UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

ETERNAL WORD TELEVISION NETWORK, INC., *and* STATE OF ALABAMA, *Plaintiffs,* v. KATHLEEN SEBELIUS, *et al.*, *Defendants*	NO. 1:13-CV-521 **EWTN'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND ITS MOTION EITHER TO EXPEDITE THE CASE OR FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

This case is one of many challenges to the HHS Mandate, a federal regulation that requires employers to cover contraceptives in their health plans or face onerous fines. The government admits that many religious organizations cannot in good conscience comply with the Mandate, but it has granted genuine exemptions only to churches and their affiliates. For the rest, the government has offered an "accommodation," under which a religious organization must execute and deliver a form to its plan administrator, who in turn "must provide or arrange for payments for contraceptive services requested by plan participants or beneficiaries." *E. Tex. Baptist Univ. v. Sebelius*, 2013 WL 6838893, at *9 (S.D. Tex. Dec, 27, 2013). One of those "accommodated" organizations is the plaintiff here, the Eternal Word Television Network ("EWTN"), which was founded by a cloistered nun and has become the world's largest Catholic broadcasting network. Like many religious organizations now challenging the Mandate, EWTN sees the accommodation as a meaningless fig leaf. The added layer of paperwork cannot hide the fact that EWTN is being forced to "authorize[ ] a third party to provide the contraceptive coverage to which [it] object[s]." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013). Despite the government's assurances that the accommodation solves the Mandate's moral problem,

EWTN cannot deputize another party to sin on its behalf without morally implicating itself in the wrong.

In nearly twenty district court decisions issued to date, the overwhelming majority have ruled that the accommodation violates the civil and constitutional rights of religious organizations like EWTN. *See infra* note 4 (collecting decisions). This Court should reach the same result and grant EWTN's motion for partial summary judgment. EWTN's conscientious objection is protected by the Religious Freedom Restoration Act (RFRA) (Count I), the Free Exercise Clause (Count II), the Establishment Clause (Count V), and the Free Speech Clause (Count IX). Against these protections of constitutional rights, the Defendants can coerce EWTN's participation in the accommodation scheme only if they prove a compelling interest of the highest order. The Mandate does not meet this strict standard. Summary judgment is thus warranted.

If EWTN does not comply with the accommodation and authorize contraceptive payments by July 1, 2014, it will face massive penalties. EWTN therefore urges this Court to expedite consideration of summary judgment motion. Alternatively, EWTN requests preliminary injunctive relief on those same claims. Summary judgment is the better course, however, because there are no material fact disputes and the legal issues are essentially identical for both types of relief. *See, e.g., Persico v. Sebelius*,

No. 13-cv-00303 (W.D. Pa.); *Zubik v. Sebelius*, No. 13-cv-01459 (W.D. Pa.) (converting preliminary injunction to permanent injunction following government concession that it had no additional evidence to submit).

STATEMENT OF FACTS

A. THE HHS MANDATE

The Patient Protection and Affordable Care Act ("ACA") mandates that any "group health plan" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. §300gg-13(a). The ACA allowed the Health Resources and Services Administration (HRSA), a division of Defendant HHS, to define "preventative care." 42 U.S.C. § 300gg-13(a)(4).

HRSA's definition includes FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, including "emergency contraception" such as Plan B (the "morning-after" pill) and Ella (the "week-after" pill). Ex. A; Ex. B at 11-12. The FDA's Birth Control Guide notes that these drugs and devices may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. Ex. B at 11-12. HHS allowed HRSA "discretion" to create an exemption for "certain religious employers." 76 Fed. Reg. 46621-01 (published Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B).

On June 28, 2013, HHS issued the Mandate as a final rule. It treats as exempt "religious employers" only certain entities—institutional churches, their integrated auxiliaries and the exclusively religious activities of any

religious order—that are "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. 39870-01, 39874(a); 45 C.F.R. § 147.131(a).[1] The Mandate creates a claimed "accommodation" for any "non-exempt" 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). Such "non-exempt" entities must provide the certification to their insurer or third party administrator before "the beginning of the first plan year" beginning on or after January 1, 2014. 78 Fed. Reg. at 39875.

The non-exempt organization's required delivery of the certification triggers 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. If an administrator declines to provide the

[1] Whether an entity is an "integrated auxiliary" of a church turns primarily on the degree of the church's control over and funding of the entity. *See* 26 C.F.R. §1.6033-2 (h)(2) & (3) (affiliation); *id* § 1.6033-2(h)(4) (funding). The definition was for tax considerations, not religious conscience concerns, and thus can arbitrarily turn on whether a religious non-profit receives 49% or 50% of financial support from a formal church in a given year.

services, the religious organization must find one that is willing. 78 Fed. Reg. at 39880.

If a third party administrator is willing, the religious organization—via its self-certification—must expressly designate the third party administrator as its "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." *Id*. at 39879. The self-certification notifies the third party administrator of its "obligations set forth in these final regulations." *Id*. at 39879.

By contrast to this convoluted "accommodation" for "non-exempt" religious organizations, many secular businesses are exempt from the Mandate. Employers who provide "grandfathered" health care plans, covering an estimated 87 million people, are exempt. *See* 42 U.S.C. § 18011 (2010); Ex. D at 5. Employers with fewer than fifty employees, covering about 34 million individuals, may also avoid the Mandate. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); Ex. F at 2.

B. ETERNAL WORD TELEVISION NETWORK

EWTN was founded in 1981 by a Catholic nun, Mother M. Angelica, and has since become the largest Catholic media network in the world. Exhibit G, Michael Warsaw Decl. ¶ 4. Twenty-four hours a day, seven days a week, it broadcasts over eleven television feeds and two distinct radio services into 230 million homes in 144 countries. *Id*. Every minute of those

communications exists for one purpose: faithfully proclaiming to the world the truth as taught by the Roman Catholic Church. *Id*. ¶ 6. To achieve this purpose, EWTN airs daily live Masses and prayers, Catholic devotions, live coverage of Catholic Church events, teaching series, documentaries, and numerous other shows. *Id*. ¶ 6. EWTN prohibits any commercial advertising and does not charge spiritually orthodox organizations for access to its programs. *Id*. ¶¶ 6, 22.

EWTN's Catholic identity infuses everything it does. The chapel on its Irondale, Alabama campus hosts pilgrims for daily Masses celebrated by the Franciscan friars who live there. *Id*. ¶ 8. EWTN's grounds feature an outdoor shrine, a Stations of the Cross devotional area, and numerous religious statues. *Id*. ¶ 9. Virtually every room in EWTN's buildings features religious images, including crucifixes, depictions of the Pietà, paintings of saints, and Bible verses and prayers. *Id*. ¶ 10. EWTN's employees often adorn their work spaces with pictures of Catholic saints, prayers, and religious icons. *Id*. ¶ 11.

EWTN sincerely holds and professes traditional Catholic teachings concerning the sanctity of life. *Id*. at ¶ 12. It believes that each human being bears the image of God, and therefore that abortion ends a human life and is a grave sin. *Id*. Furthermore, in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, EWTN holds to traditional Catholic teaching that

human sexuality has two primary purposes—to "unit[e] husband and wife" and "for the generation of new lives"—that cannot properly be separated. *Id*. ¶¶ 13-14. EWTN therefore believes that artificial contraception and sterilization are gravely immoral. *Id*.

EWTN also obeys Church teaching that Catholics may never encourage the use of abortion, contraception, or sterilization. *Id*. It believes those practices are not "health care" and cannot in good conscience treat them as such. *Id*. ¶ 15. EWTN has often professed and taught these beliefs to its worldwide audience and will continue to do so. *Id.* ¶ 17. Also, as part of EWTN's religious convictions, it provides for the well-being of the employees who further its mission and form its community. *Id*. ¶ 18. It is non-negotiable that EWTN's insurance plan is consistent with its beliefs, which is why it has taken pains for years to ensure its health plan does not cover abortions, sterilization, or contraception. *Id*. ¶ 20. EWTN is self-insured, using Blue Cross Blue Shield of Alabama as its third party administrator ("TPA"). *Id*. ¶ 24. This means EWTN controls the terms of its plan, and its TPA administers the plan according to those terms. EWTN's insurance plan is not grandfathered. *Id*. ¶ 27.

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, encourage, or otherwise facilitate access to

abortion-inducing drugs, contraception, or sterilization, this would violate EWTN's religious beliefs, betray its identity, and contradict its public teaching. *Id*.¶ 17.

The Mandate will take effect against EWTN on July 1, 2014. *Id*. ¶ 47. On that date, it will face the unconscionable choice either to violate the law or violate its faith. *Id*. If EWTN violates the law by ceasing to offer employee health insurance, it will face the prospect of fines of $2,000 per employee per year, or nearly $700,000 every year. *Id*. ¶¶ 61-62; 26 U.S.C. § 4980H.[2] 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. Ex. G ¶¶ 17, 20, 64. Terminating its health plan would also place EWTN at a serious competitive disadvantage by making it much harder to attract and retain quality employees. *Id*. ¶ 60.

Alternatively, if EWTN violates the law by continuing to offer insurance that fails to comply with the Mandate, it would *at least* incur penalties of

[2] Defendants recently announced that they postponed implementing the annual fine of $2000 per employee for organizations that drop their insurance altogether, but the postponement is only 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* http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx (last visited Dec. 31, 2013).

$100 per day per full-time employee, which comes to over $12 million per year for its 350 employees. Ex. G ¶ 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 even larger. EWTN could also face regulatory action and lawsuits under ERISA. Ex. G ¶ 59; 29 U.S.C. § 1132.

C. THE MANDATE'S IMPACT ON EWTN

Although EWTN has no objection to covering most preventive services required by the ACA, its religious convictions forbid it from covering contraception, sterilization, and abortifacient products in its employee healthcare plans. Ex. G ¶¶ 48-51. EWTN is excluded from the religious employer exemption, *id*. ¶ 26, and does not qualify for the grandfathering exemption, *id*. ¶ 27. The only avenue left EWTN is the so-called "accommodation." But to comply with the "accommodation," EWTN would have to execute a government-mandated self-certification form ("Form") and deliver the Form to its TPA prior to July 1, 2014. *Id*. ¶ 28.

According to the government, the Form:

- Gives TPAs the "legal authority" to provide contraceptives to employees of organizations like EWTN. *See* 78 Fed. Reg. at 39880.
- Authorizes EWTN's TPA to offer contraceptives to "participants and beneficiaries" in EWTN's health plan, "so long as they remain enrolled in the plan." 78 Fed. Reg. at 39893; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2590.715–2713A.
- Designates each TPA that receives the Form a "plan administrator . . . solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879.

- Notifies each TPA of its legal "obligations" to offer contraceptive coverage by citing regulations issued under both ERISA and the Internal Revenue Code. *See* Exhibit I at 2 (citing 26 C.F.R. §54.9815-2713A); *see also* 78 Fed. Reg. at 39879.
- Incorporates these new instructions into EWTN's existing health plan. Ex. I at 2 ("This certification is an instrument under which the plan is operated.").
- Authorizes a recipient TPA to use the Form to seek federal reimbursement plus an allowance for administrative costs and margin equal to at least 10% of the cost for any contraceptives that it provides to EWTN's employees. 45 C.F.R. § 156.50.[3]
- Bans EWTN from telling its TPA not to provide the objectionable drugs and services. Ex. G ¶ 44-45; *See* 29 C.F.R. § 2590.715-2713A ("must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements").

As Defendants explain, they adopted this system because they believed that it "best ensure[d] that plan participants and beneficiaries receive contraceptive coverage without cost sharing." 78 Fed. Reg. at 39880.

EWTN's sincere religious beliefs prohibit it from involvement in this process. EWTN cannot in good conscience execute the Form and thereby become an integral part of the government's scheme. EWTN's beliefs preclude it—not only from providing contraceptives and abortifacients

[3] *See also* 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 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").

itself—but also from soliciting, contracting with, or designating a third party to provide them. Ex. G ¶ 64. From EWTN's perspective, arranging for coverage and forcing its administrator to provide payments for contraceptive and abortifacient services is no different than providing those services itself. *Id*. ¶ 49. The government's command to outsource EWTN's conscience would do nothing to lessen EWTN's complicity in what it believes to be a grave moral wrong. *Id*. Indeed, the "accommodation" would *exacerbate* the moral problem by requiring EWTN to cause a third party to engage in wrongdoing on its behalf. *Id*. ¶ 50. 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 discredit EWTN's reliability as a witness to Catholic truth, undermining the reason for EWTN's existence. *Id*. ¶¶ 17, 21-23, 51-53. Worse yet, EWTN's compromised example may lead others astray—precisely the opposite of EWTN's purpose. *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. Ex. G ¶¶ 18, 21, 63. 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. *Id*. ¶¶ 47-48.

ARGUMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, there can be no dispute that the Mandate substantially burdens EWTN's sincere religious exercise, that applying the Mandate to EWTN fails to further a compelling interest, and that Defendants have numerous less restrictive means to achieve their goals. Similarly, there can be no dispute that the Mandate discriminates among religious organizations and compels EWTN to speak against its will. Thus, as courts have found in recent weeks in eighteen similar challenges to the Mandate, EWTN is entitled to judgment in its favor.[4]

[4] *See Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-00709 (E.D. Tex. Dec. 31, 2013); *Roman Catholic Diocese of Ft. Worth v. Sebelius*, No. 12-cv-314 (N.D. Tex. Dec. 31, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Srvs.*, No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit plaintiffs); *E. Tex. Baptist Univ. v. Sebelius*, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Grace Sch. v. Sebelius*, No. 3:12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, No. 13-cv-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, 2013 WL 3071481 (W.D. Pa. Dec. 23 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-cv-12061-RHC-MJH (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archbishop of*

I. THE MANDATE VIOLATES RFRA.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (b). RFRA thus restores strict scrutiny to religious exercise claims. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006); *see also* 42 U.S.C. § 2000bb (b)(1) (stating that RFRA "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)").

There is a three-step analysis for RFRA claims: First, a court must "identify the religious belief" at issue. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc), *cert. granted* 134 S. Ct. 678 (2013). Second, it must "determine whether this belief is sincere." *Id*. Third,

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Wash. v. Sebelius, No. 13-cv-1441 (D.D.C. Dec. 20, 2013) (enjoining mandate on free speech grounds); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 2013 WL 6579764, *6 (E.D.N.Y. Dec. 16, 2013); *Persico v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *see also Priests for Life v. U.S. Dep't of Health & Human Srvs.*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (granting injunction pending appeal); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (same); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same).

it must determine "whether the government places substantial pressure on the religious believer." *Id*; *accord O Centro*, 546 U.S. at 428. Finally, if there is substantial pressure, Defendants' action will be upheld only if Defendants satisfy strict scrutiny, *Hobby Lobby*, 723 F.3d at 1143, which they must do by, *inter alia*, showing they have a compelling interest in applying "the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31 (citation omitted).

A. EWTN sincerely exercises religion by refusing to facilitate contraceptive use through its employee health plan.

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).

The Mandate requires EWTN, contrary to its sincere religious beliefs, to actively participate in a scheme to facilitate and encourage the use of contraceptives, sterilization, and abortifacients. *See* Ex. G ¶ 4-23, 47-65. To comply with the accommodation, EWTN must execute a self-certification form which triggers a process that solely exists to promote the use of contraception, sterilization, and abortifacients. 78 Fed. Reg. at 39875-77. EWTN cannot execute the self-certification without making itself morally complicit in this scheme.

It is a violation of EWTN's sincere religious beliefs to allow its own insurance plan to become a conduit for these products and services. Ex. G ¶¶ 48-49, 64. EWTN has always sought to avoid facilitating access to such products and services through its insurance plan, and the Mandate forces it to abandon this practice. *Id.* ¶ 20. Abstaining for religious reasons from practices believed to be immoral easily qualifies as "religious exercise," just as much as refusing to manufacture items that will later be used in warfare, *see Thomas v. Review Bd.*, 450 U.S. 707 (1981), abstaining from work on certain days, *see Sherbert*, 374 U.S. 398, or providing alternative education for children, *see Yoder*, 406 U.S. 205.

Numerous courts have already accurately recognized identical religious objections to the accommodation scheme. *See, e.g., S. Nazarene Univ.*, 2013 WL 6804265, at *8 ("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"); *accord Zubik*, 2013 WL 6118696, at *14 ("Completion of the self-certification form would be akin to cooperating with/facilitating 'an evil' and would place the Diocese 'in a position of providing scandal' because 'it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching.'"); *E. Tex. Baptist Univ.*, 2013 WL 6838893, at

*20 ("The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms."); *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *14 ("Plaintiffs' religious objection is . . . to being required to actively participate in a scheme to provide such services.").

B. The Mandate substantially burdens EWTN's religious exercise by threatening enormous fines and disruption to its operations.

A government action substantially burdens a religious belief when it places "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). The 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. *Id.*; *see also* Ex. G ¶¶ 55-65.

By executing the self-certification 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. *See* Ex. G ¶¶ 28-38, 49-51. Under this

scheme, EWTN could continue to exercise its faith only by continuing coverage and facing enormous penalties, or by dropping coverage entirely, paying fines, and severely disrupting its operations and its employee relations, 26 U.S.C. § 4980D; 29 U.S.C. § 1132 (a).

These consequences obviously place "pressure that tends to force" EWTN to "forego religious precepts." *Midrash Sephardi*, 366 F.3d at 1227; *see also* Ex. G ¶¶ 58-62 (devastating impact of penalties and loss of health benefits); *id*. ¶¶ 20, 60 (impact that threat of losing health benefits has on EWTN's ability to hire and retain employees); *id*. ¶¶ 22, 53 (impact on donor support). It leaves EWTN with a "Hobson's choice" between obeying its conscience or sacrificing the continued viability of its ministry. *Hobby Lobby*, 723 F.3d 1141; *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"); *accord Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *15 ("[T]here can be no doubt that the coercive pressure here is substantial."); *Zubik*, 2013 WL 6118696, at *27 (concluding that "the religious employer 'accommodation' places a substantial burden on Plaintiffs' right to freely exercise their religion").

Several courts have rejected Defendants' "attenuation" argument that, since the religious employer is neither using nor directly subsidizing contraceptives, participating in the accommodation cannot constitute a substantial burden on its religious exercise. *See, e.g.*, *Zubik*, 2013 WL 6118696, *24 (describing the "attenuation" argument). But courts have recognized that the employers' "religious objection is not only to the use of contraceptives but also being required to actively participate in a scheme to provide such services." *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *14. The accommodation requires objectors to sign what is, "in effect, a permission slip." *S. Nazarene Univ.*, 2013 WL 6804265, at *8. Thus, the proper question is whether the objectors believe it is immoral to sign the permission slip and thereby entangle their health plans in the provision of morally objectionable services. *Reaching Souls*, 2013 WL 6804259, at *7 (determining that the question is "'not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity'") (quoting *Hobby Lobby*, 723 F.3d at 1142). Ultimately, Defendants' attenuation argument is "fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in

question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." *Id.*

C. The Mandate cannot satisfy strict scrutiny.

The Mandate fails strict scrutiny for three separate reasons: (1) the government has neither identified an "interest of the highest order" nor has it acted as if its interests are compelling; (2) the Mandate will not further the government's purported interests; and (3) the government has multiple alternative means of pursuing their ends that are less restrictive of EWTN's constitutional and civil rights than the Mandate.

1. The government has identified no compelling interest.

Strict scrutiny requires "the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31.

a. Providing EWTN's employees coverage for the objectionable drugs and devices is not an "interest of the highest order."

In other lawsuits, the government has claimed the Mandate furthers compelling interests in "public health" and "gender equality." *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1143; *E. Tex. Baptist Univ.*, 2013 WL 6838893, *23. However important these interests are in the abstract, they cannot qualify as compelling here because, 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). As the Seventh Circuit has explained in another Mandate challenge, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013); *see also, e.g., S. Nazarene Univ.*, 2013 WL 6804265, *9 ("Aside from mentioning generalized governmental interests in public health and gender equality …, the government offers no developed argument on this prong."). Instead of relying on such patently inadequate justifications, the government must instead 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 *O Centro*.

b. The government has issued numerous exemptions, and the objected-to products and services are already widely available.

A purported government interest also cannot qualify as compelling where the government's own behavior shows it does not have a critical need to pursue the interest. 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 Hialeah*, 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. "[T]his exempted population includes those working for private employers with grandfathered plans, [and] for employers with fewer than fifty employees." *Id*. In addition, some religious organizations are exempt from the Mandate altogether. *See* 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). These massive exemptions cover upwards of 80 million people.[5] That means that the Mandate fails strict scrutiny. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547; *accord Hobby Lobby*, 723 F.3d at 1143.

Numerous district courts have already found that Defendants have failed to meet their burden to demonstrate a compelling interest and that the Mandate therefore fails strict scrutiny for that reason alone. *See, e.g.*, *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *23 ("The government has not clearly shown how denying these [religious non-profit] plaintiffs an exemption from

[5] The government expects over 50 million people to be on grandfathered plans. *See* Ex. D at 4-5. And "small employers," employing nearly 34 million people, need not offer health insurance at all and can therefore avoid the Mandate. Ex. F at 1.

the mandate … would undermine a compelling interest in protecting women's health."); *Roman Catholic Archdiocese of N.Y.*, No. 2013 WL 6579764, at *17 ("Having granted so many exemptions already, the Government cannot show a compelling interest in denying one to these plaintiffs."); *id.* ("The fact that these exemptions work the same harm to the Government's interests as would any exemption granted to plaintiffs greatly undermines the Government's assertion that it has a compelling interest in enforcing the Mandate against plaintiffs."); *S. Nazarene Univ.*, 2013 WL 6804265, at *10 (noting that "the number of excepted and exempted individuals may total more than 190 million," and concluding that "this assemblage of special cases 'severely undermines the legitimacy of defendants' claim of a compelling interest'") (quoting *Geneva Coll.*, 2013 WL 3071481, at *10).

2. The Mandate will not further the government's interests.

Even assuming the government's interests are compelling, applying the Mandate to EWTN would not further them. To meet strict scrutiny, the government must 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 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)). This

means the government must "show with more particularity *how* its admittedly strong interest . . . would be adversely affected by granting an exemption *to the [religious claimant]*." *Id*. (quoting *Yoder*, 406 U.S. at 236) (first emphasis added).

First, the government cannot show that making free contraceptive and sterilization payments to EWTN employees will increase the use of those services. Critical to the government's interests is not merely increasing "access" to the mandated products but increasing their *use*. *See, e.g.*, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (stating that "[i]ndividuals are *more likely to use preventive services* if they do not have to satisfy cost sharing requirements") (emphasis added). It is hard to imagine that any meaningful percentage of the employees of a religious organization like EWTN would use health benefits in a way contrary to the religious mission publicly espoused by the organization. *See* Ex. G ¶¶ 11, 21 (discussing employee religious practices). In any event, the government must demonstrate why one should expect the contrary. All it offers, however, is a guess that only exempted churches and church-affiliated organizations are likely to employ persons who share their employer's faith. *See* 78 Fed. Reg. at 39874 (opining that exempted religious organizations "are more likely that 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"). This baseless speculation has no application to an organization like EWTN, which—founded by a nun, home to daily masses and an order of friars, laden with religious imagery and iconography, and wholly devoted to expressing Catholic beliefs—is every bit as "religious" as a church but simply lacks the formal affiliation of exempted organizations.

Second, forcing a conflict between EWTN's religious beliefs and the Mandate may coerce EWTN into dropping employee health insurance altogether. How this disastrous outcome would advance the government's claimed purpose of expanding contraceptive coverage is anybody's guess. Forcing EWTN to drop employee health coverage would result in *fewer* people having *any* insurance coverage—whereas presently EWTN employees enjoy generous health benefits that cover all mandated preventive services *except* contraceptives and sterilization.

Third, even setting aside the first two points, applying the Mandate to EWTN would, at best, only *marginally* further the government's interests. The government has admitted that the Mandate's target beneficiaries are socio-economically at-risk women who face dire economic barriers to purchasing contraceptives. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, at 101-102 (July 19, 2011). Yet, with EWTN, the government seeks to insure free contraceptive payments to

employees with full-time jobs and generous health benefits that cover all preventive services except contraception. Thus, at best, the government could show that the Mandate would provide marginal assistance to EWTN employees in purchasing contraceptives. But "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n. 9 (2011).

3. Defendants have numerous less restrictive means of furthering their interests.

Even assuming that HHS had identified a compelling interest and that 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."). Moreover, HHS must put forward "specific evidence" explaining why applying the Mandate "to the person"—that is, specifically to EWTN—is the least restrictive means of furthering the government's interests. *O Centro*, 546 U.S. at 430.

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 its 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.

Indeed, HHS has "many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Id*. It could

- Directly provide or subsidize the drugs at issue through pre-existing government family-planning programs.
- Directly provide insurance coverage for the drugs at issue through the state and federal health exchanges.
- Provide a tax credit to employees who purchase contraceptives with their own funds.
- Empower willing actors—for instance, physicians, pharmaceutical companies, or various interest groups—to deliver the drugs and sponsor education about them.
- Use their own resources to inform the public that these drugs are available in a wide array of publicly-funded venues.

This array of alternatives is real. *Korte*, 735 F.3d at 686 (listing several similar options); *see also, e.g.*, *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *18 (noting similar alternative means "have been recognized as feasible alternatives by other courts") (citing *Korte*). Moreover, HHS planned to spend over $300 million in 2012 to provide

contraceptives directly through Title X funding.[6] And the federal government, in partnership with state governments, has constructed an extensive funding network designed to increase contraceptive access, education, and use, including:

- $2.37 billion for family planning in FY 2010.
- $228 million in FY 2010 for Title X program.
- $294 million in state spending for family planning in FY 2010.[7]

The government can employ such 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 of N.C.*, 487 U.S. 781, 800 (1988) (striking down a law due to existing alternative means of accomplishing the state's interests

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[6] *See* HHS Grant Announcement, 2012 Family Planning Services FOA, *available at* https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=12978 (click on Grant Announcement – View PDF Version) (last visited Dec. 31, 2013) (announcing that "[t]he President's Budget for . . . (FY) 2012 requests approximately $327 million for the Title X Family Planning Program").

[7] Guttmacher Inst., *Facts on Publicly Funded Contraceptive Services in the United States* (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Dec. 31, 2013) (citations omitted).

without harming First Amendment rights, concluding that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms").

Numerous district courts have already concluded that the Mandate fails the least-restrictive-means test. *See, e.g.*, *S. Nazarene Univ.*, 2013 WL 6804265, at *9 (concluding that "[t]he government offers no developed argument on the [least restrictive means] issue" and therefore "loses by default on this issue"); *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *24 (concluding that "[t]he government has not explained why the mandate and accommodation [are] the least restrictive means of advancing a compelling government interest"); *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *18 (concluding that "numerous less restrictive alternatives are readily apparent," including direct provision by government, cooperation with third parties, or provision of "tax incentives to consumers or producers of contraceptive products").

II. THE MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

The Mandate is neither neutral nor generally applicable under the Free Exercise Clause and therefore faces strict scrutiny. *Lukumi*, 508 U.S. 520.

A. The Mandate is not generally applicable.

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 359, 365 (3d Cir. 1999) (Alito, J.). For example, the slaughter ordinances in *Lukumi* ostensibly protected public health and prevented animal cruelty, but were not generally applicable because they exempted hunting, pest control, and euthanasia. 508 U.S. at 543-44. Similarly, the regulation in *Fraternal Order* prohibited police officers from growing beards for religious reasons but allowed beards for medical reasons, thus making an unconstitutional "value judgment in favor of secular motivations, but not religious motivations." 170 F.3d at 366.

Here, the Mandate is far worse than the exemption schemes in *Lukumi* and *Fraternal Order*, because it allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes while denying religious exemptions to organizations like EWTN. Most notably, over 50 million Americans are covered under "grandfathered" plans that are indefinitely excused for administrative convenience, not only from complying with the Mandate, but from covering *any* of the mandated preventive services. Ex. D at 4-5; 42 U.S.C. § 18011 (a)(2). Additionally, the government has admitted that 96% of businesses in the United States, which employ 34 million more Americans, may also avoid the Mandate. Ex. F at 1; 26 U.S.C. § 4980H (c)(2). While these secular exemptions severely undermine the Mandate's interest in increasing coverage for the *all* women's

preventive services, EWTN gets no exemption for its religious objections to the mandated contraceptives. This is just 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.

B. The Mandate is not neutral.

The Mandate is not neutral because it expressly discriminates among religious objectors, creating a three-tiered system in which some are exempt (churches and "integrated auxiliaries"), some must comply with the "accommodation" and the gag rule at issue here (non-exempt religious non-profits), and some receive not even the accommodation fig-leaf (religious believers who run commercial businesses), *but see Hobby Lobby*, 723 F.3d 1114). Defendants openly admit that this facial discrimination among religious believers who have the same beliefs, and seek to engage in the same religious conduct, is based on the *government's* untutored predictions about the religious practices of different organizations' employees. *See* 78 Fed. Reg. at 39874.

This open discrimination among religious institutions fails even "the minimum requirement of neutrality" that a law *not* discriminate on its face. *Lukumi*, 508 U.S. at 533; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.) ("[T]he First Amendment prohibits not only laws with 'the object' of suppressing a religious practice, but also '[o]fficial action that targets religious conduct for distinctive treatment.'")

(quoting *Lukumi*, 508 U.S. at 534). Facially discriminating among religious institutions is "a puzzling and wholly artificial distinction" that the Free Exercise Clause cannot countenance. *Weaver*, 534 F.3d at 1259-60. Nor is this open discrimination justifiable, as discussed in more detail below, based on the Defendants' speculation that an institutional church's employees are more likely than EWTN employees to share their employer's beliefs about contraception. Defendants offer no reason to distinguish EWTN from the more institutionally-affiliated religious employers the government has exempted. Ex. G ¶ 21; *see, also, e.g., Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 609 (5th Cir. 2008) (neutrality requires that government policy be "actually based on the justifications it purports, and not something more nefarious").

III. THE MANDATE VIOLATES THE ESTABLISHMENT CLAUSE

The Mandate's "explicit and deliberate distinctions between different religious organizations" also violate the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982); *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."). 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 (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). This is forbidden by the Establishment Clause.

Larson invalidated a Minnesota law that imposed anti-fraud disclosure requirements on religious organizations that did not "receive[ ] more than half of their total contributions from members or affiliated organizations." 456 U.S. at 231-32. The law thus exempted established, self-supported churches, while targeting churches that relied on outside donations. *Id*. at 247 n.23; *see also Weaver*, 534 F.3d at 1259 (explaining that the law in *Larson* "discriminated against religions . . . that depend heavily on soliciting donations from the general public"). This was an "explicit and deliberate distinction[] between different religious organizations," one that failed strict scrutiny and violated the Establishment Clause. *Larson*, 456 U.S. at 247 n.23, 255.

Like the exemption struck down by *Larson*, the Mandate's "religious employer" exemption impermissibly distinguishes religious organizations based on their 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.

The government has candidly explained that it structured the Mandate exemption this way because it claims that objecting "[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). Defendants cite no factual authority for that assumption, and have admitted in parallel litigation that it is nothing more than a guess. Ex. K at 5 (Deposition Transcript of Gary M. Cohen, Defendants' Rule 30(b)(6) Designee, Dkt. 51-1, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.)) (admitting there is "no evidence" for Defendants' speculation that employees of religious organizations like Plaintiffs "are more likely not to object to the use of contraceptives.") But differentiating religious

organizations based on internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*." *Weaver*, 534 F.3d at 1259.

IV. THE MANDATE VIOLATES THE FREE SPEECH CLAUSE.

The First Amendment protects EWTN's rights to be free from government efforts to compel its speech. *Riley*, 487 U.S. at 796-97. The proposed accommodation requires EWTN to make statements that will trigger payments for the use of contraception, sterilization, and abortifacients. Ex. G ¶¶ 28-30. In particular, EWTN would have to make certifications about its religious objections to its insurer "in a form and manner specified by the Secretary." 45 C.F.R. § 147.131 (b)(4), (c). As set forth above in Part I.A, EWTN is forbidden by its religion from engaging in such speech. Just last term, the Supreme Court held that 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 Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *FAIR*, 547 U.S. at 61). The 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*. Such a direct regulation of speech is presented here. Forcing EWTN to comply is not remotely permissible under the First Amendment. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 624, 642 (1994).

The mechanism of the accommodation also triggers strict scrutiny because "[l]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. The Mandate fails strict scrutiny for all the reasons set forth in Section I.C.

Finally, EWTN is not even able to avoid these coercive requirements about what it must say by foregoing the accommodation. That course of action would subject it to the original Mandate, meaning EWTN would be forced by the government to pay directly for contraceptive and abortifacient drugs and devices, and for related "patient education and counseling for all women with reproductive capacity." Ex. A at 2. For the reasons set forth above, such a course would violate EWTN's religious liberty. And forcing it to pay for speech counseling and educating people about how to use abortion-inducing drugs would separately violate EWTN's speech rights. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (finding that forced contributions for union political speech violate the First Amendment "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); *United States v. United Foods Inc.*, 533

U.S. 405, 411 (2001) (finding that forced contributions for advertising related to unbranded mushrooms violates First Amendment).

V. THE COURT SHOULD EXPEDITE SUMMARY JUDGMENT PROCEEDINGS.

Unless EWTN obtains relief by July 1, 2014, it will face massive penalties. EWTN therefore needs this Court to rule on its request for relief before then. The simplest way to do so would be to expedite consideration of its partial motion for summary judgment, because there are no material disputes of fact and the legal issues for either summary judgment or a preliminary injunction are essentially identical. This is why the government quickly conceded the *Persico/Zubik* court should simply convert its preliminary injunction to a permanent injunction: deciding the preliminary issue necessarily decides the ultimate one. Defendants do not oppose EWTN's request for expedited consideration.

VI. ALTERNATIVELY, THE COURT SHOULD ENTER A PRELIMINARY INJUNCTION.

Should the Court not have sufficient time to rule on EWTN's summary judgment motion before the July 1, 2014 deadline, the Court should enter preliminary injunctive relief against the Mandate. Recently, courts in nearly identical cases have taken this route when faced with an impending Mandate deadline. *See, e.g.*, *Sharpe Holdings*, No. 2:12-cv-92; *Reaching Souls*, 2013 WL 6804259; *S. Nazarene Univ.*, 2013 WL 6804265.

Likelihood of Success on the Merits. As shown above, EWTN is highly likely to succeed on the merits. And in cases like this one, 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). This is because "in First Amendment cases, 'the likelihood of success on the merits will often be the determinative factor." *Korte*, 735 F.3d at 666 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012)); *Hobby Lobby*, 723 F.3d at 1146 (same). This principle also holds true for 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").

Irreparable Harm. A potential violation of 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 Lobby*, 723 F.3d at 1146; *Korte*, 735 F.3d at 666 (the loss of RFRA-protected freedoms "constitutes irreparable injury"). Further, the impending Mandate is causing harms *now* as EWTN undertakes "the extensive planning involved in preparing and providing its employee [benefit] plan." *Newland*, 881 F. Supp. 2d at 1294-95, *aff'd* 2013 WL 5481997 at *2; Ex. G ¶ 65.

Balance of Harms. Courts have recognized both the overriding importance of an entity's religious liberty interests and the substantial burden that the Mandate places on those interests, and have also recognized that Defendants' interest in enforcing the Mandate 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. Further, 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).

Public Interest. 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 Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd* 546 U.S. 418 (2006)). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights" which are protected by RFRA. *Briscoe v. Sebelius*,

2013 WL 4781711, at *5 (D. Colo. Sept. 6, 2013); *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)).

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

EWTN respectfully requests that the Court expedite consideration of its summary judgment motion and grant it summary judgment on Counts I (RFRA), II (Free Exercise), V (Establishment Clause), and IX (Free Speech) of the Complaint. Alternatively, EWTN respectfully requests a preliminary injunction on the same claims. EWTN also requests oral argument.

Respectfully submitted this 31st day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2013, the foregoing motion and memorandum was served via ECF.

/s/ *Daniel Blomberg*
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