the next few years. Small plans tend to make substantial changes to cost sharing, employer contributions, and health insurance issuers more frequently than large plans. As such, we estimate that 70% of plans will be grandfathered in the first year, but depending on the choices these employers make, this could drop to about one-third over several years. To help sustain small business coverage, the Affordable Care Act also includes a tax credit for up to 35% of their premium contributions.

Individual Health Market

The 17 million people who are covered in the individual health insurance market, where switching of plans and substantial changes in coverage are common, will receive the new protections of the Affordable Care Act sooner rather than later. Roughly 40 percent to two-thirds of people in individual market policies change plans within a year. Given this "churn," the transition for the 17 million people in this market will be swift. In the short run, individuals whose plan changes and is no longer grandfathered will gain access to free preventive services, protections against restricted annual limits, and patient protections such as improved access to emergency rooms. These Americans also will benefit from the Health Insurance Exchanges that will be established in 2014 to offer individuals and workers in small businesses a much greater choice of plans at more affordable rates.

People in Special Types of Health Plans

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Fully-insured health plans subject to collective bargaining agreements will be able to maintain their grandfathered status until their agreement terminates. After that point, they are subject to the same rules as other health plans; in other words, they will lose their grandfathered status if they make any of the substantial changes described above. Retiree-only and "excepted health plans" such as dental plans, long-term care insurance, or Medigap, are exempt from the Affordable Care Act insurance reforms.

Projections of Employer Plans Remaining Grandfathered, 2011-2013

There is considerable uncertainty about what choices employers will make over the next few years as the market prepares for the establishment of the competitive Exchanges and other market reforms such as new consumer protections, middle-class tax credits and other steps to expand affordabilty and choice for millions more Americans. This rule estimates the likely decisions of employers based on assumptions and extrapolations of recent market behavior, including the decisions by employers to change their health plans in 2008 and 2009. The table below depicts the results of this analysis:

Type of Plan	Enrollees	Employer Plans Remaining Grandfathered		Explanation	
		2011	2013		
Allowable Percent Change in Co-Payments from 2010		Medical inflation* (4%) + 15% = 19%	Medical inflation* (4%³ = 12%) + 15% = 27%	Deductibles, copayments can increase faster than medical inflation over time	
Large Employer	133 million	Low: 87% remain grandfathered Mid-range: 82% remain grandfathered High: 71% remain grandfathered	Low: 66% remain grandfathered Mid-range: 55% remain grandfathered High: 36% remain grandfathered	Large plans are more stable and often self-insured. Regulation permits plans to make routine changes needed to keep premium growth in check.	
Small Employer	43 million	Low: 80% remain grandfathered Mid-range: 70% remain grandfathered High: 58% remain grandfathered	Low: 51% remain grandfathered Mid-range: 34% remain grandfathered High: 20% remain grandfathered	Small businesses typically buy commercial insurance and frequently make changes in insurers and coverage. Limited purchasing power and high overhead often force a trade-off between dramatic changes in benefits and cost sharing and affordable premiums.	

^{*} Assumes medical inflation at 4%

The "low" percentage is based on the mid-range percentages plus plans that could stay grandfathered with small premium changes.

The "mid-range" percentage is based on assumptions of the number of plans that would lose their grandfathered status if they made changes consistent with the changes that they made in 2008 and 2009 that would not lead to premium increases.

The "high" percentage assumes that some plans would not be able to make the adjustments to employer premium contribution they would need to keep premiums the same while keeping their other cost-sharing parameters within the grandfathering rules. The estimates in this case assume these plans will choose to relinquish their grandfathered status instead.

Choices in 2014 and Subsequent Years

In 2014, small businesses and individuals who purchase insurance on their own will gain access to the competitive market Exchanges. These Exchanges will offer individuals and workers in small businesses with a much greater choice of plans at more affordable rates – the same choice as members of Congress. In fact, the Congressional Budget Office (CBO) has estimated that, on an apples-to-apples basis, premiums will be 14- 20 percent lower than they would be under current law in 2016 due to competition, lower insurance overhead, and increased pooling and purchasing power. Small

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businesses also will have more affordable options. CBO has estimated that a family policy for small businesses would be available in the Exchanges at a premium that is \$4,000 lower than under current law in 2016. These reduced premiums do not take into account the tax credits available to small businesses and middle-class families to help make insurance affordable. These additional new choices may further lower the likelihood that small businesses workers will remain in grandfathered health plans. Consumers insured through large employers are more likely to remain in grandfathered plans in 2014 and beyond. Read the Press Release at: http://www.hhs.gov/news/press/2010pres/06/20100614e.html. Read the Questions and Answers on the Regulation at http://www.healthreform.gov/about/grandfathering.html. You can view the Regulation at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi? dbname=2010_register&docid=DOCID:fr17jn10-25.pdf. Posted: June 14, 2010 • 1. Was this page helpful? ○ Yes ○ No Form Approved OMB# 0990-0379 Exp. Date 06/03/2014 Next Page • 1. I found this page helpful because the content on the page: (check all \square Had the information I needed \square Was trustworthy \square Was up-todate
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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses

WHITEHOUSE.GOV/HEALTHREFORM

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Small businesses are the backbone of our economy, but high health care costs and declining coverage have hindered small business owners and their employees. Over the past decade, average annual family premiums for workers at small firms increased by 123 percent, from \$5,700 in 1999 to \$12,700 in 2009, while the percentage of small firms offering coverage fell from 65 to 59 percent. The Affordable Care Act will provide enormous benefits to the millions of small business owners and the tens of millions of small business employees by expanding coverage options, increasing purchasing power, lowering costs and giving consumers, not insurance companies, control over their own health care.

No Employer Mandate, Exempts Small Firms from Employer Responsibility Requirement

The Affordable Care Act does not include an employer mandate. In 2014, as a matter of fairness, the Affordable Care Act requires large employers to pay a shared responsibility fee only if they don't provide affordable coverage and taxpayers are supporting the cost of health insurance for their workers through premium tax credits for middle to low income families.

- The law specifically exempts all firms that have fewer than 50 employees 96 percent of all firms in the United States or 5.8 million out of 6 million total firms from any employer responsibility requirements. These 5.8 million firms employ nearly 34 million workers. More than 96 percent of firms with 50 or more employees already offer health insurance to their workers. Less than 0.2 percent of all firms (about 10,000 out of 6 million) may face employer responsibility requirements. Many firms that do not currently offer coverage will be more likely to do so because of lower premiums and wider choices in the Exchange.
- > For more information, please visit: www.healthreform.gov/about/answers.html.

Small Business Health Care Affordability Tax Credits

Under the Affordable Care Act, an estimated 4 million small businesses nationwide could qualify for a small

business tax credit this year, which will provide a total of \$40 billion in relief for small firms over the next 10 years.

- Small employers with fewer than 25 full-time equivalent employees and average annual wages of less than \$50,000 that purchase health insurance for employees are eligible for the tax credit. The maximum credit will be available to employers with 10 or fewer full-time equivalent employees and average annual wages of less than \$25,000. To be eligible for a tax credit, the employer must contribute at least 50 percent of the total premium cost.
- Businesses that receive state health care tax credits may also qualify for the federal tax credit. Dental and vision care qualify for the credit as well.
- For 2010 through 2013, eligible employers will receive a small business credit for up to 35 percent of their contribution toward the employee's health insurance premium. Tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 25 percent of their contribution.
- For 2014 and beyond, small employers who purchase coverage through the new Health Insurance Exchanges can receive a tax credit for two years of up to 50 percent of their contribution. Tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 35 percent of their contribution.
- > For more information on tax credits, please visit: www.irs.gov/newsroom/article/0,,id=223666,00.html.

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Better Information on Affordable Health Care Options

In July 2010, the Department of Health and Human Services will establish a new consumer website with easy to understand information about affordable and comprehensive coverage choices. The website will also provide information to small businesses about available health coverage options, including information on reinsurance for early retirees, small business tax credits, and how to shop for insurance in the Exchanges that will increase the purchasing power of small businesses.

Administrative Simplification

The Affordable Care Act accelerates adoption of standard "operating rules" for health insurance plan administration. Operating rules are the business rules and guidelines for electronic transactions with health insurance plans, and the current non-standard environment is a source of waste, unnecessary cost, and frustration for small business owners and others. Under administrative simplification, there will be one format and one set of codes for claims, remittance advice, service authorization, eligibility verification, and claims status inquiry.

By establishing uniform operating rules, the Affordable Care Act ensures that small businesses, health plans, physicians, hospitals, and patients are all speaking the same language. Benefits include:

- · Improved coordination of care for the patient
- Increased payment accuracy and timeliness
- Reduced administrative cost and hassle factor for small businesses
- Payment transparency

The Affordable Care Act requires standard operating rules for eligibility and claims status to be adopted by July1, 2011 and fully implemented by January 1, 2013.

Increases Quality, Affordable Options for Small Businesses

Currently, small businesses face not only premiums that are 18 percent higher than large businesses pay, but also face higher administrative costs to set up and maintain a health plan. The premiums they pay have up to three times as much administrative cost built into them as plans in the large group market. They are also at a disadvantage in negotiating with insurance companies because they lack bargaining power. The Affordable Care Act will change this dynamic. Starting in 2014, small businesses with up to 100 employees will have access to state-based Small Business Health Options Program (SHOP) Exchanges, which will expand their purchasing power. The Congressional Budget Office (CBO) stated that the Exchanges will reduce costs and increase competitive pressure on insurers, driving down premiums by up to 4 percent for small businesses.

- These Exchanges would include web portals that provide standardized, easy-to-understand information that make comparing and purchasing health care coverage easier for small business employees, and reduce the administrative hassle that small businesses currently face in offering plans.
- Starting in 2017, the Affordable Care Act also provides states flexibility to allow businesses with more than 100 employees to purchase coverage in the SHOP Exchange.
- If businesses don't offer coverage, workers at small firms and their families would be eligible for their own tax credits to purchase coverage through the Exchange.
- The Affordable Care Act streamlines health plans to keep premiums lower by instituting a premium rate review process and setting standards for how much insurance companies can spend on administrative costs, also known as the medical loss ratio.
- > To learn more, visit: www.healthreform.gov/newsroom/naicletter.html.

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Security and Stability that Promotes Entrepreneurship

In 2014, the Affordable Care Act ends the discriminatory insurance industry practices of jacking up premiums by up to 200 percent because an employee got sick or older, or because the business hired a woman. In many cases, women can be charged higher premiums than men, simply because of their gender. It will also reduce "job lock" – the fear of switching jobs or starting a small business due to concerns over losing health coverage – by guaranteeing access to coverage for all Americans. This will encourage more people to launch their own small businesses, or join existing small employers.

Reviews the Impact of Reform on Small Businesses

The Affordable Care Act requires the Government Accountability Office (GAO) to specifically review the impact of Exchanges on increasing access to affordable health care for small businesses to ensure that Exchanges are indeed making a difference for small business owners.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION NETWORK, INC.,

and

STATE OF ALABAMA,

Plaintiffs,

v.

KATHLEEN SEBELIUS, et al.

Defendants.

Civil No. 1:13-CV-521

DECLARATION OF DANIEL BLOMBERG

- I, Daniel Blomberg, hereby state under penalty of perjury as follows:
- 1. I am one of the attorneys representing Plaintiff EWTN in the above-captioned matter. I have personal knowledge of everything testified to in this declaration.
- 2. Attached as Exhibit A to EWTN's Motion for Partial Summary Judgment and Its Motion Either to Expedite the Case or for Preliminary Injunction ("Motion") is a true and correct copy of Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011).
- 3. Attached as Exhibit B to EWTN's Motion is a true and correct copy of the FDA Birth Control Guide.
- 4. Attached as Exhibit C to EWTN's Motion is a true and correct copy of the January 20, 2012 Statement of U.S. Department of Health and Human Services Secretary Kathleen Sebelius.

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- 5. Attached as Exhibit D to EWTN's Motion is a true and correct copy of HealthCare.gov's *Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans* available at http://web.archive.org/web/20130620171510/http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html.
- 6. Attached as Exhibit E to EWTN's Motion is a true and correct copy of the Centers for Medicare & Medicaid Services' *Amendment to Regulations on "Grandfathered" Health Plans under the Affordable Care Act.*
- 7. Attached as Exhibit F to EWTN's Motion is a true and correct copy of The White House, *The Affordable Care Act Increases Choice and Saving Money for Small Businesses*.
- 8. Attached as Exhibit G to EWTN's Motion is a true and correct copy of the Declaration of Michael Warsaw.
- 9. Attached as Exhibit H to EWTN's Motion is a true and correct copy of the Declaration of Dr. John M. Haas.
- 10. Attached as Exhibit I to EWTN's Motion is a true and correct copy of EBSA Form 700, the Mandate's self-certification form.
- 11. Attached as Exhibit J to EWTN's Motion is a true and correct copy of the 12/16/2013 hearing transcript in *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-1092 (W.D. Okla.).
- 12. Attached as Exhibit K to EWTN's Motion is a true and correct copy of an excerpt of the deposition transcript of Gary M. Cohen, Defendants' Rule 30(b)(6) Designee, filed as Dkt. 51-1 in *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.).

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Executed this 31st day of December, 2013, in Washington, D.C.

/s/ Daniel Blomberg

Daniel Blomberg, KS Bar No. 23723 THE BECKET FUND FOR RELIGIOUS LIBERTY 3000 K St. NW, Ste. 220 Washington, DC 20007

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Counsel for Plaintiff EWTN

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Exhibit A

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Health Resources and Services Administration









HRSA Home

and Well-Being

Guidelines











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Clinical Preventive Services for Women: Closing the Gaps Institute of Medicine report







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those services. Preventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services when they are delivered by a network provider.

Affordable Care Act Expands Prevention Coverage for Women's Health

The Affordable Care Act – the health insurance reform legislation passed by Congress and signed into

law by President Obama on March 23, 2010 - helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for

Women's Preventive Services Guidelines Supported by the Health Resources and **Services Administration**

Under the Affordable Care Act, women's preventive health care - such as mammograms, screenings for cervical cancer, prenatal care, and other services - generally must be covered by health plans with no cost sharing. However, the law recognizes and HHS understands the need to take into account the unique health needs of women throughout their lifespan.

The HRSA-supported health plan coverage quidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a copayment, co-insurance or a deductible. HHS commissioned an IOM study to review what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women. HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.

Health Resources and Services Administration Women's Preventive Services Guidelines

Non-grandfathered plans (plans or policies created or sold after March 23, 2010, or older plans or policies that have been changed in certain ways since that date) generally are required to provide coverage without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012.

Type of Preventive Service	HHS Guideline for Health Insurance Coverage	Frequency	
Well-woman visits.	Well-woman preventive care visit annually for adult women to obtain the recommended preventive services that are age and developmentally appropriate, including preconception care and many services necessary for prenatal care. This well-woman visit should, where appropriate, include other preventive services listed in this set of guidelines, as well as others referenced in section 2713.	Annual, although HHS recognizes that several visits may be needed to obtain all necessary recommended preventive services, depending on a woman's health status, health needs, and other risk factors.* (see note)	
Screening for gestational diabetes.	Screening for gestational diabetes.	In pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for	

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Cas	e: 14-12696 Date Fi	arggnant women identified tobeg at high risk for diabetes.	e: 93 of 263
Human papillomavirus testing.	High-risk human papillomavirus DNA testing in women with normal cytology results.	Screening should begin at 30 years of age and should occur no more frequently than every 3 years.	
Counseling for sexually transmitted infections.	Counseling on sexually transmitted infections for all sexually active women.	Annual.	
Counseling and screening for human immune-deficiency virus.	Counseling and screening for human immune-deficiency virus infection for all sexually active women.	Annual.	
Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.	As prescribed.	
Breastfeeding support, supplies, and counseling.	Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment.	In conjunction with each birth.	
Screening and counseling for interpersonal and domestic violence.	Screening and counseling for interpersonal and domestic violence.		

^{*} Refer to guidance issued by the Center for Consumer Information and Insurance Oversight entitled Affordable Care Act Implementation FAQs. Set 12, Q10. In addition, refer to recommendations in the July 2011 IOM report entitled Clinical Preventive Services for Women: Closing the Gaps concerning distinct preventive services that may be obtained during a well-woman preventive services visit.

^{**} The guidelines concerning contraceptive methods and counseling described above do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement. See Federal Register Notice: Coverage of Certain Preventive Services Under the Affordable Care Act (PDF - 327 KB)

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Exhibit B



Protecting and Promoting Your Health

<u>Home For Consumers Consumer Information by Audience For Women</u>

For Consumers

Birth Control: Medicines To Help You

Introduction

If you do not want to get pregnant, there are many birth control options to choose from. No one product is best for everyone. The only sure way to avoid pregnancy and sexually transmitted infections (STIs or STDs) is not to have any sexual contact (abstinence). This guide lists FDA-approved products for birth control. Talk to your doctor, nurse, or pharmacist about the best method for you.

There are different kinds of medicines and devices for birth control:

Barrier Methods
Hormonal Methods
Emergency Contraception
Implanted Devices
Permanent Methods

Some things to think about when you choose birth control:

- · Your health.
- How often you have sex.
- · How many sexual partners you have.
- If you want to have children in the future.
- If you will need a prescription or if you can buy the method over-the-counter.
- The number of pregnancies expected per 100 women who use a method for one year. For comparison, about 85 out of 100 sexually active women who do not use any birth control can expect to become pregnant in a year.
- This booklet lists pregnancy rates of **typical use**. Typical use shows how effective the different methods are during actual use (including sometimes using a method in a way that is not correct or no consistent).
- For more information on the chance of getting pregnant while using a method, please see Trussell,J. (2011). "Contraceptive failure in the United States." Contraception 83(5):397-404. ¹ № ²

Tell your doctor, nurse, or pharmacist if you:

- Smoke.
- Have liver disease.
- Have blood clots.
- Have family members who have had blood clots.
- Are taking any other medicines, like antibiotics.
- Are taking any herbal products, like St. John's Wort.

To avoid pregnancy:

- No matter which method you choose, it is important to follow all of the directions carefully. If you don't, you raise your chance of getting pregnant.
- The best way to avoid pregnancy and sexually transmitted infections (STIs) is to practice total abstinence (do not have any sexual contact).

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BARRIER METHODS: Block sperm from reaching the egg

Male Condom



What is it?

• A thin film sheath placed over the erect penis.

How do I use it?

- Put it on the erect penis right before sex.
- Pull out before the penis softens.
- Hold the condom against the base of the penis before pulling out.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter or online.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, 18 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions (If you are allergic to latex, you can try condoms made of polyurethane).

Does it protect me from sexually transmitted infections (STIs)?

• Yes. Except for abstinence, latex condoms are the best protection against HIV/AIDS and other STIs.

Female Condom



What is it?

• A thin, lubricated pouch that is put into the vagina. It is created from man-made materials. It is not made with natural rubber latex.

How do I use it?

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- Put the female Constinuity the vaching selection of 263
- Follow the directions on the package to be sure the penis stays within the condom during sex and does not move alongside the condom.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter or online.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 21 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions

Does it protect me from sexually transmitted infections (STIs)?

- Yes.
- Natural rubber latex condoms for men are highly effective at preventing sexually transmitted infections, including HIV/AIDS, if used correctly. If you are not going to use a male condom, you can use the female condom to help protect yourself and your partner.

Diaphragm with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

- A dome-shaped flexible disk with a flexible rim.
- Made from latex rubber or silicone.
- It covers the cervix.

How do I use it?

- You need to put spermicidal jelly on the inside of the diaphragm before putting it into the vagina.
- You must put the diaphragm into the vagina before having sex.
- You must leave the diaphragm in place at least 6 hours after having sex.
- It can be left in place for up to 24 hours. You need to use more spermicide every time you have sex.

How do I get it?

- · You need a prescription.
- A doctor or nurse will need to do an exam to find the right size diaphragm for you.
- You should have the diaphragm checked after childbirth or if you lose more than 15 pounds. You might need a different size.

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Chance of getting pregnant with typical tise (Number 46) pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 12 may get pregnant.

Some Risks

- Irritation, allergic reactions, and urinary tract infection.
- If you keep it in place longer than 24 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Sponge with spermide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

• A disk-shaped polyurethane device with the spermicide nonoxynol-9.

How do I use it?

- Put it into the vagina before you have sex.
- Protects for up to 24 hours.
- You do not need to use more spermicide each time you have sex.
- You must leave the sponge in place for at least 6 hours after having sex.
- You must take the sponge out within 30 hours after you put it in. Throw it away after you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)O

- Out of 100 women who use this method, 12 to 24 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the sponge may not fit as well.

Some Risks

- Irritation
- Allergic reactions
- Some women may have a hard time taking the sponge out.
- If you keep it in place longer than 24-30 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Cervical Cap with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

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What is it?

• A soft latex or silicone cup with a round rim, which fits snugly around the cervix.

How do I use it?

- You need to put spermicidal jelly inside the cap before you use it.
- You must put the cap in the vagina before you have sex.
- You must leave the cap in place for at least 6 hours after having sex.
- You may leave the cap in for up to 48 hours.
- You do NOT need to use more spermicide each time you have sex.

How do I get it?

You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 17 to 23 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the cap may not fit as well.

Some Risks

- Irritation, allergic reactions, and abnormal Pap test.
- You may find it hard to put in.
- If you keep it in place longer than 48 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No

Spermicide Alone

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

• A foam, cream, jelly, film, or tablet that you put into the vagina.

How do I use it?

- You need to put spermicide into the vagina 5 to 90 minutes before you have sex.
- You usually need to leave it in place at least 6 to 8 hours after sex; do not douche or rinse the vaginal

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• Instructions can be different for each type of spermicide. Read the label before you use it.

How do I get it?

- · You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 28 may get pregnant.
- Different studies show different rates of effectiveness.

Some Risks

- Irritation
- · Allergic reactions
- Urinary tract infection
- If you are also using a medicine for a vaginal yeast infection, the spermicide might not work as well.

Does it protect me from sexually transmitted infections (STIs)? No.

HORMONAL METHODS: Prevent Pregnancy by interfering with ovulation and possibly fertilization of the egg

Oral Contraceptives (Combined Pill) "The Pill"



What is it?

- A pill that has two hormones (estrogen and progestin) to stop the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

- Changes in your cycle (period)
- Nausea
- Breast tenderness
- Headache

Less Common Serious Side Effects

- It is not common stit to the Gomen Date Filed: the pil 12014 op Right old pressure.
- It is rare, but some women will have blood clots, heart attacks, or strokes.

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Progestin-only)

"The Mini Pill"



What is it?

- A pill that has only one hormone, a progestin.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- Less often, it stops the ovaries from releasing eggs.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

- · Irregular bleeding
- Headache
- · Breast tenderness
- Nausea
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Extended/Continuous Use) "Pill"



What is it?

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- A pill that has two horthones lestroget and progesting the stop the ovalies from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.
- These pills are designed so women have fewer or no periods.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Risks are similar to other oral contraceptives with estrogen and progestin.
- You may have more light bleeding and spotting between periods than with 21 or 24 day oral contraceptives.
- It may be harder to know if you become pregnant, since you will likely have fewer periods or no periods.

Does it protect me from sexually transmitted infections (STIs)? No.

Patch



What is it?

- This is a skin patch you can wear on the lower abdomen, buttocks, or upper arm or back.
- It has two hormones (estrogen and progestin) that stop the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put on a new patch and take off the old patch once a week for 3 weeks (21 total days).
- Don't put on a patch during the fourth week. Your menstrual period should start during this patch-free week.
- If the patch comes loose or falls off, you may need to use another method of birth control, like a condom.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, about 9 may get pregnant.

Some Risks

- It will expose you to higher levels of estrogen compared to most combined oral contraceptives.
- It is not known if serious risks, such as blood clots and strokes, are greater with the patch because o

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Does it protect me from sexually transmitted infections (STIs)? No.

Vaginal Contraceptive Ring



What is it?

- It is a flexible ring that is about 2 inches around.
- It releases two hormones (progestin and estrogen) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put the ring into your vagina.
- Keep the ring in your vagina for 3 weeks and then take it out for 1 week. Your menstrual period should start during this ring-free week.
- If the ring falls out and stays out for more than 3 hours, replace it but use another method of birth control, like a condom, until the ring has been in place for 7 days in a row.
- Read the directions and talk to your doctor, nurse or pharmacist about what to do.

How do I get it?

· You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Vaginal discharge, discomfort in the vagina, and mild irritation.
- Other risks are similar to oral contraceptives (combined pill).

Does it protect me from sexually transmitted infections (STIs)? No.

Shot/Injection



What is it?

A shot of the hormone progestin, either in the muscle or under the skin.

How does it work?

- The shot stops the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps the sperm from getting to the egg.

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How do I get it? Case: 14-12696 Date Filed: 08/04/2014 Page: 104 of 263

You need one shot every 3 months from a healthcare provider.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, including women who don't get the shot on time, 6 may get pregnant.

Some Risks

- You may lose bone density if you get the shot for more than 2 years in a row.
- Bleeding between periods
- Headaches
- Weight gain
- Nervousness
- Abdominal discomfort

Does it protect me from sexually transmitted infections (STIs)? No.

EMERGENCY CONTRACEPTION: May be used if you did not use birth control or if your regular birth control fails. It should not be used as a regular form of birth control

Plan B, Plan B One- Step and Next Choice (Levonorgestrel)



What is it?

- · These are pills with the hormone progestin.
- · They help prevent pregnancy after birth control failure or unprotected sex.

How does it work?

- It works mainly by stopping the release of an egg from the ovary. It may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the womb (uterus).
- For the best chance for it to work, you should start taking the pill(s) as soon as possible after unprotected sex.
- · You should take emergency contraception within three days after having unprotected sex.

How do I get it?

- You can buy Plan B One-Step over-the-counter. You do not need a prescription.
- You can buy Plan B and Next Choice over-the-counter if you are age 17 years or older. If you are younger than age 17, you need a prescription.

Chance of getting pregnant

• Seven out of every 8 women who would have gotten pregnant will not become pregnant after taking Plan B, Plan B One-Step, or Next Choice.

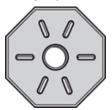
Some Risks

· Nausea, vomiting, abdominal pain, fatigue and headache

Does it protect me from sexually transmitted infections (STIs)? No.

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Ella (ulipristal acetate)



What is it?

- A pill that blocks the hormone progesterone.
- It helps prevent pregnancy after birth control failure or unprotected sex.
- It works mainly by stopping or delaying the ovaries from releasing an egg. It may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation).

How do I use it?

- For the best chance for it to work, you should take the pill as soon as possible after unprotected sex.
- You should take Ella within five days after unprotected sex.

How do I get it?

· You need a prescription.

Chance of getting pregnant

 Six or 7 out of every 10 women who would have gotten pregnant will not become pregnant after taking ella.

Some Risks

- Headache
- Nausea
- Abdominal pain
- Menstrual pain
- Tiredness
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

IMPLANTED DEVICES: Inserted/implanted into the body and can be kept in place for several years

Copper IUD



What is it?

• A T-shaped device containing copper that is put into the uterus by a healthcare provider.

How does it work?

- The IUD prevents sperm from reaching the egg, from fertilizing the egg, and may prevent the egg from attaching (implanting) in the womb (uterus).
- It does not stop the ovaries from making an egg each month.
- The Copper IUD can be used for up to 10 years.

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• After the IUD is Classe and out, 21696 possible Folget 0086042014 Page: 106 of 263

How do I get it?

• A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Cramps
- · Irregular bleeding

Uncommon Risks

- · Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus.
- · Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

IUD with progestin



What is it?

A T-shaped device containing a progestin that is put into the uterus by a healthcare provider.

How does it work?

- It may thicken the mucus of your cervix, which makes it harder for sperm to get to the egg, and also thins the lining of your uterus.
- After a doctor or other healthcare provider puts in the IUD, it can be used for up to 3 to 5 years, depending on the type.
- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- · Irregular bleeding
- No periods
- Abdominal/pelvic pain
- Ovarian cysts

Uncommon Risks

- · Pelvic inflammatory disease
- Infertility

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Rare Risk Case: 14-12696 Date Filed: 08/04/2014 Page: 107 of 263

- · IUD is stuck in the uterus or found outside the uterus
- Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Implantable Rod



What is it?

- A thin, matchstick-sized rod that contains the hormone progestin.
- It is put under the skin on the inside of your upper arm.

How does it work?

- It stops the ovaries from releasing eggs.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- It can be used for up to 3 years.

How do I get it?

 After giving you local anesthesia, a doctor or nurse will put it under the skin of your arm with a specia needle.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- changes in bleeding patterns
- · weight gain
- breast and abdominal pain

Does it protect me from sexually transmitted infections (STIs)? No.

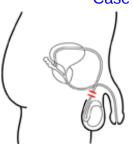
PERMANENT METHODS: For people who are sure they never want to have a child or do not want any more children.

Sterilization Surgery for Men (Vasectomy)

This method is for men who are sure they never want to have a child or do not want any more children. It you are thinking about reversal, vasectomy may not be right for you. Sometimes it is possible to reverse the operation, but there are no guarantees. Reversal involves complicated surgery that might not work.

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What is it?

- This is a surgery a man has only once.
- · It is permanent

How does it work?

- A surgery blocks a man's vas deferens (the tubes that carry sperm from the testes to other glands).
- Semen (the fluid that comes out of a man's penis) never has any sperm in it.
- It takes about three months to clear sperm out of a man's system. You need to use another form of birth control until a test shows there are no longer any sperm in the seminal fluid.

How do I get it?

- A man needs to have surgery.
- · Local anesthesia is used.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women whose partner has had a vasectomy, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- Infection

Does it protect me from sexually transmitted infections (STIs)? No.

The success of reversal surgery depends on:

- The length of time since the vasectomy was performed.
- Whether or not antibodies to sperm have developed.
- The method used for vasectomy
- · Length and location of the segments of vas deferens that were removed or blocked.

Sterilization Surgery for Women Surgical Implant (also called trans-abdominal surgical sterilization)



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What is it?

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• A device is placed on the outside of each fallopian tube.

How does it work?

- One way is by tying and cutting the tubes this is called tubal ligation. The fallopian tubes also can be sealed using an instrument with an electrical current. They also can be closed with clips, clamps, or rings. Sometimes, a small piece of the tube is removed.
- The woman's fallopian tubes are blocked so the egg and sperm can't meet in the fallopian tube. This stops you from getting pregnant.
- This is a surgery a woman has only once.
- It is permanent.

How do I get it?

- This is a surgery you ask for.
- You will need general anesthesia.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

• Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- · Infection or other complications after surgery
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)? No.

Sterilization Implant for Women (Transcervical Surgical Sterilization Implant)



What is it?

- Small flexible, metal coil that is put into the fallopian tubes through the vagina.
- The device works by causing scar tissue to form around the coil. This blocks the fallopian tubes and stops you from getting pregnant.

How does it work?

- The device is put inside the fallopian tube with a special catheter.
- You need to use another birth control method during the first 3 months. You will need an X-ray to make sure the device is in the right place.
- It is permanent.

How do I get it?

The devices are placed into the tubes using a camera placed in the uterus.

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- Once the tubesCarsefoLund, 26666devia atea Feleros e08604/1203kin cirtures (Lindisio 2663 needed.
- You may need local anesthesia.
- Since it is inserted through the vagina, you do not need an incision (cutting).

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- · Mild to moderate pain after insertion
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)? No.

To Learn More:

This guide should not be used in place of talking to your doctor or reading the label for your product. The product and risk information may change.

To get the most recent information for your birth control go to:

Drugs:

http://www.accessdata.fda.gov/scripts/cder/drugsatfda⁴ (type in the name of your drug)

http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm⁵ (type in the name of your device)

Updated May 2013

Page Last Updated: 08/27/2013

Note: If you need help accessing information in different file formats, see Instructions for Downloading Viewers and Players.

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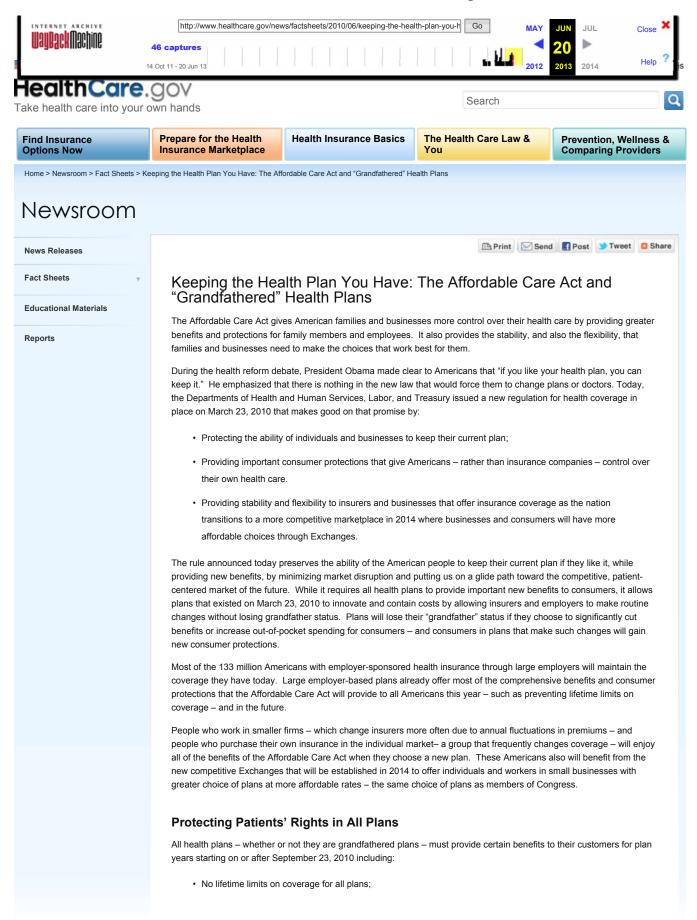
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- 2. http://www.fda.gov/AboutFDA/AboutThisWebsite/WebsitePolicies/Disclaimers/default.htm
- 3. javascript:void(0);/*1343680975526*/
- 4. http://www.accessdata.fda.gov/scripts/cder/drugsatfda
- 5. http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm

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EXHIBIT D

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- No rescissions of coverage when people get sick and have previously made an unintentional mistake on their
 application;
- · Extension of parents' coverage to young adults under 26 years old; and the

For the vast majority of Americans who get their health insurance through employers, additional benefits will be offered, irrespective of whether their plan is grandfathered, including:

- · No coverage exclusions for children with pre-existing conditions; and
- No "restricted" annual limits (e.g., annual dollar-amount limits on coverage below standards to be set in future regulations).

Additional Consumer Protections Apply to Non-Grandfathered Plans

Grandfathered health plans will be able to make routine changes to their policies and maintain their status. These routine changes include cost adjustments to keep pace with medical inflation, adding new benefits, making modest adjustments to existing benefits, voluntarily adopting new consumer protections under the new law, or making changes to comply with State or other Federal laws. Premium changes are not taken into account when determining whether or not a plan is grandfathered.

Plans will lose their grandfathered status if they choose to make significant changes that reduce benefits or increase costs to consumers. If a plan loses its grandfathered status, then consumers in these plans will gain additional new benefits including:

- · Coverage of recommended prevention services with no cost sharing; and
- · Patient protections such as guaranteed access to OB-GYNs and pediatricians.

Under the Affordable Care Act, these requirements are applicable to all new plans, and existing plans that choose to make the following changes that would cause them to lose their grandfathered status.

Compared to their polices in effect on March 23, 2010, grandfathered plans:

- Cannot Significantly Cut or Reduce Benefits. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.
- Cannot Raise Co-Insurance Charges. Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.
- Cannot Significantly Raise Co-Payment Charges. Frequently, plans require patients to pay a fixed-dollar
 amount for doctor's office visits and other services. Compared with the copayments in effect on March 23, 2010,
 grandfathered plans will be able to increase those co-pays by no more than the greater of \$5 (adjusted annually
 for medical inflation) or a percentage equal to medical inflation plus 15 percentage points. For example, if a
 plan raises its copayment from \$30 to \$50 over the next 2 years, it will lose its grandfathered status.
- Cannot Significantly Raise Deductibles. Many plans require patients to pay the first bills they receive each year (for example, the first \$500, \$1,000, or \$1,500 a year). Compared with the deductible required as of March 23, 2010, grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points. In recent years, medical costs have risen an average of 4-to-5% so this formula would allow deductibles to go up, for example, by 19-20% between 2010 and 2011, or by 23-25% between 2010 and 2012. For a family with a \$1,000 annual deductible, this would mean if they had a hike of \$190 or \$200 from 2010 to 2011, their plan could then increase the deductible again by another \$50 the following year.
- Cannot Significantly Lower Employer Contributions. Many employers pay a portion of their employees'
 premium for insurance and this is usually deducted from their paychecks. Grandfathered plans cannot decrease
 the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own
 share and increase the workers' share of premium from 15% to 25%).
- Cannot Add or Tighten an Annual Limit on What the Insurer Pays. Some insurers cap the amount that they will pay for covered services each year. If they want to retain their status as grandfathered plans, plans cannot tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit (which is more protective of high-cost enrollees).

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May Change Insurance Companies. An employer with a group health plan can switch plan administrators as
well as buy insurance from a different insurance company without losing grandfathered status--provided the
plan does not make any of the above six changes to its cost or benefits structure.*

* Previously, one way an employer group health plan could lose its grandfather status was to change issuers--switch from one insurance company to another. The original regulation allowed only self-funded plans to change third-party administrators without necessarily losing their grandfathered plan status. On November 15, the regulation was amended to allow all group health plans to switch insurance companies and shop for the same coverage at a lower cost while maintaining their grandfathered status, as long as the structure of the coverage doesn't violate one of the other rules for maintaining grandfathered plan status.

Protecting Against Abuse of Grandfathered Health Plan Status

To prevent health plans from using the grandfather rule to avoid providing important consumer protections, the regulation provides for:

- Promoting transparency by requiring a plan to disclose to consumers every time it distributes materials whether
 the plan believes that it is a grandfathered plan and therefore is not subject to some of the additional consumer
 protections of the Affordable Care Act. This allows consumers to understand the benefits of staying in a
 grandfathered plan or switching to a new plan. The plan must also provide contact information for enrollees to
 have their questions and complaints addressed;
- Revoking a plan's grandfathered status if it forces consumers to switch to another grandfathered plan that,
 compared to the current plan, has less benefits or higher cost sharing as a means of avoiding new consumer protections; or
- Revoking a plan's grandfathered status if it is bought by or merges with another plan simply to avoid complying
 with the law.

Projected Impact on Consumers and Plans

Large Employer Plans

The 133 million Americans with employer-sponsored health insurance through large employers (100 or more workers) —who make up the vast majority of those with private health insurance today—will not see major changes to their coverage as a result of this regulation. This regulation affirms that most of these plans will remain grandfathered – more than three-quarters of firms in 2011 – based on the way they changed cost sharing from 2008-2009. Most of these plans already offer the patient protections applied to grandfathered plans such as no pre-existing condition exclusions for children and no rescissions of coverage when a person gets sick. In addition, they are likely to already give their workers and families protections like a choice of OB-GYN and pediatrician and access to emergency rooms in other states without prior authorization. Based on past patterns of behavior, it is expected that large employers will continue to make adjustments to the health plans they offer from year to year so that, by the time the health insurance Exchanges are established in 2014, fewer – but still most – large employer plans will have grandfather status. However, the assumed market changes depend on the choices large employers make in the future.

Small Business Plans

The roughly 43 million people insured through small businesses will likely transition from their current plan to one with the new protections over the next few years. Small plans tend to make substantial changes to cost sharing, employer contributions, and health insurance issuers more frequently than large plans. As such, we estimate that 70% of plans will be grandfathered in the first year, but depending on the choices these employers make, this could drop to about one-third over several years. To help sustain small business coverage, the Affordable Care Act also includes a tax credit for up to 35% of their premium contributions.

Individual Health Market

The 17 million people who are covered in the individual health insurance market, where switching of plans and substantial changes in coverage are common, will receive the new protections of the Affordable Care Act sooner rather than later. Roughly 40 percent to two-thirds of people in individual market policies change plans within a year. Given this "churn," the transition for the 17 million people in this market will be swift. In the short run, individuals whose plan changes and is no longer grandfathered will gain access to free preventive services, protections against restricted annual limits, and patient protections such as improved access to emergency rooms. These Americans also will benefit from the Health Insurance Exchanges that will be established in 2014 to offer individuals and workers in small businesses a much greater choice of plans at more affordable rates.

People in Special Types of Health Plans

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Fully-insured health plans subject to collective bargaining agreements will be able to maintain their grandfathered status until their agreement terminates. After that point, they are subject to the same rules as other health plans; in other words, they will lose their grandfathered status if they make any of the substantial changes described above. Retiree-only and "excepted health plans" such as dental plans, long-term care insurance, or Medigap, are exempt from the Affordable Care Act insurance reforms.

Projections of Employer Plans Remaining Grandfathered, 2011-2013

There is considerable uncertainty about what choices employers will make over the next few years as the market prepares for the establishment of the competitive Exchanges and other market reforms such as new consumer protections, middle-class tax credits and other steps to expand affordability and choice for millions more Americans. This rule estimates the likely decisions of employers based on assumptions and extrapolations of recent market behavior, including the decisions by employers to change their health plans in 2008 and 2009. The table below depicts the results of this analysis:

Type of Plan	Enrollees	Employer Plans Remaining Grandfathered		Explanation	
		2011	2013		
Allowable Percent Change in Co-Payments from 2010		Medical inflation* (4%) + 15% = 19%	Medical inflation* (4%³ = 12%) + 15% = 27%	Deductibles, copayments can increase faster than medical inflation over time	
Large Employer	133 million	Low: 87% remain grandfathered Mid-range: 82% remain grandfathered High: 71% remain grandfathered	Low: 66% remain grandfathered Mid-range: 55% remain grandfathered High: 36% remain grandfathered	Large plans are more stable and often self-insured. Regulation permits plans to make routine changes needed to keep premium growth in check.	
Small Employer	43 million	Low: 80% remain grandfathered Mid-range: 70% remain grandfathered High: 58% remain grandfathered	Low: 51% remain grandfathered Mid-range: 34% remain grandfathered High: 20% remain grandfathered	Small businesses typically buy commercial insurance and frequently make changes in insurers and coverage. Limited purchasing power and high overhead often force a trade-off between dramatic changes in benefits and cost sharing and affordable premiums.	

^{*} Assumes medical inflation at 4%

The "low" percentage is based on the mid-range percentages plus plans that could stay grandfathered with small premium changes.

The "mid-range" percentage is based on assumptions of the number of plans that would lose their grandfathered status if they made changes consistent with the changes that they made in 2008 and 2009 that would not lead to premium increases.

The "high" percentage assumes that some plans would not be able to make the adjustments to employer premium contribution they would need to keep premiums the same while keeping their other cost-sharing parameters within the grandfathering rules. The estimates in this case assume these plans will choose to relinquish their grandfathered status instead.

Choices in 2014 and Subsequent Years

In 2014, small businesses and individuals who purchase insurance on their own will gain access to the competitive market Exchanges. These Exchanges will offer individuals and workers in small businesses with a much greater choice of plans at more affordable rates – the same choice as members of Congress. In fact, the Congressional Budget Office (CBO) has estimated that, on an apples-to-apples basis, premiums will be 14- 20 percent lower than they would be under current law in 2016 due to competition, lower insurance overhead, and increased pooling and purchasing power. Small

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businesses also will have more affordable options. CBO has estimated that a family policy for small businesses would be available in the Exchanges at a premium that is \$4,000 lower than under current law in 2016. These reduced premiums do not take into account the tax credits available to small businesses and middle-class families to help make insurance affordable. These additional new choices may further lower the likelihood that small businesses workers will remain in grandfathered health plans. Consumers insured through large employers are more likely to remain in grandfathered plans in 2014 and beyond. Read the Press Release at: http://www.hhs.gov/news/press/2010pres/06/20100614e.html. Read the Questions and Answers on the Regulation at http://www.healthreform.gov/about/grandfathering.html. You can view the Regulation at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi? dbname=2010_register&docid=DOCID:fr17jn10-25.pdf. Posted: June 14, 2010 • 1. Was this page helpful? ○ Yes ○ No Form Approved OMB# 0990-0379 Exp. Date 06/03/2014 Next Page • 1. I found this page helpful because the content on the page: (check all \square Had the information I needed \square Was trustworthy \square Was up-todate
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Exhibit F

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses

WHITEHOUSE.GOV/HEALTHREFORM

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Small businesses are the backbone of our economy, but high health care costs and declining coverage have hindered small business owners and their employees. Over the past decade, average annual family premiums for workers at small firms increased by 123 percent, from \$5,700 in 1999 to \$12,700 in 2009, while the percentage of small firms offering coverage fell from 65 to 59 percent. The Affordable Care Act will provide enormous benefits to the millions of small business owners and the tens of millions of small business employees by expanding coverage options, increasing purchasing power, lowering costs and giving consumers, not insurance companies, control over their own health care.

No Employer Mandate, Exempts Small Firms from Employer Responsibility Requirement

The Affordable Care Act does not include an employer mandate. In 2014, as a matter of fairness, the Affordable Care Act requires large employers to pay a shared responsibility fee only if they don't provide affordable coverage and taxpayers are supporting the cost of health insurance for their workers through premium tax credits for middle to low income families.

- The law specifically exempts all firms that have fewer than 50 employees 96 percent of all firms in the United States or 5.8 million out of 6 million total firms from any employer responsibility requirements. These 5.8 million firms employ nearly 34 million workers. More than 96 percent of firms with 50 or more employees already offer health insurance to their workers. Less than 0.2 percent of all firms (about 10,000 out of 6 million) may face employer responsibility requirements. Many firms that do not currently offer coverage will be more likely to do so because of lower premiums and wider choices in the Exchange.
- > For more information, please visit: www.healthreform.gov/about/answers.html.

Small Business Health Care Affordability Tax Credits

Under the Affordable Care Act, an estimated 4 million small businesses nationwide could qualify for a small

business tax credit this year, which will provide a total of \$40 billion in relief for small firms over the next 10 years.

- Small employers with fewer than 25 full-time equivalent employees and average annual wages of less than \$50,000 that purchase health insurance for employees are eligible for the tax credit. The maximum credit will be available to employers with 10 or fewer full-time equivalent employees and average annual wages of less than \$25,000. To be eligible for a tax credit, the employer must contribute at least 50 percent of the total premium cost.
- Businesses that receive state health care tax credits may also qualify for the federal tax credit. Dental and vision care qualify for the credit as well.
- For 2010 through 2013, eligible employers will receive a small business credit for up to 35 percent of their contribution toward the employee's health insurance premium. Tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 25 percent of their contribution.
- For 2014 and beyond, small employers who purchase coverage through the new Health Insurance Exchanges can receive a tax credit for two years of up to 50 percent of their contribution. Tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 35 percent of their contribution.
- > For more information on tax credits, please visit: www.irs.gov/newsroom/article/0,,id=223666,00.html.

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Better Information on Affordable Health Care Options

In July 2010, the Department of Health and Human Services will establish a new consumer website with easy to understand information about affordable and comprehensive coverage choices. The website will also provide information to small businesses about available health coverage options, including information on reinsurance for early retirees, small business tax credits, and how to shop for insurance in the Exchanges that will increase the purchasing power of small businesses.

Administrative Simplification

The Affordable Care Act accelerates adoption of standard "operating rules" for health insurance plan administration. Operating rules are the business rules and guidelines for electronic transactions with health insurance plans, and the current non-standard environment is a source of waste, unnecessary cost, and frustration for small business owners and others. Under administrative simplification, there will be one format and one set of codes for claims, remittance advice, service authorization, eligibility verification, and claims status inquiry.

By establishing uniform operating rules, the Affordable Care Act ensures that small businesses, health plans, physicians, hospitals, and patients are all speaking the same language. Benefits include:

- · Improved coordination of care for the patient
- Increased payment accuracy and timeliness
- Reduced administrative cost and hassle factor for small businesses
- Payment transparency

The Affordable Care Act requires standard operating rules for eligibility and claims status to be adopted by July1, 2011 and fully implemented by January 1, 2013.

Increases Quality, Affordable Options for Small Businesses

Currently, small businesses face not only premiums that are 18 percent higher than large businesses pay, but also face higher administrative costs to set up and maintain a health plan. The premiums they pay have up to three times as much administrative cost built into them as plans in the large group market. They are also at a disadvantage in negotiating with insurance companies because they lack bargaining power. The Affordable Care Act will change this dynamic. Starting in 2014, small businesses with up to 100 employees will have access to state-based Small Business Health Options Program (SHOP) Exchanges, which will expand their purchasing power. The Congressional Budget Office (CBO) stated that the Exchanges will reduce costs and increase competitive pressure on insurers, driving down premiums by up to 4 percent for small businesses.

- These Exchanges would include web portals that provide standardized, easy-to-understand information that make comparing and purchasing health care coverage easier for small business employees, and reduce the administrative hassle that small businesses currently face in offering plans.
- Starting in 2017, the Affordable Care Act also provides states flexibility to allow businesses with more than 100 employees to purchase coverage in the SHOP Exchange.
- If businesses don't offer coverage, workers at small firms and their families would be eligible for their own tax credits to purchase coverage through the Exchange.
- The Affordable Care Act streamlines health plans to keep premiums lower by instituting a premium rate review process and setting standards for how much insurance companies can spend on administrative costs, also known as the medical loss ratio.
- > To learn more, visit: www.healthreform.gov/newsroom/naicletter.html.

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HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Security and Stability that Promotes Entrepreneurship

In 2014, the Affordable Care Act ends the discriminatory insurance industry practices of jacking up premiums by up to 200 percent because an employee got sick or older, or because the business hired a woman. In many cases, women can be charged higher premiums than men, simply because of their gender. It will also reduce "job lock" – the fear of switching jobs or starting a small business due to concerns over losing health coverage – by guaranteeing access to coverage for all Americans. This will encourage more people to launch their own small businesses, or join existing small employers.

Reviews the Impact of Reform on Small Businesses

The Affordable Care Act requires the Government Accountability Office (GAO) to specifically review the impact of Exchanges on increasing access to affordable health care for small businesses to ensure that Exchanges are indeed making a difference for small business owners.

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Exhibit G

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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

DECLARATION OF MICHAEL WARSAW

- 1. My name is Michael Warsaw. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty.
- 2. The facts contained herein are either within my personal knowledge, contained in the business records of EWTN, or based on upon teachings of my church with which I am intimately familiar and which I believe to be true and correct. If I were called upon to testify to these facts, I could and would competently do so.
- 3. In 2013, I became the Chairman of the Board and since 2009 I have been Chief Executive Officer of the Eternal Word Television Network ("EWTN"). Before that, I was EWTN's president for nine years and, before that time, held various senior management positions for nine years.

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I. EWTN's History and Religious Beliefs

- 4. In 1981, Mother M. Angelica, a cloistered nun of the Poor Clares of Perpetual Adoration order, founded EWTN on the property of Our Lady of Angels Monastery in Irondale, Alabama. Since then, EWTN has become the largest Catholic media network in the world. EWTN transmits programming twenty-four hours a day in English, Spanish, German, and other language channels on over eleven full-time television feeds to more than 230 million homes in 144 countries and territories on more than 5,000 multichannel video programming distribution systems, two distinct twenty-four hour radio services broadcast worldwide on shortwave radio, satellite radio, direct over internet, and through more than 230 affiliated broadcast stations in the United States as well as other communications media, such as its principal website which receives approximately 3 million visits per month.
- 5. EWTN is an Alabama non-profit corporation that qualifies as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 ("the Code"). EWTN currently employs approximately 350 full-time employees.
- 6. EWTN airs family and religious programming from a Catholic point of view that presents the teachings of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church. Additionally, it provides spiritual devotions based on Catholic religious practice, and airs daily live Masses and prayers. Providing more than 80% original programming, EWTN also offers talk shows, children's animation, teaching series, documentaries, and live coverage of Catholic Church events. EWTN also has an internal printing press, which it uses to mail out newsletters that feature Catholic teaching.
- 7. A deep devotion to the Catholic faith is central to EWTN's mission. While not affiliated with the Roman Catholic Church or any Roman Catholic diocese as an ecclesiastical or structural matter, EWTN is dedicated to the advancement of truth as defined by the Magisterium

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of the Roman Catholic Church. EWTN's mission is to serve the orthodox belief and teaching of the Church as proclaimed by the Supreme Pontiff and his predecessors. EWTN's goal is to provide the means by which the various organizations within the Church will have a nation-wide vehicle of expression—a goal EWTN achieves without charge to those organizations as long as their spirituality remains within the theological context of Mother Church. The best evidence of their spiritual orthodoxy is acceptance of the Dogmas, Rules and Regulations of the Church in all matters, especially as they relate to the topics on which their television presentation is based. EWTN exists to provide a medium for orthodox endeavors, and its mission, as reflected in its mission statement, is the foundation for this essential spiritual growth ministry, not an attempt to censor any organization or individual.

- 8. Above and beyond EWTN's religious programming, the network's religious centers themselves are visited daily by pilgrims who travel to worship at the daily Masses held at the chapel on EWTN's campus in Irondale, Alabama. The chapel is open every day from 6:00 AM to 9:00 PM. EWTN's principal campus houses an order of Franciscan friars near the EWTN chapel, who work closely with EWTN in a number of its activities, including celebrating Mass at the chapel.
- 9. The EWTN grounds highlight religious devotion and include an outdoor shrine, a Stations of the Cross devotional area, private prayer areas, and religious statues throughout.
- 10. Virtually every room within the EWTN buildings features Catholic images and icons, including crucifixes, depictions of the Pietà, paintings of saints, and Bible verses and prayers.
- 11. This is also generally true of employee-controlled spaces. Employees are permitted to decorate their own work places, and a large number have heavily adorned the spaces with pictures of Catholic saints, prayers, and religious icons.

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- 12. EWTN holds and actively professes religious beliefs that include Catholic teachings on the sanctity of life. It believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious from the moment of conception. EWTN therefore believes and teaches that abortion ends a human life and is a grave sin. *See* Sections 2270 and 2271 of the Catechism of the Catholic Church (1994) (affirming that life begins at conception, that directly intending to take innocent human life is gravely immoral, and that post-conception contraceptive is an abortifacient and "gravely contrary to moral law"); *see* also id. section 2274 ("Since it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.")
- 13. EWTN's religious beliefs also include Catholic teaching on the nature and purpose of human sexuality, which exclude the use of contraceptive drugs and devices as well as voluntary sterilization methods. *See* Section 234 of the Compendium of the Social Doctrine of the Church (2004) (teaching that programs of "economic assistance aimed at financing campaigns of sterilization and contraception" are "affronts to the dignity of the person and the family").
- 14. In particular, EWTN believes, in accordance with traditional Catholic doctrine as articulated and confirmed by Pope Paul VI's 1968 encyclical *Humanae Vitae*, that human sexuality has two primary purposes—namely, to "unit[e] husband and wife" and "for the generation of new lives"—that cannot be properly separated. Accordingly, EWTN believes and actively professes, with the Catholic Church, that "[t]o use this divine gift destroying, even if only partially, its meaning and its purpose is to contradict the nature both of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His Will." *Humanae Vitae*, ¶ 13. Therefore, EWTN believes and teaches that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent

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procreation, whether as an end or as a means"—including contraception and sterilization—is a grave sin. *See also* Section 91 of *Evangelium Vitae* (1995) (making clear that Catholics may never "encourage" the use of "contraception, sterilization, and abortion").

- 15. Furthermore, EWTN subscribes to authoritative Catholic teaching about the proper nature and aims of health care and medical treatment. For instance, EWTN believes, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." EWTN likewise believes and teaches that sterilization and contraceptives are not properly understood as health care, since pregnancy and the natural process of human reproduction are not diseases to be cured.
- 16. The declaration contemporaneously submitted to this Court by Catholic theologian John Haas accurately explains in greater technical detail the Catholic religious beliefs EWTN holds and follows.
- 17. On numerous occasions, EWTN has publicly proclaimed the foregoing moral precepts as authentic and binding Catholic doctrine through its television, radio, and internet transmissions. To fulfill its mission, EWTN must continue to do so.
- 18. As part of its commitment to Catholic social teaching, EWTN promotes the well-being and health of its employees and their families. In furtherance of these beliefs, EWTN has striven over the years to provide employee health coverage superior to coverage generally available in the Alabama market. *See Economic Justice For All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, ¶103, available at http://www.usccb.org/upload/economic_justice_for_all.pdf (last visited December 30, 2013)

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("The provision of wages and other benefits sufficient to support a family in dignity is a basic

necessity to prevent this exploitation of workers. The dignity of workers also requires adequate

health care . . . ").

19. Moreover, as part of its religious commitment to the authoritative teachings of the

Catholic Church, EWTN cannot provide, subsidize, or support health care insurance—or

facilitate any form of payment or benefit in connection with its health insurance, whether or not

that payment or benefit is denominated "insurance coverage"—that covers, facilitates, or in any

way encourages the use of artificial contraception, sterilization, or abortion, or related education

and counseling, without violating its deeply held religious beliefs and without publicly

contradicting the same Catholic doctrine that EWTN routinely proclaims through its television,

radio, and internet transmissions.

20. EWTN ensures that its insurance plan does not cover or otherwise facilitate access to

drugs, devices, services or procedures inconsistent with its faith. In particular, EWTN has taken

great pains through the years to ensure that its insurance plans do not cover, or in any way

facilitate access to, sterilization, contraception, or abortion.

21. EWTN cannot provide information or guidance to its employees about other locations

or means through which they can access artificial contraception, sterilization, abortion, or related

education and counseling, without violating its deeply held religious beliefs and without publicly

contradicting its own mission. Many of EWTN's employees choose to work at EWTN because

they share its religious beliefs and wish to help EWTN further its mission of sharing Catholic

teaching. EWTN would violate their implicit trust in the organization and detrimentally alter its

relationship with its employees if it were to violate its religious beliefs regarding abortion,

sterilization and contraception.

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22. Furthermore, EWTN exists on donations from the public. EWTN does not generate revenue from carriage fees and advertising, and indeed prohibits any form of commercial advertising on its television services. Donors who give to EWTN do so with an understanding of EWTN's mission and with the assurance that EWTN will continue to adhere to, disseminate, and report reliable Catholic teachings on morality and practices, as its Mission Statement has declared since its inception.

23. Therefore EWTN cannot operate in a manner known to be morally repugnant to its donors and in ways that violate the implicit trust of the purpose of their donations.

II. The Affordable Care Act and EWTN

- 24. EWTN's employee health care plan is self-insured. Its plan is governed by ERISA and administered by Blue Cross Blue Shield of Alabama.
- 25. It is my understanding that the Affordable Care Act requires EWTN to provide "coverage" of certain preventative health care services, and that Defendants have interpreted the Act to require that those services include coverage of contraceptives, abortifacients, and sterilization.
- 26. EWTN is not eligible for the Defendants' religious employers exemption from the Mandate because EWTN is not an organization "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. 46621, 46626.
- 27. Nor does EWTN's employee healthcare plan meet the definition of a "grandfathered" plan, which is also exempt from the Mandate. (This is why EWTN's employee healthcare plans do not include the notices required to claim grandfathered status.)
 - 28. Thus, it is my understanding that EWTN must either:

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a. Directly pay for and provide contraceptives, abortifacients, and sterilization via its

health insurance plan, or

b. Accept a so-called "accommodation" that requires EWTN to execute a self-

certification form and deliver it to EWTN's third party administrator before our

next health plan year starts on July 1, 2014.

29. The government's prescribed self-certification form is available at

http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf (last

visited November 15, 2013).

30. The self-certification instructs the third party administrator of its "obligations set

forth in the[] final regulations," and by delivering this self-certification to its administrator,

EWTN would "designat[e]" the administrator as the "plan administrator and claims administrator

for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39879. By this

act, EWTN would trigger the administrator's obligation to make "separate payments for

contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76. It is my

understanding that executing the self-certification form would also make the administrator

eligible to receive both cost reimbursement and an additional 10% for margin from Defendants

for providing the objectionable drugs.

31. Acceptance by the administrator of the self-certification form makes the form an

instrument under which EWTN's plan is operated.

32. EWTN would have to identify its employees to its third party administrator for the

distinct purpose of enabling the government's scheme of facilitating and subsidizing

contraceptive and abortifacient services and related education and counseling.

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33. The third party administrator's obligation to make direct payments for contraceptive and abortion services would continue only "for so long as the participant or beneficiary remains enrolled in the plan." 78 Fed. Reg. at 39876.

- 34. Thus, EWTN would have to coordinate with its third party administrator regarding when it was adding or removing employees and beneficiaries from its healthcare plan and, as a result, from the contraceptive and abortifacient services payment scheme.
- 35. The third party administrators would be required to notify plan participants and beneficiaries of the contraceptive payment benefit "contemporaneous with (to the extent possible) but separate from any application materials distributed in connection with enrollment" in a group health plan. 78 Fed. Reg. at 39876.
- 36. This would also require EWTN to coordinate the notices with its third-party administrator.
- 37. The third-party administrators would be required to provide the contraceptive benefits "in a manner consistent" with the provision of other covered services. 78 Fed. Reg. at 39876-77.
- 38. Therefore, any payment or coverage disputes presumably would be resolved under the terms of EWTN's existing plan documents.
- 39. Further, Defendants acknowledge "there is no obligation for a third party administrator to enter into or remain in a contract with the eligible organization if it objects to any of these responsibilities." 78 Fed. Reg. at 39880.
- 40. Thus, in order to take advantage of the accommodation, EWTN must hope that its third party administrator will agree to arrange for free contraceptive, sterilization and abortifacient payments that EWTN cannot provide directly, or else EWTN must find another administrator willing to do so.

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- 41. In any event, once EWTN secures a consenting third party administrator, EWTN—via its self-certification—must expressly designate that administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879.
- 42. The self-certification must specifically notify the third party administrator of its "obligations set forth in the[] final regulations, and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39879.
- 43. Because EWTN is required to designate the third party administrator as a plan administrator with fiduciary duties, EWTN cannot understand the resulting payments for contraceptive and abortifacient services as anything other than payments made under EWTN's plan.
- 44. Finally, by participating in the "accommodation," EWTN is barred from telling any third party administrator to disregard the instructions on the form and instead to follow EWTN's religious beliefs by not paying for the drugs.
- 45. Specifically, the final rules state that EWTN "must not, *directly or indirectly*, seek to influence the third party administrator's decision" to "provide or arrange separate payments for contraceptive services for participants or beneficiaries." 26 C.F.R. § 54.9815–2713A(b)(3) (emphasis added).
- 46. Thus, by executing the self-certification and participating in the "accommodation" scheme, EWTN would ensure that its health insurance plan would serve as the trigger for a stream of payments to its employees for the specific purpose of increasing access to, and use of, contraceptive, sterilization, and abortifacient services.

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III. EWTN's Religious Objection

- 47. Beginning on or about July 1, 2014, EWTN must choose either to include coverage for contraceptive and abortifacient services, and related education and counseling, in its employee healthcare plan or else to "designate" its third party administrator as its fiduciary to provide a stream of free payments to its employees for exactly the same services.
- 48. EWTN's religious convictions equally forbid it from choosing either of these options. That is, EWTN cannot include coverage for contraceptive and abortifacient services, and related education and counseling, in its employee healthcare plan. Nor, for the same reason, can EWTN "designate" its third party administrator as its agent with fiduciary obligations to provide free payments for the same services.
- 49. From EWTN's religious perspective, "designating" its third party administrator as its agent to provide free payments for contraceptive and abortifacient services is precisely the same as directly providing those services.
- 50. Indeed, in a real way, such designation would be worse because it requires EWTN to ask someone else to do something that EWTN believes is wrong, meaning that EWTN remains complicit in the wrongdoing *and* has also caused someone else to commit wrongdoing.
- 51. Further, obeying the Mandate's requirement to participate in the provision of abortion-inducing drugs would contradict EWTN's public witness to Catholic beliefs, particularly Catholic teaching regarding respect for innocent human life and human dignity, that EWTN is committed to expressing at all times.
- 52. EWTN believes that its ministry and all of its resources are gifts from God that it must use to God's glory and for the good of all, to help bear the burdens and sufferings of others.

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It cannot allow those gifts to be co-opted to serve ends that it believes dishonor God and the dignity of the human person.

53. EWTN may not engage in conduct that may lead others to do evil, or lead others to

think that the EWTN condones evil. See Catechism No. 2284, 86 (instructing Catholic

institutions to avoid "scandal" and defining "scandal" as "an attitude or behavior which leads

another to do evil"; explaining that scandal can be caused "by laws or institutions"). This is

particularly true given EWTN's complete reliance on donations from fellow believers who

support its ministry. Participating in the provision of health benefits that violate Catholic

teaching poses a grave risk for EWTN as it interacts with Catholic faithful and others who share

our beliefs.

54. The declaration contemporaneously submitted to this Court by Catholic theologian

John Haas accurately explains in greater technical detail the theological basis for EWTN's

religious objection to participating in the Defendants' "accommodation."

55. The Mandate imposes government pressure and coercion on EWTN to change or

violate its religious beliefs.

56. Because EWTN refuses to comply with the Mandate and refuses to designate its third

party administrator to carry out the Mandate on its behalf, it faces crippling fines of \$100 each

day, "for each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1).

57. Depending on how the Defendants apply this penalty, EWTN could face tens of

millions of dollars of fines each year unless it facilitates the required coverage.

58. EWTN currently employs approximately 350 full-time employees. If the Defendants

levy the fine on a per-full-time-employee basis, EWTN would face daily fines of \$35,000, and

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annual fines of \$12,775,000. If the Defendants levy the fine on the basis of total number of employees *and* dependents receiving benefits, the fines would be orders of magnitude larger.

- 59. EWTN would also face regulatory action and lawsuits under ERISA. 29 U.S.C. § 1132.
- 60. Dropping its employee insurance is not a realistic option, however, because doing so would both violate EWTN's religious beliefs and place EWTN at a severe competitive disadvantage in its efforts to recruit and retain employees.
- 61. EWTN would also face fines of \$2000 per year for each of its employees for dropping its insurance plans, for an approximate total of \$700,000 per year in fines.
- 62. Although the government has recently announced that it will postpone implementing the annual fine of \$2000 per employee for organizations that drop their insurance altogether, the postponement is only for one year, until 2015. This postponement does not delay the crippling daily fines under 26 U.S.C. § 4980D.
- 63. EWTN's Catholic faith compels it to promote the spiritual and physical well-being of its employees by providing them with generous health services. It would violate EWTN's sincere religious beliefs to drop coverage for its employees and force them to buy insurance that is not only less generous, but also covers contraceptive and abortifacient drugs and devices.
- 64. In sum, EWTN's religious beliefs prohibit it from authorizing anyone to arrange for or make payments for contraceptives, sterilization, and abortifacients; take action that triggers the provision of contraceptives, sterilization, and abortifacients; or is the but-for cause of the provision of contraceptives, sterilization, and abortifacients. With respect to the accommodation, these religious principles mean that EWTN cannot:

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- a. Sign the self-certification form that on its face designates EWTN's third party administrator as its agent with a fiduciary obligation to make payments for contraceptives, sterilization, and abortifacients to EWTN's employees and other beneficiaries;
- Sign the self-certification form and thereby trigger the provision of free payments for contraceptive, sterilization, and abortifacient services to EWTN employees and their beneficiaries;
- c. Deliver the self-certification form to another organization that would then rely on it as an authorization to provide these contraceptives, sterilization, and abortifacients to EWTN's employees and beneficiaries, and to receive payments from the Defendants for that provision;
- d. Agree to refrain from instructing or asking its administrator or other organization not to deliver contraceptives, sterilization, and abortifacients to EWTN's employees;
- e. Participate in a scheme, the sole purpose of which is to provide payments for contraceptives, sterilization, and abortifacients to EWTN's plan employees or other beneficiaries.

Yet, under the guise of the "accommodation," the government requires EWTN to do all of these things or face massive penalties and disruption to its operations, its mission, and its relationship with its employees, donors, and audience.

65. EWTN is facing pressure on its religious beliefs now as it undertakes extensive planning to prepare for and provide its employee benefit plan. While EWTN's new insurance plan year does not start until July 1, 2014, preparing for that deadline requires several months of

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advance planning. Furthermore, EWTN is also being harmed now by the uncertainty that the Mandate creates for EWTN's health plan and its employees.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2013.

Michael Warsaw

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EXHIBIT H

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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

DECLARATION OF JOHN M. HAAS

- 1. My name is John M. Haas. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are either within my personal knowledge or are based on upon teachings of my church with which I am intimately familiar and which I believe to be true and correct.
- I am the President of The National Catholic Bioethics Center (NCBC), which was 2. established in 1972 to apply the teachings of the Catholic Church to ethical issues arising from developments in medicine, the life sciences, and civil law. Its message derives from the official teaching of the Catholic Church. NCBC is the largest Catholic publisher of books and periodicals on bioethics in the country.
- 3. I earned a Ph.D. in Moral Theology from The Catholic University of America, a Licentiate in Sacred Theology (S.T.L.) Degree in Moral Theology from the University of Fribourg, Switzerland, a Masters of Divinity from Nashotah House Theological Seminary, and have studied at the University of Munich and the University of Chicago Divinity School.

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4. Before becoming president of NCBC, I was the John Cardinal Krol Professor of

Moral Theology at St. Charles Borromeo Seminary of the Archdiocese of Philadelphia and an

adjunct professor at the Pontifical John Paul II Institute for Studies in Marriage and the Family in

Washington, DC. I also served as a faculty member of the Commission for Inter-professional

Education and Practice at Ohio State University and as Professor of Moral Theology at the

Pontifical College Josephinum in Worthington, Ohio.

5. In 2006, I was appointed by Pope Benedict XVI to the Pontifical Academy for Life

and then, in 2010, to my current position on the Directive Council of the Academy. I was also

appointed by Pope Benedict XVI as a Consultor to the Pontifical Council for Pastoral Care of

Health Workers.

6. I have served as a consultant for twenty years to the Pro-Life Committee of the

United States Conference of Catholic Bishops, and I serve as a consultant to the Health Care

Subcommittee of the Doctrine Committee of the United States Conference of Catholic Bishops.

7. I have written and lectured extensively on issues of moral theology and bioethics,

including on Catholic teaching regarding the sanctity of human life and the purposes of human

sexuality. I have testified before state and federal judicial and legislative committees, and to the

President's National Bioethics Advisory Commission.

Catholic Teaching on Contraception and Abortion

8. The Catholic Church is an institution that believes in truths revealed by God which

require assent on the part of the members of the Church. In other words, it is an institution that

believes in objective truth, and this is true even in the area of morality.

9. The Church also believes that God appointed a teaching authority (Magisterium)

comprised of successors to St. Peter (the Pope) and the successor to the twelve Apostles of Jesus

2

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(the Bishops) which was established to provide infallible guidance to human beings to attain

happiness arising from moral living and to help them secure eternal life. In the area of morality

the Church believes that all human beings are able to ascertain right from wrong by virtue of the

guidance of the natural moral law imparted by God to all his creation. Even though these moral

truths can be known to all through reason, God still revealed the truths of them in various ways,

most notably through what are known as the Ten Commandments.

10. The Catholic Church holds that even its teaching on the immorality of contraception

ought to be able to be understood by the light of natural reason. Nonetheless, the Church has

been given the gift of the Magisterium to interpret the natural law even as it applies to marital

acts. As Pope Paul VI said in his 1968 encyclical *Humanae Vitae*, which taught the immorality

of contraception:

No member of the faithful could possibly deny that the Church is competent in her magisterium to interpret the natural moral law. It is in fact indisputable, as Our predecessors have many times declared, (I) that Jesus Christ, when He communicated His divine power to Peter and the other Apostles and sent them to teach all nations His commandments, (2) constituted them as the authentic guardians and interpreters of the whole moral law, not only, that is, of the law of the Gospel but also of the natural law. For the natural law, too, declares the will of God, and its faithful observance is necessary for men's eternal salvation.

No. 4.

11. The Catholic Church has a long, consistent, and clearly articulated moral tradition.

Two matters about which the Church has been clear from its beginnings is the immorality, i.e.,

the sinful character, of both contraception and abortion. In fact, in the oldest extant Christian

writing outside Scripture, indeed, older than some portions of Scripture, is the Didache, or

Teachings of the Twelve Apostles (AD 96) which taught, "You shall not murder a child by

abortion nor kill that which is born."

3

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12. St. Augustine, Bishop of Hippo in Africa, wrote of both in his Marriage and

Concupiscence in the Fifth Century:

[The licentious cruelty of the marital couple] or their cruel licentiousness sometimes goes to such lengths as to procure sterilizing poisons, and if these are unavailing, in some way to stifle within the womb and eject the fetus that has been conceived. They want their offspring to die before it comes to life, or, if it is already living in the womb, to perish before it is born.

Along with St. Thomas Aquinas in the Twelfth Century, St. Augustine is probably one of the writers who has most clearly defined the orthodox traditions of the Catholic Church. In the passage just quoted one can see the Christian condemnation of both contraception and abortion.

- 13. One of the most thorough and scholarly researched books on the subject of the history of the Church's teaching on contraception is by Judge John T. Noonan, Ph.D., *Contraception: A History of Its Treatment by Catholic Theologians and Canonists* published by Harvard University Press in 1968. Judge Noonan surveys the consistent position taken by the Catholic Church on the topic of contraception and shows indisputably the Church's consistent teaching against the practice.
- 14. In modern times, the teachings of the Church have remained unchanged and consistent. In 1930 Pope Pius XI issued an encyclical entitled *Casti Connubbii* or *Chaste Marriage* in which he addressed the threats to marriage at that time. The Pope denounced the practice of contraception that was becoming a mainstay of the population control movement: "Any use whatever of marriage, in the exercise of which the act by human effort is deprived of its natural power of procreating life, violates the law of God and nature, and those who do such a thing are stained by a grave and mortal flaw."
- 15. In an address to the Italian Association of Catholic Midwives October 19, 1951, Pope Pius XII referenced the encyclical by Pius XI and repeated the condemnation of contraception: "This precept [of *Casti Connubii*] is as valid today as it was yesterday, and will be the same

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tomorrow and always, because it does not imply a precept of human law but is the expression of a law which is human and divine."

- 16. Pius XII went on to give greater specification to the condemnation of contraception in an *Address to the Society of Hematology* on September 12, 1958: "Sterilization is direct when it is effected by an action which seeks as means or end to render procreation impossible, whether the effect is permanent, as in ligature of the oviducts or spermatic ducts, or temporary, as in the use of anovulant pills."
- 17. In the mid-1960 all the Bishops of the Catholic Church gathered in Rome for what is called an Ecumenical Council which carries great authoritative weight since the Bishops all assemble with the Pope himself to address doctrinal and moral issues. In a document known as the *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)*, the issue of contraception was raised in the part of the document dealing with family life.

When it is a question of harmonizing married love with the responsible transmission of life, it is not enough to take only the good intention and the evaluation of motives into account; objective criteria must be used, criteria drawn from the nature of the human person and human action, criteria which respect the total meaning of mutual self-giving and human procreation in the context of true love; all this is possible only if the virtue of married chastity is seriously practiced. In questions of birth regulation the sons of the Church, faithful to these principles, are forbidden to use methods disapproved of by the teaching authority of the Church in its interpretation of the divine law.

December 7, 1965, No. 51.

18. A Vatican commission had been established in the 1960s by Pope John XXIII to study the moral regulation of births. Some Catholics thought that this might signal a change in the Church's consistent, millennia long teaching. John XXIII's successor Paul VI expanded the commission and at the same time tried to make it clear that the existence of the commission ought not to be seen as an indication that there might be a change in the Church's teaching. "It cannot be considered," he wrote, "not binding as if the magisterium of the Church were in a state

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of doubt at the present time, whereas it is rather in a moment of study and reflection concerning matters which have been put before it as worthy of the most attentive consideration."

19. Then in 1968 Pope Paul VI issued his encyclical *Humanae Vitae* which is considered

by Catholics to be the definitive teaching on contraception in our day. It engendered

considerable controversy inside and outside the Catholic Church because it reiterated the

received, and two millennia long, teaching with respect to contraception. Paul VI made the point

that the act of contraception itself is intrinsically disordered even if most of the sexual acts

engaged in by the married couple are open to children. He wrote: "It is a serious error to think

that a whole married life of otherwise normal relations can justify sexual intercourse which is

deliberately contraceptive and so intrinsically wrong."

20. In the language of Catholic moral theology, to call something intrinsically wrong

means that it is understood to be wrong in and of itself, by its very nature, and no good intentions

can make the action right or morally licit. Paul VI also spoke of the nature of the true marital act

manifesting the "the inseparable connection, willed by God and unable to be broken by man on

his own initiative, between the two meanings of the conjugal act: the unitive meaning and the

procreative meaning."

21. In fact, Pope Paul VI even warned in this encyclical of the intrusion of governments

into the most intimate relations of married couples with the promotion of methods of birth

regulation that would do violence to human dignity by promoting contraception. He wrote:

"Who will stop rulers from favoring, from even imposing upon their peoples, if they were to

consider it necessary, the method of contraception which they judge to be most efficacious?"

There are two ways in which the Pope predicted the situation that obtains in the United States

even now: first, the Department of Health and Human Services (HHS) has exercised the power

of the state to force employers to provide their employees contraception via insurance coverage; and second, HHS has defined "contraception" to include what are in fact abortifacients, such as the intrauterine device (IUD), and drugs such as levonorgestrel (Plan B) and ulipristal acetate (Ella One).

22. Pope John Paul II, who followed Paul VI, reaffirmed the constant teaching of the Church on contraception and appealed to the encyclical of Paul VI, *Humanae Vitae*. On October 8, 1979 he addressed the Catholic Bishops of the United States and declared:

In exalting the beauty of marriage you rightly spoke against both the ideology of contraception and contraceptive acts, as did the encyclical *Humanae Vitae*. And I myself today, with the same conviction of Paul VI, ratify the teaching of this encyclical, which was put forth by my Predecessor by virtue of the mandate entrusted to us by Christ.

AAS, 60, 1968, p. 485, Origins, Oct. 18, 1979.

23. On June 7, 1980, Pope John Paul II addressed a group of Indonesian Bishops and again reaffirmed the teaching of Paul VI and the Catholic moral tradition.

In the question of the Church's teaching on the regulation of birth we are called to profess in union with the whole Church the exigent but uplifting teaching recorded in the Encyclical *Humanae Vitae*, which my Predecessor Paul VI put forth 'by virtue of the mandate entrusted to us by Christ' (AAS 60, 1968). Particularly in this regard we must be conscious of the fact that God's wisdom supersedes human calculation and His grace is powerful in people's lives. Contraception is to be judged objectively so illicit that it can never, for any reason, be justified.

24. On November 5, 1981, John Paul II issued his Apostolic Exhortation *Familiaris Consortio*, *The Role of the Family in the Modern World*. A papal "Apostolic Exhortation" has more authoritative weight than an "Address" but the teaching about contraception has remained the same no matter the vehicle being used to impart it.

25. John Paul II wrote:

When couples, by means of recourse to contraception, separate these two meanings that God the Creator has inscribed in the being of man and woman and

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in the dynamism of their sexual communion, they act as 'arbiters' of the Divine plan and they 'manipulate' and degrade human sexuality - and with it themselves and their married partner - by altering its value of 'total' self-giving. Thus the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other. This leads not only to a positive refusal to be open to life but also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality.

No. 32.

26. On May 30, 1983, the same Pope addressed the first Plenary Assembly of the Pontifical Council for the Family and discussed the necessity to be faithful to the teaching of *Humanae Vitae* and *Familiaris consortio*:

It is absolutely necessary that the pastoral action of Christian communities be totally faithful to the teachings of the Encyclical *Humanae Vitae* and the Apostolic Exhortation *Familiaris consortio*. It would be a grave error to set up pastoral requirements in opposition to doctrinal teaching, since the very first service that the Church must perform for people is to tell them the truth of which she is neither the author nor the master.

Osservatore Romano, June 6, 1983.

- 27. From such statements it is clear that the Church does not consider the teaching on contraception to be a matter of individual, subjective sentiment but an articulation of the will and intent of the Creator Himself as manifested in nature and in the constant teaching of the Magisterium, or teaching authority of the Church, i.e., the Pope and the bishops of the Church.
- 28. On March 14, 1988, Pope John Paul II addressed a Congress on the Family which occurred close to the 20th anniversary of *Humanae Vitae*. At that Congress he declared that the Church's teaching on contraception contained in that encyclical "belongs to the permanent patrimony of the Church's moral doctrine." He continued, "The doctrine expounded in the encyclical *Humanae Vitae* thus constitutes the necessary defense of the dignity and truth of conjugal love."

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29. On August 6, 1993, John Paul II issued an encyclical entitled *The Splendor of Truth* (*Veritatis splendor*) in which he critiqued certain erroneous moral theories which were being taught in some Catholic seminaries. In that encyclical, he reiterated the fact that certain actions, such as contraception, must be considered as "intrinsically evil". He wrote:

With regard to intrinsically evil acts, and in reference to contraceptive practices whereby the conjugal act is intentionally rendered infertile, Pope Paul VI teaches: 'Though it is true that sometimes it is lawful to tolerate a lesser moral evil in order to avoid a greater evil or in order to promote a greater good, it is never lawful, even for the gravest reasons, to do evil that good may come of it (cf. Romans 3:8) - in other words, to intend directly something which of its very nature contradicts the moral order, and which must therefore be judged unworthy of man, even though the intention is to protect or promote the welfare of an individual, of a family or of society in general.'

No. 80.

30. On November 16, 1998, John Paul II addressed a Congress being held in Rome on the moral means of regulating births through periodic abstinence rather than through contraception. His message was directed to Bishop Elio Sgreccia, who is now a Cardinal, who had organized the conference.

The courageous effort to promote these methods in obedience to the teaching of *Humanae Vitae*, *Familiaris consortio* and *Evangelium vitae*, after a difficult start surrounded by the misunderstanding of public opinion, today enjoys growing scientific recognition and is confirmed in the serenity and peace of married couples who are committed to living periodic continence and understand its value and spirit. These results can instill new courage in the face of the worrying consequences of a false sexual freedom for which contraception provides the incentive and means, increasing the dulling of consciences and the eclipse of values. The harmful campaigns of certain demographic policies, which attempt to pass off contraception as licit and right, and which spread and impose on individuals and peoples an instrumental and utilitarian view of life, must be answered with every initiative that can support scientifically and with correct information the validity of natural methods, in accordance with the Church's constant teaching.

No. 2.

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31. In 1998, Pope John Paul II issued one of the most forceful encyclicals of his pontificate, entitled *The Gospel of Life* (*Evangelium vitae*). In that encyclical the Pope links contraception with abortion in very clear and strong terms, insisting that both are grave evils. This will be discussed in somewhat greater detail when the question of abortion is discussed. For now, we can allow one quotation from that document to show the constant, unchanging character of Catholic teaching on contraception, particularly since it can so clearly be applied to the HHS Mandate. "It is therefore morally unacceptable to encourage, let alone impose, the use of methods such as contraception, sterilization and abortion in order to regulate births." *See* No. 91.

- 32. In May of 2008 Pope Benedict XVI addressed the encyclical *Humanae vitae* on the occasion of the 40th anniversary of its having been issued by Pope Paul VI. "What was true yesterday remains true even today," he said. "The truth expressed in *Humane vitae* doesn't change; on the contrary, in the light of new scientific discoveries it is ever more up to date." He continued, "No mechanical technique can substitute the act of love that two married people exchange as a sign of a greater mystery."
- 33. There simply can be no suggestion that the Catholic Church has not consistently and vigorously taught that contraception is wrong in and of itself and that its use constitutes a grave sin. The Catholic Church does hold to the objective fact that there are inherently disordered acts. However, whether guilt or sin can be attributed to individuals engaging in disordered acts requires that the individuals know that the acts are sinful or disordered and that they freely choose to engage in those acts. Such a judgment would have to do with the subjective imputation of guilt for the disordered act in which one has engaged. However, no one can

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contest the fact that the teaching of the Church on inherent disorder of contraception has been consistent.

- 34. The same can be said for the Church's teaching on abortion. The jurist and philosopher John Noonan compiled an impressive history of the West's consistent teaching on this topic as well in his book *An Almost Absolute Value in History: The Morality of Abortion: Legal and Historical Perspectives* (Cambridge, MA: Harvard University Press, 1970). This book outlines not only the Church's position on abortion but that of western jurisprudence in general. Another excellent compendium from the Catholic perspective was published the same year by the philosopher/theologian Germain Grisez, *Abortion: The Myths, the Realities and the Arguments*. Both books contain ample proof of the Church's consistent, unchanging teaching.
- 35. Abortion has been condemned by the Church from its very beginnings. The teaching contained in the *Didache* has already been mentioned. Another example of the Church's consistent teaching can be found in the *Letter of Barnabas* dating from the year 74: "Thou shalt not slay the child by procuring abortion; nor, again, shalt thou destroy it after it is born."
- 36. Tertullian, the great Latin Father of the Church, wrote in his *Apologia* in 197: "In our case, a murder being once for all forbidden, we may not destroy even the fetus in the womb . . . To hinder a birth is merely a speedier man-killing; nor does it matter whether you take away a life that is born, or destroy one that is coming to birth." *Id.* at 9:8. He went on later in the Letter: "Now we allow that life begins with conception because we contend that the soul also begins from conception; life taking its commencement at the same moment and place that the soul does." *Id.* at 27.
- 37. The Council of Ancyra in 314 spoke of the canonical sanctions that had been imposed on women who were guilty of procuring abortions.

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Concerning women who commit fornication, and destroy that which they have conceived, or who are employed in making drugs for abortion, a former decree excluded them until the hour of death, and to this some have assented. Nevertheless, being desirous to use somewhat greater leniency, we have ordained that they fulfill ten years [of penance], according to the prescribed degrees.

See Canon 21. St. Basil the Great wrote in his *First Canonical Letter* in the year 374: "Let her that procures abortion undergo ten years' penance, whether the embryo were perfectly formed, or not." *See* Canon 2. The Council and St. Basil are mentioned because they deal with the canonical penalties imposed on those procuring abortions and not simply the moral judgment made by the Church. The Catholic Church has at different times imposed different canonical sanctions for this action. For example, the penalty now in the Catholic Church for procuring, or helping one procure, an abortion is automatic excommunication (*latae sententiae*). The very act of procuring an abortion results in the punishment of excommunication rather than the remedial penalty having to be applied by Church authority. However, despite different legal sanctions at different times, Catholic teaching on the intrinsic evil and great gravity of abortion has never changed.

38. In the 12th Century the existing canons of the Church were collected into what was known as the *Decretum Gratiani*, or *Gratian Decretals*. There a distinction was made between the destructive acts performed on "formed" rather than "unformed" offspring in the womb. It was thought by some that the immortal soul was not infused into the fetus until some point during its later development. Hence the Decretals stated: "He is not a murderer who brings about an abortion before the soul is in the body." The great medieval theologian Thomas Aquinas believed as well that the immortal soul entered the body at a later stage of development and classified sins differently depending on when the destructive act took place: "This sin, although grave and to be reckoned among misdeeds and against nature . . . is something less than homicide . . . unless one procures the abortion of an already formed fetus."

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39. However, the notion that the immortal soul was infused later in the child's development and could be detected by the subjective awareness of "quickening" or movement of the child perceived by the mother, was based on a primitive biology which did not recognize that organized growth is present from the moment of the fusion of the nuclei of the male and female gametes.

- 40. Even though the theologians made different classifications for the sinful action, the Church never taught that abortion was anything other than a gravely sinful act.
- 41. In 1869 Pope Pius IX issued his Papal Bull *Apostolicae Sedis moderationi* and rescinded the distinction between the formed and unformed unborn with respect to the canonical penalties for abortion. He declared that anyone who procured an abortion, whether the child was formed or unformed, would suffer the penalty of excommunication which could be removed only by the bishop. Some have erroneously argued that the Catholic Church did not take a position against abortion until 1869 because of this Bull. In fact, abortion was always considered to be a mortal sin, that is, a sin which spiritually destroys the soul of the one who commits the act, despite the differing canonical penalties which were imposed.
- 42. It must be said that the Catholic Church has found itself confirmed in its constant opposition to abortion as a result of the discoveries of modern science. It is now known scientifically that a completely new and genetically unique human being comes into existence at the time of the fusion of the nuclei of the male and female gametes.
- 43. In modern times the Catholic Church has continued to condemn abortion. Pius XI in his previously mentioned encyclical *Casti Connubii* addressed not only the immorality of contraception but of abortion as well.

As to the "medical and therapeutic indication" [for abortion] . . . however much we may pity the mother whose health and even life is gravely imperiled in the

performance of the duty allotted to her by nature, nevertheless what could ever be a sufficient reason for excusing in any way the direct murder of the innocent? This is precisely what we are dealing with here. Whether inflicted upon the mother or upon the child, it is against the precept of God and the law of nature: "Thou shalt not kill!" The life of each is equally sacred, and no one has the power, not even the public authority, to destroy it. . . . Upright and skillful doctors strive most praiseworthily to guard and preserve the lives of both mother and child; on the contrary, those show themselves most unworthy of the noble medical profession who encompass the death of one or the other, through a pretense at practicing medicine or through motives of misguided pity.

No. 64.

44. Pius XI went on to speak to the duty of public authorities to protect the unborn.

Those who hold the reins of government should not forget that it is the duty of public authority by appropriate laws and sanctions to defend the lives of the innocent, and this all the more so since those whose lives are endangered and assailed cannot defend themselves. Among whom we must mention in the first place infants hidden in the mother's womb. And if the public magistrates not only do not defend them, but by their laws and ordinances betray them to death at the hands of doctors or of others, let them remember that God is the Judge and Avenger of innocent blood which cried from earth to Heaven.

No. 67.

45. In 1974 the Congregation for the Doctrine of the Faith, the most authoritative doctrinal office of the Vatican, issued its *Declaration on Procured Abortion* in which it reiterated the Church's teaching on abortion and stated that life must be respected from its very inception:

From the time that the ovum is fertilized, a new life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already. To this perpetual evidence . . . modern genetic science brings valuable confirmation. It has demonstrated that, from the first instant, the program is fixed as to what this living being will be: a man, this individual-man with his characteristic aspects already well determined.

No. 12.

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- 46. This document also insists that life be protected by the state and that "man can never obey a law which is in itself immoral, and such is the case of a law which would admit in principle the liceity of abortion." No. 22.
- 47. All contemporary Popes have condemned the practice of abortion, but none so strongly as Pope John Paul II in his encyclical *Evangelium vitae*.
- 48. One thing he does in the encyclical is to illustrate the mentality that links contraception and abortion, both of which evils would be covered by insurance under the HHS Mandate and both of which are considered gravely sinful by the Catholic Church.

It is frequently asserted that contraception, if made safe and available to all, is the most effective remedy against abortion. The Catholic Church is then accused of actually promoting abortion, because she obstinately continues to teach the moral unlawfulness of contraception. When looked at carefully, this objection is clearly unfounded. It may be that many people use contraception with a view to excluding the subsequent temptation of abortion. But the negative values inherent in the "contraceptive mentality"—which is very different from responsible parenthood, lived in respect for the full truth of the conjugal act—are such that they in fact strengthen this temptation when an unwanted life is conceived. Indeed, the pro-abortion culture is especially strong precisely where the Church's teaching on contraception is rejected. Certainly, from the moral point of view, contraception and abortion are specifically different evils: the former contradicts the full truth of the sexual act as the proper expression of conjugal love, while the latter destroys the life of a human being; the former is opposed to the virtue of chastity in marriage, the latter is opposed to the virtue of justice and directly violates the divine commandment "You shall not kill." But despite their differences of nature and moral gravity, contraception and abortion are often closely connected, as fruits of the same tree.

No. 13.

49. The Pope goes on in the encyclical to condemn the practice of abortion in the strongest language that could be used by a Pope to impress upon his readers the absolutely authoritative and unchanging character of this Catholic teaching.

Therefore, by the authority which Christ conferred upon Peter [the first Pope] and his Successors [subsequent Popes], in communion with the Bishops-who on various occasions have condemned abortion and who in the aforementioned

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consultation, albeit dispersed throughout the world, have shown unanimous agreement concerning this doctrine-I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium. No circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church.

No. 62.

50. The language used in this declaration is very close to what the Second Vatican Council used to declare what is an infallible teaching of the Pope and which requires unconditioned acceptance by the members of the Catholic Church.

The Roman Pontiff, head of the college of bishops, enjoys . . . infallibility in virtue of his office, when, as supreme pastor and teacher of all the faithful...he proclaims by a definitive act a doctrine pertaining to faith or morals. For that reason his definitions are rightly said to be irreformable by their very nature and not by reason of the assent of the Church, inasmuch as they were made with the assistance of the Holy Spirit promised to him in the person of blessed Peter himself. Although the bishops, taken individually, do not enjoy the privilege of infallibility, they do, however, proclaim infallibly the doctrine of Christ on the following conditions: namely, when, even though dispersed throughout the world but preserving for all that amongst themselves and with Peter's successor the bond of communion, in their authoritative teaching concerning matters of faith and morals, they are in agreement that a particular teaching is to be held definitively and absolutely. This is still more clearly the case when, assembled in an ecumenical council, they are, for the universal Church, teachers of and judges in matters of faith and morals, whose decisions must be adhered to with the loyal and obedient assent of faith.

Lumen gentium, The Dogmatic Constitution on the Church, 25. 1965.

51. The HHS Mandate does not cover what some would view as an abortion—*i.e.*, a surgical abortion. However, the Catholic Church has made abundantly clear that life must be protected from the first moment of conception and that the strong moral admonitions found in the encyclical *Evangelium vitae* would be applicable to any intervention to end the life of a human being anywhere along the continuum of life. In 1980 the Congregation for the Doctrine

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of the Faith issued *Donum vitae*, an ethical analysis of some of the means used to overcome infertility. In it, the Church stresses the inviolability of human life from the very first moment of conception.

The fruit of human generation, from the first moment of its existence, that is to say from the moment the zygote has formed, demands the unconditional respect that is morally due to the human being in his bodily and spiritual totality. The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.

See I.1.

52. The Congregation for the Doctrine of the Faith issued another document dealing with bioethical questions on September 8, 2008, entitled *Dignitas Personae*, which begins with the declaration: "The dignity of a person must be recognized in every human being from conception to natural death." The articulation of Catholic teaching found in *Dignitas Personae* makes it clear that any means to destroy a human being at any point in his or her life is a violation of human dignity.

Alongside methods of preventing pregnancy which are, properly speaking, contraceptive, that is, which prevent conception following from a sexual act, there are other technical means which act after fertilization, when the embryo is already constituted, either before or after implantation in the uterine wall. Such methods are *interceptive* if they interfere with the embryo before implantation and *contragestative* if they cause the elimination of the embryo once implanted. . . . As is known, abortion is 'the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth'. [The Gospel of Life, 58] Therefore, the use of means of interception and contragestation fall within the *sin of abortion* and are gravely immoral. Furthermore, when there is certainty that an abortion has resulted, there are serious penalties in canon law.

53. The United States Conference of Catholic Bishops had already articulated this moral position in their *Ethical and Religious Directives for Catholic Health Care Services* (2009). In

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Directive 45, which forbids abortion in Catholic health care facilities, there is mention of the socalled interceptive interventions as also being disallowed.

Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context includes the interval between conception and the implantation of the embryo.

Id. (emphasis added).

- 54. One of the grave problems with the HHS Mandate is that it requires coverage for devices and drugs that the FDA considers to be contraceptive. However, some of them are clearly not contraceptive but rather abortifacient. The mechanisms of Intrauterine Devices (IUDs) are known to prevent implantation of the embryos and hence to be abortifacient devices, and their use would be considered immoral by the Catholic Church as being "interceptive." The same is true of "Ella One" which is given up to five days after intercourse without the use of contraception. Since a child is conceived in the fallopian tube and migrates to the endometrium where it implants about day 5 after conception, this drug does not function as a contraceptive by suppressing ovulation but rather, again, as an abortifacient or, in the words of *Dignitas Personae*, as an interceptive. Hence the Catholic Church would attach to its use the moral gravity of abortion rather than contraception.
- 55. There is some dispute over whether levonorgestrel functions principally as an anovulant, which could be the case only if given before the surge of the luteinizing hormone which brings about ovulation, or as an abortifacient/interceptive. There are those who argue that it never has an abortifacient effect. However, several scientific sources would dispute that claim. The website of the Department of Health and Human Services, the *Physician's Desk Reference* and the manufacturer of levonorgestrel all point to three modes of action: it can function as an

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anovulant, it can interfere with sperm motility and it can prevent implantation of the embryo in the endometrium. Therefore this drug, too, could function as an abortifacient and fall under the moral condemnation of abortion by the Catholic Church.

- 56. The HHS Mandate for "preventative services" to avoid diseases for women would also contradict Catholic teaching by including contraception, surgical sterilizations and abortifacient drugs and devices as though fertility were a pathology and pregnancy a disease rather than seeing human fertility and reproductive cycles as manifestations of God's creative intent. After all, fertility is a sign of good health.
- 57. It is quite clear that the Catholic Church has consistently taught that contraception and abortion are gravely immoral acts. The Catholic Church and its agencies would view providing insurance coverage for these activities as cooperating with evil and facilitating profoundly immoral acts which do violence to human dignity and to the good of the social order. The HHS Mandate would cause the Church and its institutions to violate the sacred character of their consciences which must always remain inviolate. As the Second Vatican Council taught in the *Pastoral Constitution on the Church in the Modern World (Gaudium et spes*):

In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. For man has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged.(9) Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths. (16)

Moral Complicity

58. To violate one's conscience is to violate one's own dignity and manifests a willingness to act against God and against one's neighbor. Even with the so-called "accommodation" for those self-proclaimed religious institutions that have moral objections to

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the provision of insurance coverage for these gravely immoral activities, they will still be forced into a violation of their consciences. The "accommodation" supposedly passes to the insurance companies or to the third party administrators of self-insured entities the requirement to cover the cost of such coverage with no charge to the objecting institution. The insurance companies or administrators will directly notify the women of reproductive age who are beneficiaries on the ministries' health plans and will inform them of the contraceptive coverage. But it is the action of the covered objecting institution which "triggers" this constellation of events; it informs the insurance company or administrator that it objects to the coverage which leads the insurance company or administrator to contact the employees whose contact information has been provided by the objecting employer! This notification will also be sent to the minor daughters of such employees without their parents' knowledge or consent. This would violate the parents' role as the guardians and moral educators of their children.

- 59. The Catholic Church is keenly aware that its members live in a world with individuals who do not always share their most profound and cherished moral beliefs and that Catholics must at times interact with individuals doing immoral things in order to achieve a great good that could be realized in no other way or to avoid a grave evil. Catholics are guided in making decisions in such situations by a moral principle that has been developed over centuries known as The Principle of Material Cooperation in Evil.
- 60. The Church's moral tradition recognizes that there are fundamentally two ways in which one can cooperate in the actions of the principal agent of an evil deed: formally and materially.
- 61. Formal cooperation is applied to the situation in which the "cooperator" agrees with and intends the same evil being perpetrated by the principal agent. Such a cooperator would

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incur the same moral opprobrium and guilt as the principal agent. Criminal law recognizes this as well. The one who knowingly and willingly provides the gun to the murderer for the purpose of the murder is an accomplice to murder and will be appropriately punished.

- 62. Material cooperation refers to the situation in which the "cooperator" does not share in the intention of the principal agent of the evil but considers himself or herself morally compelled to cooperate with him or her to achieve some great good or to avoid a great evil. One can never simply cooperate with an evil-doer since this would violate the principal commandment to love everyone. It would hardly be an expression of love or charity to assist someone else in doing evil since this would not ultimately be in the best interest of the principal agent of the evil. There must always be a justifying reason even for licit material cooperation.
- 63. At times one may consider himself or herself compelled to cooperate with an evil doer when there is no other way to achieve an important good. For example, one might be a parking attendant at an acute care hospital where abortions are sometimes performed but one needs the job to support the family. Certain distinctions must be used when considering "material cooperation". The more grave the evil, the greater one's distance from the causation of the evil has to be. Distinctions are made between "immediate" or "mediate" material cooperation. "Immediate" material cooperation would mean that, even though one did not agree with the evil being done by the principal agent, one is cooperating in an essential circumstance of the evil. "Mediate" material cooperation refers to cooperation in a non-essential circumstance.
- 64. The parking attendant at an acute care hospital where abortions are sometimes performed would be engaged in what might be called remote mediate material cooperation with the evil which would be justified by the need to support his family. The attendant would not be doing anything wrong in and of itself and would not be involved in any essential circumstance to

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the evil taking place. On the other hand, a Catholic anesthesiologist scheduled to assist in an abortion could not morally do so. Such cooperation would involve the Catholic in an essential circumstance of the abortion taking place and could not be morally justified even for the sake of preserving one's job for the support of the family. The taking of an innocent human life is so grave that one could not justify such material cooperation under any circumstances and the provision of the anesthesia would certainly constitute an essential circumstance.

- 65. Were a religious non-profit employer to comply with the HHS Mandate's "accommodation," the employer would be guilty of immoral cooperation with evil in many ways. It should be quite clear how the Catholic Church views both contraception and abortion to be very gravely immoral, even though abortion is more grave than contraception since it involves the taking of an innocent human life. When the employer executes the self-certification form required under the "accommodation," it nominally declares itself to be "religious" with "moral and religious objections" to contraception and abortion but thereby actually becomes the agent that enables a host of immoral actions to follow. Not only is notification provided to the insurance companies that they have to cover the cost of the immoral practices for the women of child-bearing age who are employees or in the employees' families, the certificate that is submitted is what brings about these actions and therefore serves as an essential circumstance to the provision of the evil itself to which the employer is objecting! This simply could not be justified or excused by the Principle of Material Cooperation in Evil, and thus must be recognized as an immoral act.
- 66. An analogous situation arose in Germany a number of years ago. Technically abortion is illegal in Germany. However, abortions can take place without prosecution up to the first twelve weeks for health reasons after a pregnant woman has received state-mandated

counseling to find an alternative to an abortion. The German government authorized and paid the Catholic Church, along with other agencies, to provide this counseling. The Church took part in this practice with the hope that its counselors could dissuade pregnant women from having an abortion. However, the practice gave rise to considerable debate in Catholic circles over the legitimacy of such involvement based on the Principle of Material Cooperation. Once the counseling was provided, the Catholic agency had to issue a certificate indicating that the woman had received the counseling. If the woman rejected the counsel of the Church and still wanted to have the abortion, she could present the certificate to authorize the abortion to take place.

- Or The German bishops were so divided on the issue that the matter was submitted to the Vatican which made the judgment that the issuance of the certificate actually enabled the abortion to take place and therefore could not be justified. In a January 1998 letter from Pope John Paul II to the bishops, the quandary was readily admitted. He wrote: "[The] certification confirms counseling favoring the protection of life while, at the same time, it remains the necessary condition for abortion without punishment." The Pope said that after "a fundamental consideration of all the arguments, I cannot escape the view" that the practice should cease.
- 68. Analogously, the issuance of the self-certification form by the "accommodated" religious non-profit organization with profound objections to covering the expenses of contraception, sterilization and abortifacient drugs and devices becomes the "necessary condition" for these very things to take place, including the notification of minor girls of child-bearing age that such coverage is being provided to them without parental knowledge or consent.

Conclusion

69. In sum, the HHS Mandate would force Catholic institutions and individuals to violate their consciences or face draconian and unjust penalties imposed by the state. This situation is a grave injustice and profoundly immoral.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2013.

John M. Haas, Ph.D., S.T.L., M.Div.

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Exhibit I

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EBSA FORM 700-- CERTIFICATION (To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year. Name of the objecting organization Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization Mailing and email addresses and phone number for the individual listed above I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization. Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is

that it holds itself out as a religious organization.

Signature of the individual listed above

Date

true and correct. I also declare that this certification is complete.

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The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

- (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
- (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

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Exhibit J

Case 1:13-cv-00521-CG-C Document 29-12 Filed 12/31/13 Page 2 of 126 Case: 14-12696 Date Filed: 08/04/2014 Page: 169 of 263

IN THE UNITED STATES DISTRICT	COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA	
REACHING SOULS INTERNATIONAL, INC.,) TRUETT-MCCONNELL COLLEGE, INC.,) GUIDESTONE FINANCIAL RESOURCES) OF THE SOUTHERN BAPTIST CONVENTION,)	
Plaintiffs,)	
-vs-	Case No. CIV-13-1092-D
KATHLEEN SEBELIUS, SECRETARY OF U.S.) DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF HEALTH) AND HUMAN SERVICES, THOMAS E. PEREZ,) SECRETARY OF U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF LABOR, JACOB J. LEW, SECRETARY OF THE TREASURY, SECRETARY OF THE TREASURY,) Defendants.	
Defendants.	
* * * * *	
TRANSCRIPT OF PROCEEDINGS	
HAD ON DECEMBER 16, 2013	
BEFORE THE HONORABLE TIMOTHY D. DEGIUSTI	
U.S. DISTRICT JUDGE, PRESIDING	
* * * * * *	

APPEARANCES

Mr. Mark Rienzi, Ms. Adèle Leim, and Mr. Daniel Blomberg, THE BECKET FUND, 3000 K St. NW, Suite 220, Washington, DC 20007-5153, appearing for the plaintiffs

Mr. J. Dillon Curran, CONNER & WINTERS, 1700 One Leadership Square, 211 North Robinson, Oklahoma City, Oklahoma 73102-7101, appearing for the plaintiffs

Mr. Carl C. Scherz and Mr. Seth M. Roberts, LOCKE LORD, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201, appearing for the plaintiffs

Mr. Benjamin L. Berwick, U.S. DEPARTMENT OF JUSTICE, 20 Massachusetts Avenue, Washing DC 20530, appearing for the defendants

CHRISTINA L. CLARK, RPR, CRR
United States Court Reporter
200 N.W. Fourth Street, Suite 5419
Oklahoma City, Oklahoma 73102
christina_clark@okwd.uscourts.gov - ph(405)609-5123

PROCEEDINGS

(The following proceedings were had December 16, 2013, with Court and counsel present:)

THE COURT: Good morning. This is the case of Reaching Souls International, Inc., Truett-McConnell College, Inc., GuideStone Financial Resources of the Southern Baptist Convention vs. Kathleen Sebelius, Secretary of U.S. Department of Human -- of Health and Human Services, et al., Case No. CIV-13-1092-D.

Appearances, please.

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MR. RIENZI: Mark Rienzi for Plaintiff Reaching
Souls International, Truett-McConnell College, and GuideStone.
With me at counsel table I have Dillon Curran from Conner and
Winters, our local counsel; from Locke Lord, we have Carl
Scherz and Seth Roberts; I have my colleagues from The Becket
Fund, Adèle Keim and Daniel Blomberg.

THE COURT: All right. Thank you.

MR. BERWICK: Good morning, your Honor. Ben Berwick for the government.

THE COURT: All right. Thank you.

I know that with respect to, for instance, the question of subject matter jurisdiction, the burden falls on the party asserting jurisdiction, but in order to just kind of deal with the motions in a logical way, I think I'll ask the government to go ahead and present --

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to do with the TPA, they can simply pass the self-certification form on to GuideStone, who can then pass that form on to the TPA. There is no requirement that it go directly from the employers to the third-party administrator. I'm not sure if he made that point as another injury for purposes of standing. I just want to make that clear. Mr. Rienzi questioned why the government wouldn't just back off the requirement, the self-certification requirement. I think the simple answer to that question is in order to -in order to benefit from an accommodation, in order to qualify for an accommodation, an organization has to do a set of things. One of those is filling out the self-certification requirement. They're essentially saying for us just remove that requirement. But I think to do that the agencies would really have to engage in new rule-making, new notice and common rule-making. So it's simply not -- it's not an easy thing to I mean, it's certainly possible, but it would require a new rule-making. It would take time. There would have to be notice and comment. The thrust of our argument is that there is no need to do that because plaintiffs aren't actually injured by having to fill out the self-certification when that self-certification does not require TPAs to provide -- to provide this coverage.

That reminds me, your Honor -- I'm sorry to jump around a

little bit, but there was -- I want to just say one other thing about the certification form itself.

Mr. Rienzi also pointed to the language in the certification that says this certification is an instrument under which the plan is operated. Again, that language is only relevant for ERISA plans. I don't want to get into too much technical detail about this, but for an ERISA plan -- in order for the TPA, essentially, to have the authority to provide coverage, the self-certification has to designate -- has to be an instrument under which the third-party administrator is designated as a provider of those specific benefits.

For the purposes of this case, where ERISA does not apply, that language is — it simply doesn't apply either. The instrument does not designate the TPA as an administrator of the benefit. If the TPA were to provide this coverage, which is entirely speculative, it would be done outside the plan. It would not be part of the plan in any way. So I just wanted to clarify that.

So Mr. Rienzi, I think, said the self-certification is a lie. There is nothing about it that's a lie. Most of the language he referred to really applies only to the TPAs of ERISA plans.

Mr. Rienzi also mentioned the cost of filling out the form. I think I would concede, your Honor, that if that's an

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injunction purposes -- let me separate them, because I think
the arguments are a little different and I will explain why.
     But for standing purposes, at least, we think what they
have provided regarding Highmark is uncertain enough that it's
still too speculative to satisfy the imminent injury
requirement for purposes of standing.
          THE COURT: Okay. Well, let's assume --
         MR. BERWICK: And you disagree with that.
          THE COURT: Let's assume that standing --
          MR. BERWICK: Okay.
          THE COURT: -- is established.
         MR. BERWICK: So for substantial burden purposes --
so if -- so, again, let's assume that Highmark says, yeah,
we're going -- we are going to do this and we are going to do
it because -- and, again, I don't understand this to be the
case or I think it's totally unclear, but let's say they say
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that we would get. So there is a couple issues with that.

First of all, substantial burden -- what plaintiffs'

argument in that case would essentially be, that when we sign

the self-certification, the consequences of signing that form

is that a third party, our TPA, will do something that we

don't want them to do. But this type of consequences-based

objection does not -- is not enough for substantial burden

we're going to do it because we want to take advantage of the

benefits that -- you know, the user fee reimbursement benefits

under RFRA.

THE COURT: Well, right now, as the situation exists, the plaintiffs know with a great degree of certainty, I would submit, that a TPA involved in their plan is not going to provide these services because they're contractually obligated to provide certain things and not others.

MR. BERWICK: Right.

THE COURT: So right now, under the status quo, they have that assurance. But if they self-certify, then are they not empowering a TPA -- even if we accept the government's position that we don't have the ability to enforce it, are they not empowering a TPA to provide these services and seek reimbursement?

MR. BERWICK: I think I take issue with the word "empowering." I will -- I will concede that the TPA is eligible -- once -- if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.

But that issue aside, the reimbursement issue aside, I don't think the self-certification really does anything beyond what would -- the TPA would be allowed to do prior to these regulations. Because the government can't -- so in the ordinary case where we are not talking about a self-insured church plan, once the employer signs a self-certification, the TPA is required to provide coverage.

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* * * * * * * REPORTER'S CERTIFICATE I hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter. s/CHRISTINA L. CLARK Christina L. Clark, RPR, CRR 2.3

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Exhibit K

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                UNITED STATES DISTRICT COURT
                EASTERN DISTRICT OF NEW YORK
3
     THE ROMAN CATHOLIC ARCHDIOCESE )
     OF NEW YORK, et al.,
6
            Plaintiffs,
                                       ) Case No.:
7
                                       12-cv-02542(BMC)
     vs.
8
    KATHLEEN SEBELIUS, et al.,
9
            Defendants.
10
11
12
13
                  VIDEOTAPED DEPOSITION OF
14
       U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
15
                 By and Through Its Designee
16
                         GARY M. COHEN
17
                      Washington, D.C.
18
                   Tuesday, April 16, 2013
19
20
21
22
23
24
    Reported by: John L. Harmonson, RPR
25
     Job No. 59521
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Case 1:13-cv-00303-AGSC Document 529-13-iled 41/12/313/13 Page Geof 177

Page 2 G. COHEN April 16, 2013 10:07 a.m. Videotaped Deposition of GARY M. COHEN, as designee of U.S. Department of Health and Human Services, held at the offices of Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C., pursuant to Notice, before John L. Harmonson, a Registered Professional Reporter and Notary Public of the District of Columbia.

Page 33

- 1 G. COHEN the Department could have selected? I think the Department has now Α. proposed an alternative means that's different from what was in the final rule, yes. At the time that -- just staying 0. within our February time frame. At the time of the issuance of the February rule, were there other alternative means that would have been 10 available to get the same result? 11 Well, I think -- I think in the final Α. 12
- rule we instituted a temporary enforcement safe 13 harbor for a year, and we said we were going to 14 look into whether there were alternative means 15 that might further the government's interests but 16 also accommodate the objections of religious 17 employers who were not exempted under the final 18 So I don't know if we had come up with an alternative means at that moment but we were 20 going to try to find an alternative means.
- Q. I understand.
- When did you start looking into the
- question of alternative means? When the rule was
- first issued back in August of 2010?
- A. I think that we made a decision to

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Page 34 1 G. COHEN 2 seek out alternative means in the course of 3 reviewing comments for the amended interim final 4 rule. And by the time we published the final 5 rule we had made that commitment that we would 6 seek out alternative means. I don't know that we 7 had begun trying to figure out what that means 8 might be until subsequently. And why would -- What was the Q. 10 evidentiary basis for the conclusion that 11 individuals who work for entities like ArchCare 12 and Catholic Health Services of Long Island are 13 more likely not to object to the use of 14 contraceptives and therefore are more likely to 15 use contraceptives? 16 I think that conclusion was based on **A**. 17 just logic and common sense on the one hand and, 18 secondly, on the evidence that a very large 19 majority -- I've seen figures up to 95 percent of 20 sexually active women in the United States use 21 contraceptives at one point or another. 22 So there was no evidence particular to **O**. 23 those types of institutions? 24 No, I don't believe so. **A**. 25 If you look at page 13 in the response Q.

Page 64 G. COHEN THE VIDEOGRAPHER: This is the end of the videotaped deposition. Off the record at 12:13 p.m. (Deposition adjourned at 12:13 p.m.) GARY M. COHEN Subscribed and sworn to before me this ____ day of _____, 2013.

		Page	65
1	G. COHEN		
2	CERTIFICATE		
3			
4	DISTRICT OF COLUMBIA		
5			
6	I, JOHN L. HARMONSON, a Notary Public		
7	within and for the District of Columbia, do		
8	hereby certify:		
9	That GARY M. COHEN, the witness		
10	whose deposition is hereinbefore set forth,		
11	was duly sworn by me and that such		
12	deposition is a true record of the testimony		
13	given by such witness.		
14	I further certify that I am not related		
15	to any of the parties to this action by		
16	blood or marriage; and that I am in no way		
17	interested in the outcome of this matter.		
18	IN WITNESS WHEREOF, I have hereunto set		
19	my hand this 17th day of April, 2013.		
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21			
22	JOHN L. HARMONSON, RPR		
23	My commission expires: 11/14/15		
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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

SUGGESTED DETERMINATIONS
OF UNDISPUTED FACT
AND CONCLUSIONS OF LAW

I. SUGGESTED DETERMINATIONS OF UNDISPUTED FACT

A. Eternal Word Television Network

- 1. EWTN was founded in 1981 by Mother M. Angelica, a cloistered nun of the Poor Clares of Perpetual Adoration order, on the property of Our Lady of Angels Monastery in Irondale, Alabama. Exhibit G, Michael Warsaw Decl. ¶ 4.
- 2. "Since then, EWTN has become the largest Catholic media network in the world." Exhibit $G \P 4$.
- 3. EWTN is an Alabama non-profit corporation that qualifies as a tax-exempt organization under section 501(c)(3) of the Internal Revenue

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Code of 1986 ("the Code"). EWTN currently employs approximately 350 full-time employees. *Id.* ¶ 5.

- 4. "EWTN airs family and religious programming from a Catholic point of view that presents the teachings of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church. Additionally, it provides spiritual devotions based on Catholic religious practice, and airs daily live Masses and prayers." Id. ¶ 6.
- 5. "A deep devotion to the Catholic faith is central to EWTN's mission. While not affiliated with the Roman Catholic Church or any Roman Catholic diocese as a ecclesiastical or structural matter, EWTN is dedicated to the advancement of truth as defined by the Magisterium of the Roman Catholic Church." *Id.* ¶ 7. EWTN's Catholic identity infuses all aspects of its organization. Its campus in Irondale, Alabama, is home to a chapel that hosts pilgrims for daily Masses, which are celebrated by the order of Franciscan friars who live on the campus. *Id.* ¶ 8. EWTN's buildings and grounds feature numerous religious images, statues, and icons, including a shrine and Stations of the Cross devotional area. *Id.* ¶¶ 8-10. EWTN's employees likewise often fill their personal work spaces with pictures of Catholic saints, prayers, and religious icons. *Id.* ¶ 11.
- 6. As one element of its faithfulness to the Catholic Church, EWTN holds and professes traditional Catholic teachings concerning the sanctity of

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life. "It believes that each human being bears the image and likeness of God, and therefore that abortion ends a human life and is a grave sin." Id. ¶ 12.

- 7. The Catholic Church's prohibition of abortion "includes the interval between conception and the implantation of the embryo." Church teaching therefore prohibits actions which deliberately "interfere with the embryo before implantation" or "cause the elimination of the embryo once implanted." Exhibit H, Declaration of Dr. John M. Haas ¶¶ 4. See also id. ¶¶ 49-57. EWTN shares these same beliefs. Exhibit G ¶ 16.
- 8. Furthermore, EWTN believes that artificial contraception is gravely immoral. *Id.* ¶ 14.
- 9. EWTN also obeys Church teaching that Catholics may never encourage the use of abortion, contraception, or sterilization. *Id.* ¶ 14.
- 10. It further believes that those practices are not "health care" and cannot in good conscience treat them as such. *Id.* ¶ 15.
- 11. "It is quite clear that the Catholic Church has consistently taught that contraception and abortion are gravely immoral acts. The Catholic Church and its agencies would view providing insurance coverage for these activities as cooperating with evil and facilitating profoundly immoral acts which do violence to human dignity and to the good of the social order." Exhibit H \P 57; Exhibit G \P 16.

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- 12. This means that "EWTN cannot provide, subsidize, or support health care insurance—or facilitate any form of payment or benefit in connection with its health insurance, whether or not that payment or benefit is denominated 'insurance coverage'—that covers, facilitates, or in any way encourages the use of artificial contraception, sterilization, or abortion, or related education and counseling, without violating its deeply held religious beliefs and without publicly contradicting the same Catholic doctrine that EWTN routinely proclaims through its television, radio, and internet transmissions." Exhibit $G\P 19$.
- 13. Such actions would be material cooperation in a grave sin, an action prohibited by Catholic teaching. *See* Exhibit H ¶¶ 65. Moreover, EWTN believes that for every sin of cooperation in a grave sin of contraception or abortion, there is a second sin against charity (that of scandal to the person with whom the employer cooperates). Exhibit H \P 62; Exhibit G \P 16.
- 14. EWTN has often publicly professed and taught these beliefs to its worldwide audience and will continue to do so. Exhibit G \P 17. It is also a part of EWTN's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. *Id.* \P 18.

15. It is therefore non-negotiable to EWTN that its insurance plan is consistent with its religious beliefs, which is why it has taken great pains for years to ensure its health insurance plans do not cover abortions, sterilization, or contraception. *Id.* ¶ 20.

B. The Mandate and the "Religious Employer" Exemption

- 16. Signed into law in March 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, ACA) instituted significant changes to our nation's health care and health insurance systems. Among other things, the ACA mandates that any "group health plan" or "health insurance issuer" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). The ACA did not specify what "preventive care" would include, but left that up to the Health Resources and Services Administration (HRSA), a division of Defendant HHS. 42 U.S.C. § 300gg-13(a)(4); 75 Fed. Reg. 41726-01, 41728 (July 19, 2010).
- 17. On July 19, 2010, HHS published an interim final rule under the ACA (First Interim Final Rule), confirming that HRSA would publish guidelines defining "preventive care." 75 Fed. Reg. at 41759; 45 C.F.R. § 147.130(a)(1)(iv). HRSA issued its guidelines on August 1, 2011, providing that "preventive care" would include "[a]ll Food and Drug Administration

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approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Exhibit A, HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011).

- 18. FDA-approved contraceptive methods include "emergency contraception" such as Plan B (the "morning-after" pill) and Ella (the "week-after" pill). FDA Birth Control Guide (August 2012), Ex. B at 11-13. The FDA's Birth Control Guide notes that these drugs, like certain intrauterine devices (IUDs), may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. *Id.* The government has conceded this mechanism of action, including in a recent filing with the U.S. Supreme Court. *See* Pet. for Writ of Certiorari, *Kathleen Sebelius et al. v. Hobby Lobby Stores et al.*, at 10 n.5 (U.S. Sup. Ct. filed Sept. 19, 2013).
- 19. The same day HRSA issued guidelines, HHS promulgated an amended interim final rule (Second Interim Final Rule), adding a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621-01 (published Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B). Specifically, HRSA was granted "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46623; *see* 45 C.F.R. § 147.130(a)(1)(iv)(A). A "religious employer" was restrictively defined as one that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share [its] religious

- tenets"; (3) "serves primarily persons who share [its] religious tenets"; and (4) "is a nonprofit organization as described" in section 6033(a) of the Internal Revenue Code. 76 Fed. Reg. at 46626; 45 C.F.R. § 147.130(a)(1)(iv)(B). The fourth of these requirements refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and to the "exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).
- 20. The Second Interim Final Rule's narrow exemption for religious employers provoked hundreds of thousands of public comments. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).
- 21. Subsequently, on February 10, 2012, HHS issued a "Temporary Enforcement Safe Harbor," advising it would not enforce the mandate for one additional year against certain non-exempt organizations with religious objections. HHS, *Guidance on the Temporary Enforcement Safe Harbor*, available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (updated June 28, 2013; last visited Dec. 31, 2013).
- 22. Under the safe harbor, the mandate would not apply until an organization's first plan year after August 1, 2013. *Id.* (The safe harbor has since been extended through the end of 2013. *See infra* at \P 30.) The safe harbor did not expand the religious employer exemption; the same day the

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safe harbor was issued, HHS confirmed the exemption as "a final rule without change." 77 Fed. Reg. at 8730.

- 23. On March 16, 2012, HHS announced an "Advance Notice of Proposed Rulemaking" (ANPRM), stating its intention to finalize an "accommodation" by the end of the safe harbor. 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012).
- 24. The ANPRM did not announce any intention to expand the exemption. *Id.* Rather, it proposed that objecting employers' "health insurance issuers" could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." *Id.*
- 25. HHS noted "approximately 200,000 comments" submitted in response to the ANPRM. 78 Fed. Reg. 8456, 8459 (published Feb. 6, 2013).
- 26. On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM), proposing two major changes to the then-existing regulations.78 Fed. Reg. at 8456. First, it proposed revising the religious employer exemption by eliminating the requirements that religious employers have the purpose of inculcating religious values and primarily employ and serve persons of their own faith. *Id.* at 8458-59. Second, it proposed to "accommodate" non-exempt religious organizations such as EWTN by requiring them to force their insurers and third party

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administrators to provide "separate . . . coverage" for the free drugs and services. 78 Fed. Reg. at 8463.

- 27. "[O]ver 400,000 comments" were submitted in response to the NPRM. 78 Fed. Reg. 39870, 39871 (July 2, 2013).
- 28. On June 28, 2013, HHS issued a final rule (the Mandate). Under the Mandate, the "religious employer" exemption remains limited to institutional churches "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. at 39874(a); 45 C.F.R. § 147.131(a).
- 29. The Mandate also creates a separate "accommodation" for any non-exempt religious organization that (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b).
- 30. The final rule extends the safe harbor through the end of 2013. 78 Fed. Reg. at 39889. Thus, an eligible organization must execute its self-certification "prior to the beginning of the first plan year" which begins on or after January 1, 2014, and deliver it to its insurer or third party administrator. *Id.* at 39875.

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- 31. Delivering the self-certification would trigger the insurer's or third party administrator's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 29 C.F.R. § 2590.715–2713A.
- 32. If a third party administrator is unwilling to provide the services, the objecting religious organization is required to find one that is willing. 78 Fed. Reg. at 39880 ("[T]here is no obligation for a third party administrator to enter into or remain in a contract with the eligible organization").
- 33. Employers who provide "grandfathered" health care plans are exempt from the Mandate. 42 U.S.C. § 18011 (2010). In 2010, the government predicted that 87 million people would remain on grandfathered plans in 2013. Exhibit D at 5. Employers with fewer than fifty employees also may avoid the mandate, without penalty, by choosing not to provide health insurance. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Nearly 96% of American businesses, employing about 34 million individuals, are firms with fewer than fifty employees. Exhibit F at 3.

C. The Mandate's Impact on EWTN

34. EWTN provides employee health insurance through a self-insured plan. Exhibit $G \P 24$. Its plan is governed by ERISA and administered by Blue Cross Blue Shield of Alabama. Exhibit $G \P 24$.

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- 35. EWTN's next plan year begins on July 1, 2014. *Id.* ¶ 27.
- 36. EWTN is guided by its Catholic beliefs to promote "the well-being and health of its employees and their families. In furtherance of these beliefs, EWTN has striven over the years to provide employee health coverage superior to coverage generally available in the Alabama market." *Id.* ¶ 17.
- 37. EWTN is excluded from the religious employer exemption, id. ¶ 25, and does not qualify for the grandfathering exemption, id. ¶ 26. The only avenue the government has left EWTN is the so-called "accommodation."
- 38. Although EWTN has no objection to covering most of the preventive services required by the Affordable Care Act, EWTN's religious beliefs prohibit it from participating in the accommodation. *Id.* ¶¶ 18-23. As described above, "EWTN cannot provide, subsidize, or support health care insurance—or facilitate any form of payment or benefit in connection with its health insurance, whether or not that payment or benefit is denominated 'insurance coverage'—that covers, facilitates, or in any way encourages the use of artificial contraception, sterilization, or abortion, or related education and counseling, without violating its deeply held religious beliefs and without publicly contradicting the same Catholic doctrine that EWTN routinely proclaims through its television, radio, and internet transmissions." *Id.* ¶ 19. EWTN believes these actions would be material cooperation with

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grave sins, in contravention of Catholic doctrine. See id. ¶¶ 19, 28-55; Exhibit H $\P\P$ 63-65.

- 39. EWTN also believes that it must avoid engaging in conduct that may lead others to do evil or think that EWTN condones evil. Participating in conduct that violates Catholic teaching also poses a grave risk to EWTN in sharing the teachings of the Catholic Church and in EWTN's interactions with supporters and others who share the same beliefs. Exhibit $G \P 53$.
- 40. Rather, EWTN must engage in conduct and associations that advocate for and reflect Catholic beliefs, particularly as they relate to protecting human dignity and human life. *Id.* ¶¶ 7, 12-16, 51-53.
- 41. EWTN is thus prohibited by its religion from participating in the government's scheme to distribute, encourage, facilitate, and/or reduce the cost of contraceptives, sterilization, or drugs and devices that cause abortions. EWTN cannot provide such services or authorize someone else to do so; it must avoid participating in any system involving the provision of such services. *See id.* ¶¶ 12-16, 19-23, 28-55; Exhibit H ¶¶ 57-68 (setting forth religious beliefs).
- 42. To comply with the Mandate under the "accommodation," EWTN would need to execute its self-certification prior to July 1, 2014. Exhibit G ¶ 28. Delivery of the self-certification would serve as the trigger for EWTN's administrator to provide EWTN employees with payment coverage for

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contraception, sterilization, abortion-causing drugs and devices, and related education and counseling. *Id.* ¶¶ 28-46.

- 43. EWTN is prohibited by its religion from signing, submitting, or facilitating the transfer of the government-required certification at issue in this case. *See id.* ¶¶ 19, 28-55, 64.
- 44. On the back of the self-certification form, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." Exhibit I, Self-Certification Form. It is these regulations that require that TPAs shall provide or arrange payments for the complained of contraceptive services.
- 45. The self-certification form would automatically became a part of EWTN's insurance plan and would enable the administrator to obtain payment—including a 10% bonus—from the government for delivering objectionable drugs and services to EWTN employees. Exhibit I; 45 C.F.R. § 156.50(d)(3)(ii); Exhibit J at 96:15-18 (Dec. 16, 2013 Hrn'g Tr. at 96:15-18, *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-1092 (W.D. Okla.)) (Counsel for the government: "I will concede that the TPA . . . if they

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receive the certification, they are eligible for reimbursement. They would not otherwise be eligible."), *id.* at 91:12-25 (district court noting that the TPA "not only gets to be reimbursed but [it] get[s] a 10-percent bump for their margin as well").

- 46. Thus, by executing the self-certification, EWTN would arrange for this coverage and refer its plan participants to another entity for payment. *Id.* EWTN would also be banned from telling its administrator not to provide the objectionable drugs and services. *Id.* ¶ 45; *see* 29 C.F.R. § 2590.715-2713A.
- 47. Under Catholic religious principles to which it sincerely ascribes, EWTN cannot do the following and therefore objects to: (a) Signing the self-certification form that on its face authorizes and mandates another organization to deliver contraceptives, sterilization, and abortifacients to employees and other beneficiaries now; (b) Delivering the self-certification form to another organization that could then rely on it as an authorization to deliver these contraceptives, sterilization, and abortifacients to employees and beneficiaries, now or in the future; (c) Agreeing to refrain from instructing or asking other organizations not to deliver contraceptives, sterilization, and abortifacients to employees; (d) Creating a provider-insured relationship (between plan beneficiaries and Blue Cross Blue Shield or any other third-party administrator), the sole purpose of which would be

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to provide contraceptives, sterilization, and abortifacients; (e) Participating in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to employees or other beneficiaries. *See* Exhibit G ¶¶ 12-16, 18-23, 28-55; Exhibit H ¶¶ 57-69.

- 48. Participating in the "accommodation" would do nothing to lessen EWTN's complicity in what it believes to be a grave moral wrong. *Id*. Indeed, in EWTN's view, the "accommodation" would *exacerbate* the moral problem by requiring EWTN to cause a third party to engage in wrongdoing on its behalf. Exhibit $G \P 50$.
- 49. Finally, by acting in a way that violates Catholic teaching, EWTN would not only brand itself a hypocrite, but would undermine the trust placed in it by employees, viewers, and supporters. *Id.* ¶¶ 17, 21-23. Such a violation of trust would severely undermine EWTN's reliability as a witness to Catholic truth, undermining the reason for EWTN's existence. *Id.* ¶¶ 18, 21-23, 51-54. Worse yet, EWTN's compromised example may lead others astray—precisely the opposite of EWTN's purpose. *Id.* ¶ 53.
- 50. With respect to the Mandate, the outcome of EWTN's sincere religious beliefs is simple and clear: were EWTN deliberately to provide insurance coverage for, or to fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, contraception, or sterilization,

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this would violate EWTN's religious beliefs, betray its identity, and contradict its public teaching. *Id.* ¶ 19-23.

- 51. The Mandate will take effect against EWTN on July 1, 2014. *Id.* ¶ 28, 47.
- 52. On that date, EWTN will face the unconscionable choice either to violate the law or to violate its faith. *Id*.
- 53. The practical impact of the Mandate on EWTN is no less devastating. The Mandate burdens EWTN's employee recruitment and retention efforts by creating uncertainty as to whether it will be able to offer health benefits beyond July 2014, severely harming its competitive advantage. *Id.* ¶¶ 19, 21, 60, 63.
- 54. If EWTN violates the law by ceasing to offer employee health insurance, it will face the prospect of fines of \$2000 per employee per year, or nearly \$700,000 every year. *Id.* ¶¶ 61-62; 26 U.S.C. § 4980H. Although the government has recently announced that it will postpone implementing the annual fine of \$2000 per employee for organizations that drop their insurance altogether, the postponement is only for one year, until 2015. Mark J. Mazur, Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner* (July 2, 2013), *available at*

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http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx (last visited Dec. 31, 2013).

- 55. Further, terminating EWTN's health plan would violate its religious commitment to provide generous, conscience-compliant health coverage for its employees and would betray the faith that those employees have placed in EWTN. Exhibit G ¶¶ 18, 21, 65.
- 56. Alternatively, if EWTN violates the law by offering insurance that fails to comply with the Mandate, it would *at least* incur penalties of \$100 per day per full-time employee, which comes to over \$12 million per year for its 350 employees. *Id.* ¶ 57-58; 26 U.S.C. § 4980D; 29 U.S.C. § 1132. If the government levies fines based on both employees *and* dependents, the penalties would be orders of magnitude larger. EWTN could also face regulatory action and lawsuits under ERISA. Exhibit G ¶ 59; 29 U.S.C. § 1132.
- 57. In sum, the Mandate forces EWTN to choose between, on the one hand, violating its religious beliefs and compromising its religious mission, and, on the other hand, incurring substantial fines and terminating its employee benefits. Exhibit $G \P 55-63$, 65.

II. SUGGESTED CONCLUSIONS OF LAW

A. The Religious Freedom Restoration Act

- 1. The Religious Freedom Restoration Act (RFRA) broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), as amended by 42 U.S.C. § 2000cc-5(7)(A).
- 2. In obedience to the teachings of the Catholic Church, EWTN believes that abortion, contraception, and sterilization are gravely immoral acts. Further, EWTN believes that it cannot facilitate or encourage others in performing those acts without itself becoming morally complicit in them. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc), *cert. granted* 134 S. Ct. 678 (2013) (under RFRA, a court must "identify the religious belief" at issue).
- 3. These religious beliefs of EWTN are sincere. *See id. at* 1140 (under RFRA, a court must "determine whether this belief is sincere.").
- 4. Because of its sincere religious beliefs, EWTN refuses to cover contraceptives, sterilization, and abortifacients in its self-funded employee health plan. Because of the same religious beliefs, EWTN also refuses to participate in the Defendants' "accommodation" by executing the self-certification and thereby designating EWTN's third-party administrator to provide payments to its employees for those same services. In both ways,

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EWTN engages in religious exercise within the meaning of RFRA by refusing to participate in the facilitation and encouragement of contraceptive, sterilization, and abortifacient use.

- 5. Under RFRA, government action substantially burdens a religious belief by placing "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2011).
- 6. The Mandate substantially burdens EWTN's religious exercise by threatening it with enormous fines and severe disruption to its operations unless it agrees to engage in actions that contradict its religious convictions. The Mandate therefore "directly coerces" EWTN to "conform [its] behavior" to a course of action it believes is religiously prohibited. *Id.*; *see also* Exhibit G ¶¶ 55-65. *See*, *e.g.*, *Hobby Lobby Stores*, *Inc. v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013); *see also Gilardi v. U.S. Dep't of Health & Human Srvs.*, 733 F.3d 1208, 1219 (D.C. Cir. 2013) (the Mandate burdens objectors by "pressur[ing] [them] to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties"). The Mandate's harsh consequences obviously exert "pressure that tends to force"

EWTN to "forego religious precepts." *Midrash Sephardi*, 366 F.3d at 1227; *see also* Ex. G ¶¶ 56-62 (discussing devastating impact of penalties and loss of health benefits); *id.* ¶¶ 21, 60 (discussing impact that threat of losing health benefits has on EWTN's ability to hire and retain employees); *id.* ¶¶ 22, 53 (discussing impact on donor support). Therefore, according to RFRA, the government must justify the Mandate's application to EWTN under strict scrutiny. *See* 42 U.S.C. § 2000bb-1(b).

- 7. To pass strict scrutiny, the government must first identify a compelling interest.
- 8. Under RFRA, the government has an obligation to bring forward evidence showing why it has a compelling interest in requiring religious objectors like EWTN to facilitate insurance coverage of the mandated products and services under the standard articulated in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006). When applying RFRA, courts must "look[] beyond broadly formulated interests" and instead "scrutinize [] the asserted harm of granting specific exemptions to particular religious claimants." *Hobby Lobby*, 723 F.3d at 1143 (quoting *O Centro*, 546 U.S. at 431). In this case, the government has only asserted broadly formulated interests in women's health and gender equality. As the Seventh Circuit has explained in another Mandate challenge, "[b]y stating the public interests so generally, the government

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guarantees that the mandate will flunk the test." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013); *cf. A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 268 (5th Cir. 2010) ("invocation of general interests, standing alone, is not enough").

- 9. Furthermore, when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hiahleah*, 508 U.S. 520, 546-47 (1993). Here, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *see also* 45 C.F.R. § 147.131 (religious exemptions); 26 U.S.C. § 5000A(d)(2)(A) & (B) (exempting "health care sharing ministr[ies]" and other religious organizations). "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Hobby Lobby*, 723 F.3d at 1143 (citations omitted).
- 10. Additionally, to meet strict scrutiny, the government must also prove that applying its chosen means to the particular religious claimant would actually further its interests. *See, e.g., O Centro*, 546 U.S. at 431 (in applying strict scrutiny courts "must searchingly examine the interests that

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the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing [the claimed exemption]" (quoting Yoder, 406 U.S. at 221) (emphasis added). The government "cannot rely on 'general platitudes,' but 'must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests." Betenbaugh, 611 F.3d at 268 (citation omitted).

- 11. Critical to the government's interests is not merely increasing "access" to the mandated products but increasing their frequent and effective *use. See, e.g.*, 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012). But nowhere have Defendants offered evidence that imposing the mandate on EWTN would actually increase the frequency and the effective use of the mandated drugs, devices and services.
- 12. Finally, even had Defendants identified a compelling interest and even if the Mandate advanced it, the Mandate still fails strict scrutiny because there are other readily-available means of expanding contraception coverage far less restrictive of EWTN's rights. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). Defendants must put forward "specific evidence" explaining why applying the Mandate "to the person"—that is, specifically

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to EWTN—is the least restrictive means of furthering the government's interests. *Betenbaugh*, 611 F.3d at 268; *O Centro*, 546 U.S. at 430.

- 13. In scores of lawsuits provoked by the Mandate, HHS "has not even tried to satisfy the least-restrictive-means component of strict scrutiny, perhaps because it is nearly impossible to do so here." *Korte*, 735 F.3d at 686; *accord Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (HHS "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception"). This flows in part from Defendants' extremely broad statement of the government interest, which "makes it impossible to show that the mandate is the least restrictive means of furthering" the interests. *Korte*, 735 F.3d at 686.
- 14. Indeed, HHS has "many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Id*.
- 15. The government can use methods suggested in EWTN's memorandum, or employ its own pre-existing sources to increase contraceptive access. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting existence of "analogous programs" and concluding that government has "failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost

preventive health care coverage to women"); see also, e.g., Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 800 (1988) (striking down a law due to existing alternative means of accomplishing the state's interests without harming First Amendment rights, concluding that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms"). It has not done so. Therefore it cannot satisfy strict scrutiny.

B. The Free Exercise Clause

- 16. Laws which are not neutral or generally applicable face strict scrutiny under the Free Exercise Clause. *Lukumi*, 508 U.S. 520 (1993).
- 17. A regulation fails general applicability when it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal Order of Police v. City of Newark*, 170 F.3d 35*9, 365 (3rd Cir. 1999) (Alito, J.).
- 18. Here, the Mandate is not generally applicable because it refuses to exempt EWTN's religiously motivated conduct, but allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes. This is exactly the kind of "value judgment in favor of secular motivations, but not religious motivations" that fails general applicability and triggers strict scrutiny. *Fraternal Order*, 170 F.3d at 366.
- 19. A regulation fails neutrality when it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536.

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- 20. The government cannot rank in different tiers the rights of people with identical religious objections. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) ("[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference.") (quotations omitted); *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (law non-neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and religious" groups, but rejected exemption for plaintiffs).
- 21. Here, the Mandate establishes three tiers of religious objectors: favored "religious employers" (who are exempt), less-favored non-profit religious objectors (who are forced to facilitate access to abortion-causing drugs), and disfavored for-profit religious objectors (who are forced to facilitate and pay for access). *See* 78 Fed. Reg. at 39874-75; *Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").
- 22. A regulation also fails neutrality when it shows that "the effect of [the] law" is to accomplish a "religious gerrymander." *Lukumi*, 508 U.S. at 535.
- 23. The law accomplishes a religious gerrymander because the "religious employers" exemption protects only institutional churches, their

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"integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." *See* 78 Fed. Reg. at 39871. Yet other religious organizations—like EWTN—are excluded from the exemption, even though they share the same religious objections.

- 24. The Mandate also fails neutrality by honoring certain secular reasons for failure to comply, while rejecting EWTN's religious reasons. *See Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (it is "clear that 'neutral' also means that there must be neutrality *between* religion and non-religion."). Policies covering tens of millions of Americans are exempt for secular reasons, while EWTN must drop its insurance and pay penalties for its religious objection.
- 25. Because the Mandate cannot qualify as a neutral or generally applicable law, HHS must satisfy strict scrutiny. It cannot do so.

C. The Establishment Clause

26. The Mandate's "explicit and deliberate distinctions between different religious organizations" also violate the Establishment Clause. *See Larson*, 456 U.S. at 247 n.23; *Pelphrey v. Cobb Cnty.*, *Ga.*, 547 F.3d 1263, 1268 (11th Cir. 2008) (quoting *Larson*) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

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- 27. The government exempts favored religious organizations only if they are an institutional church or have structural, doctrinal, and financial affiliation—as defined by the government—with an institutional church. By structuring the exemption in this way, the Mandate engages in "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Weaver*, 534 F.3d at 1259. This is forbidden by the Establishment Clause.
- 28. The Mandate's "religious employer" exemption impermissibly distinguishes religious organizations based on internal religious characteristics. An organization is exempt if it qualifies as an "integrated auxiliary" of a church—meaning that it has a particular church "affiliation" and is "internally supported." As detailed in Treasury Regulations, these requirements measure the quality of an organization's ties to a church as well as its funding sources. 26 C.F.R. § 1.6033-2(h)(2) and (3) ("affiliation"); id. § 1.6033-2(h)(4) ("internal support"). If it fails to meet these requirements, a religious organization cannot qualify for the exemption and must instead take part in the government's scheme to facilitate employee access to free abortion-causing drugs and devices.
- 29. The government has candidly explained that it structured the Mandate exemption this way because "[h]ouses of worship and their integrated auxiliaries . . . are *more likely* than other employers to employ

people of the same faith who share the same objection, and who would therefore be *less likely* than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874 (emphases added). But distinguishing religious organizations based on internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*." *Weaver*, 534 F.3d at 1259.

30. Therefore the Mandate is violates the Establishment Clause.

D. The Free Speech Clause

- 31. The First Amendment protects EWTN's rights to be free from government efforts to compel its speech. *Riley*, 487 U.S. at 796-97.
- 32. It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *FAIR*, 547 U.S. at 61). The Supreme Court went on to hold that "[w]ere it enacted as a direct regulation of speech, the [government requirement that private institutions adopt government speech as their own] would plainly violate the First Amendment." *Id.*
 - 33. The Mandate is just such a direct regulation of speech.
- 34. Forcing EWTN to comply violates the First Amendment under *Turner Broacasting Systems, Inc. v. FCC*, 512 U.S. 624, 642 (1994).

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- 35. The mechanism of the accommodation also triggers strict scrutiny because "[1]aws singling out a small number of speakers for onerous treatment are inherently suspect." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012). The number of speakers here—"eligible [religious] organizations"—is quite small, especially when taken in the context of the sheer number of organizations subject to the Mandate.
- 36. The Mandate is thus subject to strict scrutiny under the Free Speech Clause, which it cannot meet.

E. Injunction Factors

- 37. EWTN is likely to succeed on the merits.
- 38. Where First Amendment rights are at stake, "the analysis begins and ends with the likelihood of success on the merits." *Korte*, 735 F.3d at 666; *accord Hobby Lobby*, 723 F.3d at 1146 (plurality opinion).
- 39. The same principle applies to EWTN's RFRA claim since "RFRA protects First Amendment free-exercise rights." *Korte*, 735 F.3d at 666; *Hobby Lobby*, 723 F.3d at 1146 ("our case law analogizes RFRA to a constitutional right").
- 40. EWTN suffers irreparable harm. A potential violation of Plaintiffs' rights under RFRA and the First Amendment constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury"); *accord Hobby*

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Lobby, 723 F.3d at 1146; Korte, 735 F.3d at 666 (the loss of RFRA-protected freedoms "constitutes irreparable injury").

- 41. The balance of harms favors EWTN. Courts have recognized the considerable importance of an entity's religious liberty interests, the substantial burden that the Mandate places on those interests, and that the Defendants' interest in enforcing the Mandate in this context is not compelling. *See Hobby Lobby*, 723 F.3d at 1141, 43-44, 45-46; *accord Korte*, 735 F.3d at 666. Thus, they have found that the balance of harms favors religious claimants. *Newland*, 2013 WL 5481997 at *3.
- 42. Granting preliminary injunctive relief will merely preserve the status quo and extend to EWTN what Defendants have already categorically given numerous other employers, *Newland*, 881 F. Supp. 2d at 1295, and have acquiesced to in many related cases. *See*, *e.g.*, Order, *Tyndale House Publishers v. Sebelius*, No. 13-5018 (D.C. Cir. May 3, 2013); Order, *Bick Holdings Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. April 1, 2013).
- 43. The public interest favors the injunction. As courts have recognized when granting injunctions against the Mandate for similar religious objectors, "there is a strong public interest in the free exercise of religion even where that interest may conflict with" another statutory scheme. *Newland*, 881 F. Supp. 2d at 1295 (quoting *O Centro Espirita*)

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Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1010 (10th Cir.

2004) (en banc), aff'd 546 U.S. 418 (2006)).

44. "[I] t is always in the public interest to prevent the violation of a

party's constitutional rights" which are protected by RFRA. Briscoe, 2013

WL 4781711 *5; *Hobby Lobby*, 723 F.3d at 1147; *Korte*, 735 F.3d at 666

("once the moving party establishes a likelihood of success on the merits, the

balance of harms 'normally favors granting preliminary injunctive relief'

because 'injunctions protecting First Amendment freedoms are always in the

public interest." (quoting Alvarez, 679 F.3d at 590)).

45. Therefore EWTN is entitled to injunctive relief.

Respectfully submitted this 31st day of December, 2013,

/s/ Daniel Blomberg

S. Kyle Duncan, LA Bar No. 25038*

Lori H. Windham, VA Bar No. 71050*

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2013, the foregoing Suggested Determinations of Undisputed Fact and Conclusions of Law was served via ECF.

/s/ *Daniel Blomberg*Daniel Blomberg

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

ETERNAL WORD TELEVISION NETWORK, INC.,)
and) Case No.1:13-cv-52
STATE OF ALABAMA,)
Plaintiffs,)
V.)
KATHLEEN SEBELIUS, et al.,)
Defendants.)
)

DEFENDANTS' RESPONSE TO EWTN'S STATEMENT OF MATERIAL FACTS

Defendants hereby submit the following responses to plaintiff Eternal Word Television Network's (EWTN) Suggested Determinations of Undisputed Facts, ECF No. 29-14. The numbered paragraphs below correspond to EWTN's numbered paragraphs¹:

- 1-6. Undisputed, but not material other than to show that EWTN is a religious organization.
- 7-15. Defendants dispute these paragraphs to the extent they suggest that the regulations require coverage of "abortifacients." The challenged regulations do

¹ Defendants note that they have filed their own motion for summary judgment and statement of suggested determinations of undisputed facts and conclusions of law in this action. This response is solely designed to respond to ETWN's Suggested Determinations of Undisputed Facts, identifying which of the factual grounds for EWTN's motion are disputed. In light of defendants' separate motion for summary judgment, the use of the word "disputed" or similar references herein should not be construed to mean that defendants believe that there are genuine issues of fact that would necessitate a trial. Rather, such language simply means that defendants dispute EWTN's statement regarding that matter.

not require coverage of abortion or abortifacients. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84; Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps 22 (2011) ("IOM Rep.") (recognizing that abortion services are outside the scope of recommendations), AR at 320; HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at*http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012008a.html; *see also* Prescription Drug Products; Certain Combined Oral Contra for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) (noting that "emergency contraceptive pills are not effective if the woman is pregnant" and that there is "no evidence that [emergency contraception] will have an adverse effect on an established pregnancy"); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery.").

Furthermore, EWTN's characterization of emergency contraception as "abortifacients" is not material to the resolution of this case. EWTN objects to providing coverage of emergency contraceptives on religious grounds. The precise reasons for EWTN's objection are immaterial.

16-17. Undisputed.

- 18. Disputed to the extent EWTN characterizes any FDA-approved contraceptive methods as "abortifacients," *see* Defendants' Response to Statements 1-15, but the precise reasons for EWTN's religious objection are immaterial.
- 19-33. Disputed to the extent EWTN offers a legal conclusion as to the propriety or substance of the rulemaking, which is not a statement of fact. Also disputed in that EWTN offers an interpretation of language in regulatory text, which is not a statement of fact; the regulatory text speaks for itself.

34-36. Undisputed.

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- 37. The first sentence of this paragraph is undisputed. The second sentence is disputed because it is not clear what is meant by "[t]he only avenue."
- 38-41. Undisputed to the extent EWTN describes its religious beliefs. Disputed to the extent that EWTN offers an interpretation of what the regulations require, which is not a statement of fact; the regulatory text speaks for itself.
- 42. Defendants dispute that the regulations require EWTN to "trigger" the provision of products and services to which it has a religious objection, as this is simply EWTN's characterization of what the challenged regulations require. Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or TPA. *Id.* at 39,878-79, AR at 10-11.
- 43. Undisputed to the extent EWTN describes its religious beliefs. Disputed to the extent that EWTN offers an interpretation of what the regulations require, which is not a statement of fact; the regulatory text speaks for itself.
- 44-46. Disputed to the extent that EWTN attempts to characterize the self-certification form, which is not a statement of fact; the language of the self-certification speaks for itself. Also disputed to the extent that EWTN offers an interpretation of what the regulations require, which is not a statement of fact; the regulatory text speaks for itself.
- 47-50. Undisputed to the extent EWTN describes its religious beliefs. Disputed to the extent that EWTN offers an interpretation of what the regulations require, which is not a statement of fact; the regulatory text speaks for itself.
 - 51. Undisputed.
 - 52. Undisputed to the extent EWTN describes its religious beliefs.

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Disputed to the not a statement of fact; the regulatory text speaks for itself.

- 53. Disputed. This paragraph consists largely of EWTN's characterization of what the regulations require and speculation about their impact, rather than statements of fact.
- 54. Disputed. This paragraph consists largely of EWTN's characterization of what the regulations require and speculation about their impact, rather than statements of fact. Defendants also dispute this paragraph to the extent that it mischaracterizes the assessable payment described in 26 U.S.C. § 4980H. If a large employer elects not to provide a qualifying health plan to its employees and their dependents, such employer would be liable for assessable payments under 26 U.S.C. § 4980H only if at least one of its employees obtains coverage through the Health Insurance Marketplace and qualifies for a premium tax credit, and would not be liable for taxes under 26 U.S.C. § 4980D. See 26 U.S.C. §§ 4980D, 4980H.
 - 55. Undisputed to the extent EWTN describes its religious beliefs.
- 56. Disputed. This paragraph consists largely of EWTN's characterization of what the regulations require and speculation about their impact, rather than statements of fact. Defendants also dispute this paragraph to the extent that it mischaracterizes the tax described in 26 U.S.C. § 4980D, which applies at a rate of \$100 per day "with respect to each individual to whom such failure relates." 26 U.S.C. § 4980D(b).
- 57. This paragraph is EWTN's summation of its earlier statements, and is not itself a statement of fact. To the extent a response is deemed required, the paragraph is undisputed to the extent EWTN describes its religious beliefs. It is disputed to the extent that EWTN offers an interpretation of what the regulations require, which is not a statement of fact; the regulatory text speaks for itself.

Respectfully submitted this 10th day of February, 2014,

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> STUART F. DELERY **Assistant Attorney General**

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Attorneys for Defendants

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Exhibit M

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, et al.,

: Docket No.: CV 13-1441

Plaintiffs,

is, :

: Washington, DC : 10:05 a.m., Friday

November 22, 2013

KATHLEEN SEBELIUS,

VS.

et al.,

:

Defendants.

• V

REPORTER'S OFFICIAL TRANSCRIPT OF MOTIONS HEARING BEFORE THE HONORABLE AMY BERMAN JACKSON UNITED STATES DISTRICT JUDGE

APPEARANCES:

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The Court Reporter: CHANTAL M. GENEUS, RPR, CRR

Certified Realtime Reporter

Registered Professional Reporter United States District Court

333 Constitution Avenue, NW

Washington, DC 20001

Proceedings reported by machine shorthand. Transcript produced by computer-aided transcription.

1	PROCEEDINGS
2	(Whereupon, at 10:05 a.m. the proceedings
3	commenced and the following ensued:)
4	THE COURTROOM DEPUTY: Your Honor, calling
5	Civil Action 13-1441, the Roman Catholic Archbishop of
6	Washington, et al., v. Kathleen Sebelius, et al.
7	Counsel, please approach the lectern and
8	identify yourself for the record and the parties you
9	represent.
10	MR. FRANCISCO: Good morning, Your Honor.
11	Noel Francisco for plaintiffs.
12	At counsel table with me is Jane Belford,
13	Chancellor of the Archdiocese of Washington; Cynthia
14	DeSimone, the general counsel for the Archdiocese of
15	Washington; and then my Jones Day colleagues, David
16	Raimer, Anthony Dick, and Eric Dreiband.
17	THE COURT: All right. Good morning.
18	MR. FRANCISCO: Good morning.
19	MR. PRUSKI: Good morning, Your Honor.
20	Jacek Pruski for the defendants. Joining me at
21	counsel table are Sheila Lieber, Benjamin Berwick, and
22	Michael Pollack.
23	THE COURT: All right. Good morning.
24	We're here today on plaintiffs' challenge to
25	regulations promulgated by the Department of Health

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they lack regulatory authority to require their TPAs
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     to make the payments. However, the accommodation is
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     still available to these plaintiffs, so they must
 4
     still complete the self-certification requirement and
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     once they do that, they have complied with the
     contraceptive coverage requirement. However, their
 6
     TPA isn't required to provide the separate payments.
8
               So to the extent they're claiming an injury
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    based on facilitating access to contraceptive
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     coverage, that injury simply doesn't exist here, and
11
     it certainly isn't a substantial burden on their
12
     religious exercise.
13
               THE COURT: So the self-certification won't
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     accomplish -- won't inexorably lead, as they say, to
15
    the provision of coverage to their employees?
16
                                 Their TPAs aren't required
               MR. PRUSKI:
                            No.
17
     to make the payments. The regulations don't require
18
     their TPAs to do anything. However, the accommodation
     is still available to them, so they will have met --
19
20
    because the statutory requirement is still applicable
21
     to those seven plaintiffs.
22
               THE COURT: But if they made the choice to
23
     self-insure otherwise, then that would be covered and
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     then the next steps would flow?
25
               MR. PRUSKI: If I understand Your Honor's
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question, you're asking if they left the Archdiocese's plan and self-insured otherwise, then, yes, then the accommodation would still be available to them, but if they completed the self-certification requirement and provide (it) to their TPA, their TPA would then be required to make the payments by the regulations. THE COURT: Why didn't this come up in your first pleading in response to their motion for preliminary injunction when you moved to dismiss and moved for summary judgment yourself, that this didn't come up until two or three pleadings down the road? MR. PRUSKI: Your Honor, it did come up in our reply brief, which was our second brief, and it wasn't -- this issue wasn't raised in their complaint or in their brief, and I didn't notice it, frankly, in writing the opening brief. But we raised it as soon as I became aware of it when reading their statement of facts and then referring back to their affidavits. Because the Court had consolidated with the merits, we were primarily responding to the arguments

Because the Court had consolidated with the merits, we were primarily responding to the arguments they made in the brief in the preliminary injunction, but we raised the issue as soon as we became aware of it. And that's been true in all of the similar cases like this.

THE COURT: All right. Well, let me ask you

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some foundational questions, because I really think what it is that these regulations actually do, as opposed to how the parties characterized the regulations, is -- has to be the foundation for my ruling.
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The regulations divide the eligible employers into two categories: Those insured under a group health insurance plan, in which case, under the regulations, the coverage has to be expressly excluded from the plan, and then it's the insurer who becomes obligated to provide the services without passing the costs along in any way.

That much is correct.

MR. PRUSKI: Right.

THE COURT: Okay. Then there are those who are self-insured, in which case, it's the third-party administrator that's obligated to arrange for separate payments for the contraceptive services without any cost to the eligible organization.

So the third-party administrator's duty is triggered by his own agreement to contract with the religious organization, having been advised of the religious organization's objection, right?

MR. PRUSKI: I wouldn't put it in terms of an agreement to contract with. They're already in a

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     relationship with the self-insured employer.
 2
               They are not required, upon receiving the
 3
     self-certification, to make the payments.
                                                They can
 4
     walk away from the relationship entirely. But if they
5
    remain (in the relationship, then, yes, upon receiving
 6
    the self-certification form, the third-party
 7
    administrator -- I'll just called them the TPA going
8
    forward -- the TPA is then -- becomes a plan
9
    administrator (solely) for the purpose (of providing the
10
    separate payments, and it is the TPA's responsibility
11
    entirely to make those payments for contraceptive
12
    coverage. And as Your Honor referenced, the TPA is
13
    not permitted to charge, and in fact is expressly
14
    prohibited from charging the employer any premium or
15
     costs associated with those payments.
16
               THE COURT: But his duty to do that only
17
    arises by virtue of the fact that he has a contract
18
    with the religious organizations?
19
               MR. PRUSKI: Yes. They become a plan
20
    administrator and are required to make these payments
21
    by virtue of the fact that they receive the
22
    self-certification form from the employer.
23
               THE COURT: All right. So if the
24
     regulations permit the -- I've got "third-party
25
     administrator" written in my notes all over the place,
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so I'm not going to say "TPA." I might, but I don't think so.
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If the regulations permit them, once they receive the self-certification, to decline to be in the contractual relationship, what happens then? Is the employer obligated to go out and find another one?

MR. PRUSKI: The employer is not obligated to find another TPA, no. An employer might find it convenient to do that. Perhaps they prefer to have a TPA rather than to administer everything about the plan themselves, but they are not obligated to find a new TPA.

THE COURT: Now, wait a minute.

They have somebody administering their health care plan, and when they go to them and say, oh, by the way, we absolutely don't want to have anything to do with the contraceptive part of health care; that's your responsibility. And he says, well, then, I don't want to be your TPA anymore, then they have to get another one.

MR. PRUSKI: And if they do get another one, then they need to provide -- and they provide the self-certification form to that TPA, it would be the same. That TPA would become responsible for making the separate payments for the coverage.

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1
               THE COURT: But ultimately, they're the ones
 2
     who have to shop around for the person whose job it is
 3
     to give the employees the contraceptive services,
     isn't it?
 4
 5
               MR. PRUSKI: Well, we don't have an
     indication in this case that their TPA is resistant
 6
     to --
8
               THE COURT: That's not my question.
9
               MR. PRUSKI: If they -- if their TPA says, I
10
     want out of this relationship, and they want to then
11
     find another TPA, then, yes, in a sense, they -- if
12
    they find another TPA, that TPA is faced with the same
13
     choice. (If (it) receives (a) self-certification form, (and
14
     it (stays (in the relationship, (it's required, then, to
15
     provide the contraceptive coverage.
16
               THE COURT: So whoever they choose
17
     ultimately has to do it? Their only choice is:
                                                       Do we
18
     forgo one, or do we have one?
19
               MR. PRUSKI: When you say "they," you
20
     mean --
21
               THE COURT: The religious organizations
22
     either have a third-party administrator, or they
23
     don't. But if they have one, it has to be one that
24
     provides these services.
25
               MR. PRUSKI: If they have one and they want
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1
     to avail themselves of the accommodation, yes.
 2
               THE COURT: All right. If it's a group
3
    health plan, it's the insurer that has to provide the
 4
    preventive services. If it doesn't, who is penalized,
5
     the employer or the insurer?
 6
               MR. PRUSKI: The insurer. It's entirely the
 7
     insurer's responsibility to provide that coverage.
               THE COURT: Well, in the section of the
8
9
     regulations that deal with the group health plans, it
10
     specifically states that coverage for contraceptive
11
     services will be excluded from the religious
12
     organization's plans.
13
               So to me, that has significant implications
14
     for the RFRA claim. Is there anything analogous in
15
     the regulations dealing with employers that have
16
     self-insured plans? As I review those regulations,
17
     they don't even talk about the plan. They talk about
18
    payments, and they say these payments must be
19
     separate. But separate from what?
20
               MR. PRUSKI: Separate from the employer. So
21
     upon receiving the self-certification form, the TPA
22
    becomes responsible for either arranging for -- with
23
     an insurer or making payments itself to the employees
24
     for the contraceptive services.
               THE COURT: But do those services become
25
```

available to the employees by virtue of their participation in the religious employer's plan? MR. PRUSKI: Yes.

THE COURT: The regs say in either case -well, the explanation in the preamble says in either
case, like the payments for contraceptive services
under the accommodation for insured plans of eligible
organizations discussed previously -- the payments are
not health insurance policies.

I understand the use of the word "policies" in that sentence. What does the word -- "payments are not policies," what does that mean? Payments are never policies, are they?

MR. PRUSKI: I believe that has to do with a difference between insured and self-insured entities.

In the insured context, my understanding is that an insurer actually creates a separate policy and is entirely responsible for that policy that they then provide to the employees.

In a self-insured situation, you know, it's -- the entity that's self-insured in general is making payments as it goes, as the employees make claims on it. So in effect, the responsibility to do that with respect to contraceptives is transferred to the third-party administrator. So it is paying as

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1
     claims come in for the services.
 2
               THE COURT: All right. Now, if you have a
 3
     group situation, you've got Blue Cross, you give all
 4
     your employees a brochure and say, this is what your
5
     plan covers. Under the accommodation, it's going to
     say, this plan excludes contraceptive services.
 6
                                                       They
 7
     can say that because it does. The insurer's
8
     obligation is then independent and separate.
9
               In the third-party administrator situation,
10
     when they say to their employees, here's what your
11
     plan covers, do they even have -- do they have a plan?
12
     They have to have a plan so that people know what they
13
     can even submit, right?
14
               MR. PRUSKI: Yes. And my understanding is
15
     those plans can have varying levels of specificity.
16
     In the self-insured case, technically, the
17
     contraceptive coverage (is) part of the plan, but the
18
     responsibility to make the payments -- in other words,
19
     to (administer) (that benefit) -- (is) entirely (the TPA's.)
20
     So in that way --
21
               THE COURT: And -- I'm sorry. Go on.
22
               MR. PRUSKI: I am was going to say in that
23
     way, it's different from the situation for, for
24
     example, for-profit companies who are subject to the
25
     contraceptive coverage requirement where they're
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1
               THE COURT: Right.
 2
               MR. PRUSKI: The source of authority to
 3
    provide -- to require the TPAs to make the separate
 4
    payments is ERISA. So in the preamble to the rule,
5
    the defendants talk about the fact that this really
 6
     all comes from ERISA, and the self-certification form
 7
    makes the TPA a plan administrator under this -- for
8
    the sole purpose of making these payments under the
9
    plan.
10
               THE COURT: Because you can only tell plan
11
     administrators to do things? They have to be a plan
12
     administrator for you to be able to tell them to do
13
     something?
14
               MR. PRUSKI: That's my understanding, yes.
15
               THE COURT:
                           Okay.
16
               MR. PRUSKI: Church plans, it's well-known,
17
     are not subject to ERISA. From the statute, there's a
18
     statutory exception for church plans. So there's no
19
     regulatory authority then to require the TPA of a
20
     self-insured church plan to make these separate
21
    payments.
22
               However, the accommodation is still
23
     available to the employer so that by filling out the
24
     self-certification form and meeting the requirements
25
     of the accommodation, they comply with the statute
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a substantial burden under the RFRA statute.
1
 2
               THE COURT: Because you're not the ones
 3
     doing the facilitating? Other people are doing the
 4
     facilitating?
 5
               MR. PRUSKI: In essence, yes.
               THE COURT: Well, if that's not it, tell me
 6
 7
     what it is because that's what I think it is.
8
               MR. PRUSKI: I would simply say that we --
9
     that I -- I've just said it, which is that because of
10
     the way the accommodation works, that's not a
11
     substantial burden on that sincerely held belief or
12
     their religious exercise.
13
               THE COURT: When we get to the
14
     constitutional stuff, we'll talk about this more.
15
     if the test under RFRA is whether the challenged law
16
     forces a party to engage in conduct his religion
17
     forbids or to forbear from engaging in conduct it
18
     requires, why doesn't just the provision that bars the
19
     organization from lobbying or influencing its
20
     third-party administrator violate the law, even if the
21
     rest of it can stand?
22
               MR. PRUSKI: So I don't understand the
23
     plaintiff to be challenging that provision under RFRA.
24
     I think they are challenging it under free speech.
25
     But it is true that there's a noninterference
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provision that is intended to protect the employees,
1
 2
     the women and other spouses and dependents who work
 3
     for employees, to be able to receive that benefit and
 4
    to prevent (the employer from interfering with the
5
    TPA's provision of those payments, for example, by
 6
    saying to the TPA, if you don't stop making the
    payments, we're going to fire you. That sort of
8
    conduct is prohibited under the accommodation.
9
               THE COURT: I was going to talk about this
10
     later, but since we're there, do you dispute that the
11
    provision covers more than interfering or coercing or
12
     threatening, but it is, at least in part, a
13
    prohibition against speech? I mean, for example, if
14
     Catholic University called up its third-party
15
     administrator and said, we believe that you are
    participating in a grave moral wrong here, isn't that
16
17
     an attempt to influence, and aren't they
18
     constitutionally permitted to say that?
19
               MR. PRUSKI: I think they are permitted to
20
     tell their TPA, just as they're self-certification
21
     tells their TPA, that they have a religious objection
22
    to the provision of the coverage. They also would be
23
    permitted to say --
24
               THE COURT: Isn't that directly or
25
     indirectly influencing a decision?
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MR. PRUSKI: Defendant's interpretation of the reg would be that it would not violate that provision, but -- so the defendants' position is that they can say that.

They can't, though, on the other hand, turn around and say, if you don't stop providing the payments, we're going to fire you. So in that sense, yes -- to Your Honor's earlier point about is that speech, yes, those are words that they say, but that kind of conduct, the threatening, is what the court in Gisell Packing said is not protected by the First Amendment.

THE COURT: Let's say I think you constitutionally can prohibit threats and coercion, but I don't think you can constitutionally prohibit speech, and I think this regulation is broad enough to cover both because you didn't say "threaten, coerce, impede, obstruct"; you said "directly or indirectly influence," which is much, much broader. And you're saying we're not going to interpret it in a way that violates the constitution, but if it, on its face, is broad enough to violate the constitution, what am I supposed to do?

MR. PRUSKI: Well, I think if Your Honor believes that it -- interpretations of it or aspects

REPORTER'S CERTIFICATE

I, Chantal M. Geneus, a Certified Realtime
Reporter and Registered Professional Reporter of the
United States District Court for the District of
Columbia, do hereby certify that I stenographically
reported the proceedings in the matter of CV 13-1441,
on Friday, November 22, 2013, in the United States
District Court for the District of Columbia, before
the Honorable Amy Berman Jackson, United States
District Judge.

I further certify that the Page Numbers 1 through 107 constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter.

In witness whereof, I have affixed my signature on December 5, 2013.

/s/ Chantal M. Geneus
Chantal M. Geneus, RPR, CRR
Official Court Reporter

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

NETWORK, INC., et al.,))
Plaintiffs,	
v.))
SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services, et)))
al., Defendants.)))

ORDER

This matter is before the court on the motions for summary judgment filed by Plaintiff Eternal World Television Network, Inc. (Doc. 29) and the State of Alabama (Doc. 27). Also before the court is a portion of the motion for summary judgment filed by Defendants¹ the U.S. Department of Health and Human Services, the U.S. Department of Labor, the U.S. Department of the Treasury, and the secretaries of those departments in their official capacities. (Doc. 34.) For the reasons that follow, Plaintiffs' motions for summary judgment are due to be denied and Defendants' motion for summary judgment is due to be granted in part.

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Sylvia M. Burwell has been substituted in her official capacity for Kathleen Sebelius as Secretary of Health and Human Services.

I. BACKGROUND

Under federal law, group health plans are generally required to cover women's health services "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg–13(a)(4). Those services "include all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider." 78 Fed. Reg. 39870-01, 39870. The court will refer to those services generally as "contraceptives" and to the contraceptive-coverage requirement as "the mandate."

Plaintiff Eternal World Television Network, Inc. ("EWTN"), has a problem with the mandate. As an organization whose "mission is to serve the orthodox belief and teaching of the [Roman Catholic] Church" (Doc. 29-9 ¶ 4), EWTN opposes the use of contraceptives in any form. That belief has led EWTN to take "great pains through the years to ensure that its insurance plans do not cover, or in any way facilitate access to, sterilization, contraception, or abortion." (Doc. 29-9 ¶ 20.) As a result, EWTN does not believe that it can comply with the mandate without violating its religious beliefs.

The mandate is not insensitive to such concerns. Instead, the mandate includes an exemption for religious employers² and an accommodation for

² The term "religious employer" includes churches, integrated auxiliaries of

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religious nonprofits that do not qualify for the religious-employer exemption. Under the accommodation, eligible religious nonprofits that do not qualify as religious employers (EWTN falls under this category) can opt out of the mandate by signing a short form objecting to the use of contraceptives and delivering that form to an appropriate third-party—in EWTN's case, to its health plan's third-party administrator—who would then be responsible for ensuring that the objecting organization's employees would receive contraceptive coverage at no cost to the organization.³

EWTN, not satisfied with the accommodation, filed this lawsuit last

October against the federal agencies and officials responsible for

implementing the mandate. Since then, EWTN and the State have filed

partial motions for summary judgment, and Defendants have responded with

a motion seeking either dismissal of or summary judgment on all counts of

the complaint. Although all of those motions are ripe, EWTN seeks expedited

consideration of its motion for summary judgment in order to meet a looming

deadline for compliance with the mandate. Because the court finds that

churches, conventions or associations of churches, and the exclusively religious activities of religious orders. 78 Fed. Reg. 39870-01, 39874.

³ If EWTN's third-party administrator did not want to take on this responsibility, it would have the option of terminating its relationship with EWTN. *See* 78 FR 39870-01, 39879. But there's no evidence that that might happen here.

⁴ In the same motion, EWTN requests that the court set a hearing for oral arguments. The court finds that the briefs adequately frame the issues, so no oral arguments are necessary.

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expedited consideration of that motion is appropriate, this order will focus on EWTN's motion for summary judgment and will address the other pending motions only to the extent that they are intertwined with EWTN's motion.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." The basic issue before the court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986).

On a motion for summary judgment, the movant bears the initial burden of proving that no genuine issue of material fact exists. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001). In evaluating the movant's arguments, the court must view all evidence and resolve all doubts in the light most favorable to the nonmovant. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999). "If reasonable minds might differ on the inferences arising from undisputed facts, then [the court] should deny summary judgment." *Hinesville Bank v. Pony Exp. Courier Corp.*, 868 F.2d 1532, 1535 (11th Cir.1989).

III. DISCUSSION

A. EWTN's Motion for Summary Judgment

EWTN's motion for summary judgment⁵ addresses four counts of the complaint: (1) Count I, which alleges that the mandate violates the Religious Freedom and Restoration Act; (2) Count II, which alleges that the mandate violates the Free Exercise Clause; (3) Count V, which alleges that the mandate violates the Establishment Clause; (4) and Count IX, which alleges that the mandate violates the Free Speech Clause. For the reasons that follow, all of those claims fail as a matter of law.

1. Count I—The Religious Freedom and Restoration Act

EWTN's first and most substantial attack on the mandate is mounted under the Religious Freedom and Restoration Act ("RFRA"). RFRA provides that the government may not "substantially burden" a person's religious exercise unless it can justify that burden as the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). To determine whether a law places a "substantial burden" on religious exercise, the court looks for "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind.*Employment Sec. Division, 450 U.S. 707, 718 (1981). EWTN says that the

⁵ Although EWTN alternatively moves for a preliminary injunction, a separate ruling on that motion is unnecessary because the parties agree that "there are no material disputes of fact and the legal issues for either summary judgment or a preliminary injunction are essentially identical." (Doc. 30 at 36.)

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mandate "easily qualifies as a substantial burden under this test because it directly coerces EWTN to conform its behavior by engaging in conduct it believes is immoral." (Doc. 30 at 16 (quotations and alterations omitted).)

According to EWTN, the problem stems from Form 700, which EWTN must sign in order to receive the accommodation. Or more accurately, the problem is with the consequences that will follow after EWTN signs and delivers Form 700. The form itself is innocuous, containing only one operative provision, which does not conflict with EWTN's religious beliefs:

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity, and the organization holds itself out as a religious organization.

(Form 700 (Doc. 29-11 at 2).) But after EWTN signs and delivers that form, the mandate will require EWTN's third-party administrator to take on those responsibilities that EWTN has cast off. As EWTN sees it, signing Form 700 is morally equivalent to providing contraceptive coverage directly because "by executing [Form 700] and thereby designating its administrator to provide contraceptive payments to its employees, EWTN would facilitate and encourage the use of products and services in violation of its sincere religious beliefs." (Doc. 30 at 16.) Thus, by requiring EWTN to sign Form 700 as a condition of the accommodation, the mandate places a substantial burden on EWTN's religious practice. Or so the argument goes.

But EWTN's argument misunderstands the nature of RFRA's

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substantial-burden inquiry. The question is not whether anything in the mandate will offend EWTN's religious beliefs. Instead, the focus of RFRA's substantial-burden inquiry is on the particular actions that the mandate requires EWTN to perform.

On that point, the decision of *Kaemmerling v. Lappin*, 553 F.3d 669, 678–79 (D.C. Cir. 2008), is instructive. In *Kaemmerling*, the court found that a law requiring inmates to submit to the collection of tissue samples for DNA testing did not substantially burden an inmate's religious practice despite the inmate's belief that "the collection and retention of his DNA information was tantamount to laying the foundation for the rise of the anti-Christ." Id. at 674. In reaching that conclusion, the court accepted "as true the factual allegations that [the inmate's] beliefs [were] sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise [was] substantially burdened." Id. at 250. The only thing the inmate was actually required to do was cooperate when prison authorities took a tissue sample, and because he did "not allege that his religion require[d] him not to cooperate with collection of a fluid or tissue sample," id., the court found that there was no substantial burden on his religious practice. And the court reached that conclusion despite the inmate's insistence that the very act of "submitting to DNA sampling . . . [was] repugnant to his strongly held religious beliefs," id. at 245. Federal officers, not the inmate, would perform the DNA analysis, so the court would not let

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that action determine whether there was a substantial burden on the inmate's religious exercise. *See id.* at 679.

The Supreme Court applied a similar line of reasoning in *Bowen v.*Roy, 476 U.S. 693, 106 S.Ct. 2147 (1986), when it decided that the government could use a Native American child's Social Security number despite her father's objection that doing so would rob her spirit and "prevent her from attaining greater spiritual power." Id. at 696. In so holding, the Court balked at the notion that the father's religious beliefs could dictate the government's actions, noting that such a claim held no more merit than one founded upon "a sincere religious objection to the size or color of the Government's filing cabinets." Id. at 700. Because the government's use of the child's social security number did not impair the father's "freedom to believe, express, and exercise his religion," Id. at 701, the Court found that his religious practice was unimpaired.

Taken together, *Kaemmerling* and *Bowen* show that the duties the mandate imposes on other parties are irrelevant to EWTN's RFRA claim. All that matters here is the action that EWTN itself is under pressure to take, which consists solely of signing and delivering Form 700. Thus, the question is whether that act, standing alone, substantially burdens EWTN's religious practice.

This court finds that it does not. As far as Form 700's substance goes, there's nothing in it that is contrary to EWTN's religious beliefs. EWTN does, Case 1:13-cv-00521-CG-C Document 61 Filed 06/17/14 Page 9 of 19 Case: 14-12696 Date Filed: 08/04/2014 Page: 246 of 263

after all, vocally "oppose[] providing coverage for some or all of" the contraceptive services required under the mandate. (Doc. 29-11 at 2). And as for the act of delivering Form 700 to its third-party administrator, EWTN cannot explain how that act violates its religion without reference to the obligation that the mandate will impose upon others after EWTN delivers the form. As discussed above, the burdens that the mandate imposes upon other parties cannot amount to a substantial burden on EWTN's religious practice.

EWTN tries to avoid that conclusion by arguing that by signing Form 700, it would "designat[e]' [its third-party] administrator as the 'plan administrator and claims administrator for contraceptive benefits" (Doc. 29-9) ¶ 17 (quoting 78 Fed. Reg. 39870-01, 39879 (first alteration in original))), an act that would directly violate its religious beliefs. A number of district courts have found that basic reasoning persuasive. See, e.g., S. Nazarene Univ. v. Sebelius, No. CIV-13-1015-F, 2013 WL 6804265, at *8 (W.D. Okla. Dec. 23, 2013) ("The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects.") But that argument attributes far too great a legal effect to Form 700, which serves only to provide notice of EWTN's decision to opt out of the mandate's contraceptive coverage requirement. To the extent that EWTN's third-party administrator is under compulsion to act, that compulsion comes from the law, not from Form 700.

The Seventh Circuit explained that point in a challenge to the mandate filed by the University of Notre Dame:

Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services. By refusing to fill out the form Notre Dame would subject itself to penalties, but [its third-party administrator] would still be required by federal law to provide the services to the university's students and employees unless and until their contractual relation with Notre Dame terminated.

Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014). See also Michigan Catholic Conference and Catholic Family Services, et al v. Burwell, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *9 - *11 (6th Cir. June 11, 2014). The court agrees with that conclusion.

Legally (if not morally) speaking, there is a world of difference between a law that compels EWTN to provide contraceptive coverage directly and one in which the government places that burden on someone else after EWTN opts out. Because EWTN's only religious objection to the mandate hinges upon the effect it will have on other parties after EWTN signs Form 700 rather than anything inherent to the act of signing and delivering Form 700 itself, the court finds that the mandate does not impose a substantial burden on EWTN's religious practice within the meaning of RFRA. As a result, EWTN's RFRA claim fails as a matter of law.

2. Count II—Free Exercise

EWTN's next claim is that the mandate violates the First

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Amendment's Free Exercise Clause, which provides that Congress shall make no law "prohibiting the free exercise" of religion, U.S. Const. amend. I. Specifically, EWTN claims that the mandate unlawfully burdens religious exercise because it "allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes while denying religious exemptions to organizations like EWTN" (Doc. 30 at 29) and that the mandate "expressly discriminates among religious objectors" (Doc. 30 at 30). EWTN makes those claims in an effort to show that the mandate is neither neutral nor generally applicable, which would mean the mandate would be subject to strict scrutiny. Otherwise, the law would be subject only rationalbasis review, because laws that are "neutral and of general applicability need not be justified by a compelling governmental interest even if [they have] the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). EWTN's argument fails, however, because the mandate is both neutral and generally applicable.

Beginning with neutrality, the court rejects EWTN's claim that the mandate is non-neutral. For a law to be non-neutral within the meaning of the Establishment Clause, there has to be evidence of a purpose to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. There's nothing in the mandate that shows an attempt to restrict EWTN's religious practices "because of their religious motivation." *Lukumi*,

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508 U.S. at 533. To the contrary, to the extent that the mandate imposes an incidental burden on EWTN's religious practices, the accommodation serves as evidence that the government made a determined effort to mitigate that burden. EWTN also argues that the mandate is non-neutral because it provides a total exemption for some religious employers while others are only eligible for the accommodation. EWTN calls this "open discrimination among religious institutions." (Doc. 30.) But that argument misses the mark; to the extent that the mandate treats some religious organizations differently than others, the difference has nothing to do with the organization's religious beliefs or practices; it turns upon whether the organization qualifies for taxexempt status under the Internal Revenue Code. 78 Fed. Reg. 39870-01, 39874 (defining a religious employer as an organization that is "organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code"). That is a legitimate basis for differential treatment, see Walz v. Tax Commission of City of New York, 397 U.S. 664, 680 (1970) (holding that the government may grant special tax benefits to churches without running afoul of the Establishment Clause), so the court concludes that the mandate is religiously neutral.

EWTN's arguments about the mandate's general applicability also fail to persuade. To determine whether the mandate is generally applicable, the court looks to see whether the mandate includes secular exemptions intended to ensure that it "impose[s] burdens only on conduct motivated by religious

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belief." See Lukumi, 508 U.S. at 543; accord Primera Iglesia Bautista

Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1309 (11th Cir. 2006). According to EWTN, the contraceptive-coverage regulations are not generally applicable because they allow "massive categorical exemptions for secular conduct... while denying religious exemptions to organizations like EWTN." (Doc. 30 at 29.)

To be fair, EWTN's premise is factually accurate, if somewhat overstated: the rules that apply to grandfathered health plans and small businesses function as limited exemptions to the mandate's contraceptive-coverage requirement. But that fact does not necessarily undermine the mandate's general applicability. Lawmakers are free to carve out exceptions from a general rule without running afoul of the Establishment Clause so long as those exceptions are equally available to secular and religious organizations. See Roman Catholic Archdiocese of Atlanta v. Sebelius, No. 1:12-cv-03489-WSD, 2014 WL 1256373, at *24 (N.D. Ga. March 26, 2014) ("Specific exemptions to a law that are equally available to the adherents of a religious belief do not affect the law's general applicability.") The rules applicable to grandfathered health plans and small employers are equally available to religious and secular employers, so they do not undermine the mandate's general applicability.

Because the regulations are neutral and generally applicable, they are subject only to rational-basis review. See GeorgiaCarry.Org, Inc. v. Georgia,

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687 F.3d 1244, 1256 (11th Cir. 2012) ("If a law is one that is neutral and generally applicable, then rational basis scrutiny should be applied").

That means the mandate is presumptively valid, and EWTN bears the burden of proving that it is not "rationally related to a legitimate government interest." *Keeton v. Anderson-Wiley*, 664 F.3d 865, 880 (11th 2011).

Here, there's no doubt that "[e]nsuring access to affordable healthcare is a legitimate legislative objective." *Deen v. Egleston,* 597 F.3d 1223, 1231 (11th Cir. 2010) (quotations omitted). And EWTN makes no attempt to prove that the regulations are not rationally related to that objective.

Because EWTN does not even come close to shouldering its burden of "negat[ing] every conceivable basis that might support" the mandate, *Leib v. Hillsborough Cnty. Pub. Transp. Com'n,* 558 F.3d 1301, 1306 (11th Cir. 2009), its Free Exercise claim fails as a matter of law.

3. Count V—Establishment Clause

EWTN's final religious-liberty claim is that the regulations violate the Establishment Clause because some religious employers are totally exempt from the mandate while other nonprofits like EWTN are only eligible for an accommodation. According to EWTN, that arrangement amounts to "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations." (Doc. 30 at 32 (quoting *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008)).

But that argument fails because the mandate does not treat religious organizations differently based on their degree of religiosity. Instead, the distinction between an organization that qualifies for the religious-employer exemption and one that does not has solely to do with the organization's tax structure. 78 Fed. Reg. 39870-01, 39874. That is a valid basis of differentiation, and it doesn't implicate the establishment clause. See Roman Catholic Archdiocese of Atlanta, 2014 WL 1256373 at *30 ("Line drawing by the Government based on the structure and purpose of religious organizations is permissible under the Establishment Clause."). As a result, EWTN's Establishment Clause claim fails as a matter of law.

4. Count IX—Compelled Speech

EWTN's final claim accuses the mandate of violating the First Amendment right to be free from compelled speech, which prohibits the government from "telling people what they must say." *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006). According to EWTN, the regulations amount to compelled speech because the accommodation is only available to an organization after it makes "certifications about its religious objections to its insurer in a form and manner specified by" the government. (Doc. 30 at 34 (quotations omitted).)

But EWTN's argument rests on an overly broad understanding of the compelled-speech doctrine. Properly understood, the right to be free from compelled speech "prohibits the government from compelling citizens to

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express beliefs that they do not hold," *Foley v. Orange County*, No. 6:12–cv–269–Orl–37KRS, 2013 WL 4110414, at *12 (M.D. Fla. Aug. 13, 2013) (emphasis removed). But when the government sets out to regulate conduct, the fact that "the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed," is not sufficient to show a compelled-speech violation. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). When compelled speech is purely incidental to the government's regulation of conduct, there is no First Amendment problem.

EWTN to express any opinions or beliefs that it does not hold. To the contrary, EWTN is not even allowed to sign Form 700 unless it believes that the form's contents are "true and correct." (Doc. 29-11 at 2.) And to the extent the accommodation requires EWTN to certify its beliefs in a particular form, that requirement is meant only to facilitate appropriate notice of EWTN's decision to opt out of the mandate's requirements. That notice requirement is a regulation of conduct, not speech, and the fact that Form 700 uses written words to facilitate that notice is purely incidental. See, e.g., Univ. of Notre Dame, 2013 WL 6804773, at *20 ("[T]he certification requirement regulates conduct, not speech."); Roman Catholic Archdiocese of Atlanta v. Sebelius, 2014 WL 1256373, at *29 (N.D. Ga. March 26, 2014) ("The compulsion to fill out a form and express statements that are consistent with Plaintiffs' beliefs is merely incidental to the regulation of conduct..."). As a result, EWTN's

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compelled-speech claim fails as a matter of law.

Before moving on, the court notes that EWTN raised a new First Amendment claim in its reply brief. Under the heading "Compelled Silence," EWTN argues that the accommodation's so-called gag order violates the First Amendment by prohibiting organizations that seek the accommodation from interfering with or influencing their third-party administrator's arrangements for contraceptive coverage, 26 C.F.R. 54.9815-2713A(b)(iii). That argument has succeeded in other lawsuits challenging the mandate. See, e.g., Roman Catholic Archdiocese of Atlanta, 2014 WL 1256373, at *29 (granting summary judgment in favor of a Free Speech challenge to the gag order). But it is not properly at issue in this lawsuit. The only Free Speech claim in EWTN's complaint is the compelled-speech claim addressed above, and EWTN has not amended its complaint to add a challenge to the gag order. As a result, despite EWTN's effort to raise the issue in its reply brief, there is no compelled-silence claim properly before the court at this time. See Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen, 815 F.2d 1435, 1446 (11th Cir. 1987) ("It is well settled that a party cannot argue an issue in its reply brief that was not preserved in its initial brief."); Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

B. The State's Motion for Summary Judgment

As the State points out, Defendants give "no real response to the

State's claims or its motion for summary judgment." (Doc. 48.) But that's only because the State made no real arguments. Instead, the State's motion for summary judgment does little more than incorporate EWTN's arguments by reference and ask for an additional form of relief. (Doc. 28 at 7.) As a result, the success of the State's motion depends on the merits of EWTN's. And because EWTN's motion for summary judgment is due to be denied, the State's is, too.

C. Defendants' Motion for Summary Judgment.

As discussed above, there are no genuine issues of material fact on Counts I, II, V, and IX, and all of those claims fail as a matter of law. As a result, Defendants' motion for summary judgment is due to be granted on those counts. The court will address the remainder of Defendants' motion in a separate order.

IV. CONCLUSION

It is therefore ORDERED as follows:

- (1) EWTN's motion to expedite summary judgment proceedings (Doc. 55) is **GRANTED**;
- (2) EWTN's motion for summary judgment (Doc. 29) is **DENIED**;
- (3) Defendants' motion for summary judgment (Doc. 34) is

 GRANTED with respect to Counts I, II, V, and IX of the complaint.

The court will address EWTN's motion for discovery under 56(d) and the

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remainder of Defendants' dispositive motion in a separate order.

DONE and **ORDERED** this 17th day of June, 2014.

/s/ Callie V. S. Granade

UNITED STATES DISTRICT JUDGE

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

ETERNAL WORD TELEVISION)
NETWORK, INC. AND)
STATE OF ALABAMA,)
Plaintiffs,))
vs.) Civil Action No. 13-0521-CG-C
SYLVIA M. BURWELL, et al,))
Defendants.)

ORDER

This matter is before the court on the joint motion for entry of judgment under Rule 54(b) for Counts I, II, V, and IX, and for a stay of litigation with respect to the remaining Counts (Doc. 63). Having considered the motion and the premises therefor, the court finds, pursuant to Rule 54(b), that there is no just reason for delay of final judgment on the claims under Counts I, II, V, and IX. The court therefore certifies that its order of partial summary judgment dated June 17, 2014, (Doc. 61), constitutes a final judgment as to Counts I, II, V, and IX. A separate final judgment as to those Counts will be entered on the docket.

The court further **ORDERS** that litigation of the remaining claims in this case, including all of the constitutional and Administrative Procedure Act claims, are hereby **STAYED** pending the appeal of the partial summary

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judgment.

DONE and **ORDERED** this 18th day of June, 2014.

/s/ Callie V. S. Granade UNITED STATES DISTRICT JUDGE Case 1:13-cv-00521-CG-C Document 66 Filed 06/18/14 Page 1 of 1 Case: 14-12696 Date Filed: 08/04/2014 Page: 259 of 263

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

ETERNAL WORD TELEVISION)	
NETWORK, INC., et al,)	
Plaintiffs,)	
vs.)	Civil No. 13-0521-CG-C
)	
SYLVIA M. BURWELL, Secretary of)	
the United States Department of)	
Health and Human Services, et al.,)	
)	
Defendants.)	

FINAL JUDGMENT

In accordance with the Order granting the defendants' motion for summary judgment in part, it is **ORDERED**, **ADJUDGED**, and **DECREED** that **JUDGMENT** is entered in favor of Defendants, Sylvia M. Burwell, Secretary of the United States Department of Health and Human Services, Thomas Perez, Secretary of the United States Department of Labor, Jacob Lew, Secretary of the United States Department of the Treasury, and against Plaintiffs, Eternal Word Television and the State of Alabama. It is, therefore, **ORDERED** that Counts I, II, V and IX of the Plaintiff's complaint are hereby **DISMISSED** with **prejudice**. Costs are to be taxed against the plaintiffs.

DONE and ORDERED this 18th day of June, 2014.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION NETWORK, INC.,

and

STATE OF ALABAMA,

Plaintiffs,

v.

SYLVIA M. BURWELL, et al.,

Defendants

No. 1:13-cv-521

NOTICE OF APPEAL

Notice is hereby given this 18th day of June, 2014, that the Eternal Word Television Network, Inc. ("EWTN"), plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the orders of this Court entered in this action on the 17th and 18th days of June, 2014:

- Dkt. 61, denying both summary judgment and preliminary injunctive relief to EWTN on Counts I, II, V, and IX, and granting summary judgment to the Defendants on those same counts;
- 2. Dkt. 65, certifying that this Court's judgment on Counts I, II, V, and IX constitutes a final judgment; and
- 3. Dkt. 66, entering final judgment on Counts I, II, V, and IX, and dismissing them with prejudice.

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Respectfully submitted this 18th day of June, 2014,

/s/ Daniel Blomberg

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2014, the foregoing notice of appeal was served on counsel for Defendants and the State of Alabama via ECF and by courier delivery.

/s/ Daniel Blomberg

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CERTIFICATE OF SERVICE

I certify that on August 4, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

Adam C. Jed

Email: Adam.C.Jed@usdoj.gov

Patrick G. Nemeroff

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All other case participants will be served via the Court's electronic filing system as well.

/s/ Daniel Blomberg

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