ADDENDUM

Exhibit I

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 that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

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.

Exhibit G

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.

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

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.

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

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)

("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.

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:

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.

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.

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.

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.

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

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:

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;

b. 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.

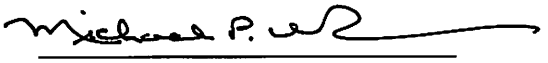
Yet, under the guise of the "accommodation," the government requires EWTN to do all of these things or face massive penalties and disruption to its operations, its mission, and its relationship with its employees, donors, and audience.

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

advance planning. Furthermore, EWTN is also being harmed now by the uncertainty that the Mandate creates for EWTN's health plan and its employees.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2013.



Michael Warsaw

EXHIBIT H

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.

2. I am the President of The National Catholic Bioethics Center (NCBC), which was 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.

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

(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, (l) 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."

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

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

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

> 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."

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.

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

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.

> 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."

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.

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

> 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

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

Directive 45, which forbids abortion in Catholic health care facilities, there is mention of the so-called 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

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

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

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

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.

67. 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.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2013.

John M. Haas.

John M. Haas, Ph.D., S.T.L., M.Div.

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 ¶ 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

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

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 ¶ 57; Exhibit G ¶ 16.

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 ¶ 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 ¶ 62; Exhibit G ¶ 16.

14. EWTN has often publicly professed and taught these beliefs to its worldwide audience and will continue to do so. Exhibit G ¶ 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.* ¶ 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

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 ¶ 30.) The safe harbor did not expand the religious employer exemption; the same day the

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

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.

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 ¶ 24. Its plan is governed by ERISA and administered by Blue Cross Blue Shield of Alabama. Exhibit G ¶ 24.

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

grave sins, in contravention of Catholic doctrine. *See id.* ¶¶ 19, 28-55; Exhibit H ¶¶ 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 ¶ 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

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

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

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 ¶ 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,

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*

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 ¶¶ 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,

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

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

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

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.

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

"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.").

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).

35. 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.

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*

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*

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,

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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-521
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 paragraphs[1]:

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.

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.

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

ETERNAL WORLD TELEVISION NETWORK, INC., et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 13-0521-CG-C**
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 Defendants[1] 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 employers[2] and an accommodation for

[2] The term "religious employer" includes churches, integrated auxiliaries of

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.[4] Because the court finds that

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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.

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 judgment[5] 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.)

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

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

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,

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

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 rational-basis 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*,

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 tax-exempt 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

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*,

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

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.

Here the accommodation's certification requirement does not compel 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

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

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

judgment.

DONE and **ORDERED** this 18th 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., 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