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

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| ETERNAL WORD TELEVISION NETWORK, INC.,<br><br>and<br><br>STATE OF ALABAMA<br><br>Plaintiffs,<br><br>v.<br><br>KATHLEEN SEBELIUS, *et al.*,<br><br>Defendants. | Case No. 1:13-cv-521 |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS EWTN'S COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

## INTRODUCTION

Although, as defendants have explained, EWTN is free not to provide contraceptive coverage, EWTN nevertheless claims that the challenged regulations substantially burden its exercise of religion. But EWTN cannot transform its right, as an eligible organization, *not* to provide contraceptive coverage into a substantial burden by characterizing its decision to opt out as "a trigger" for a third party to provide such coverage. Compl. ¶¶ 96, 112. By opting out, eligible organizations do not trigger or otherwise "facilitate," *id.* ¶ 140, the provision of contraceptive coverage by a third party. Rather, the third party—in this case, EWTN's TPA—provides coverage without EWTN's involvement. "The fact that the scheme will continue to operate without [EWTN] may offend [EWTN's] religious beliefs, but it does not substantially burden the exercise of those beliefs." *Mich. Catholic Conf. v. Sebelius*, --- F. Supp. 2d ---, 2013 WL 6838707, at *8 (W.D. Mich. 2013) (denying preliminary relief enjoining the regulations that EWTN challenges). Indeed, as the Seventh Circuit recently explained in rejecting arguments like EWTN's, "while a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that

merely offend the institution." *Univ. of Notre Dame v. Sebelius* (*Notre Dame II*), --- F.3d ---, 2014 WL 687134, at *5 (7th Cir. 2014) (Posner, J.).[1]

The contraceptive coverage requirements, and in particular the accommodations for eligible organizations like EWTN, do not impose a substantial burden on EWTN's religious exercise. And even if they did, the regulations would not violate RFRA because they are narrowly tailored to serve compelling governmental interests in public health and gender equality.

EWTN's other claims are certainly no more successful. And, given constraints on space, they do not even merit attention here. EWTN's free exercise claim fails because the regulations are neutral and generally applicable. EWTN's other First Amendment claims are equally meritless. Indeed, nearly every court to consider similar First Amendment challenges to these regulations and their

[1] The Seventh Circuit is the only Court of Appeals to have addressed the merits of claims like EWTN's; it affirmed the district court's denial of a preliminary injunction against the challenged regulations in part because Notre Dame had not shown a likelihood of success on the merits. *Notre Dame II*, 2014 WL 687134, at *15, *aff'g Univ. of Notre Dame v. Sebelius* (*Notre Dame I*), --- F. Supp. 2d ---, 2013 WL 6804773 (N.D. Ind. 2013). Otherwise at the appellate level: (i) the Supreme Court issued an injunction pending an appeal from a district court decision denying preliminary relief against the challenged regulations in a case involving differently situated plaintiffs, but stated that its "order should not be construed as an expression of the Court's views on the merits," *Little Sisters of the Poor Home for the Aged v. Sebelius*, --- U.S. ---, 134 S. Ct. 1022 (2014); (ii) citing a divergence of opinion on the challenged regulations among district courts—but notably *not* finding likelihood of success on the merits—a divided motions panel of the Sixth Circuit issued injunctions pending appeals, over Judge Stranch's reasoned dissent, *see Mich. Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013); and (iii) a divided motions panel of the D.C. Circuit issued injunctions pending appeals without stating reasons, over Judge Tatel's reasoned dissent, *see Priests for Life v. HHS*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (per curiam); *see also Notre Dame II*, 2014 WL 687134, at *12-13 (relying on Judge Tatel's dissent).

predecessors have rejected them.[2] Nor do the regulations violate the Due Process or Equal Protection Clauses, or the Administrative Procedure Act (APA), for the reasons explained in defendants' opening brief. Finally, EWTN's purported "intentional discrimination theories" lack merit and do not preclude dismissal or summary judgment.

## I. EWTN's RFRA Claim is Without Merit

### A. The Regulations Do Not Substantially Burden EWTN's Exercise of Religion

As defendants explained in their opening brief, in determining whether a law imposes a substantial burden on a plaintiff's religious exercise under RFRA, a court must determine whether the law actually requires the plaintiff to modify its behavior in a significant—or more than *de minimis*—way. *See* Defs.' Mem. in Supp. of Mot. to Dismiss or, in the Alt., for Summ J. ("Defs.' Mem.") at 14-16, ECF No. 36. Here, the regulations impose no such burden. As an eligible organization, EWTN is not required to contract, arrange, pay, or refer for such coverage. It must only fulfill the self-certification requirement by repeating what it

[2] *See Priests for Life v. HHS*, --- F. Supp. 2d ----, 2013 WL 6672400, at *10-12 (D.D.C. Dec. 19, 2013); *Notre Dame v. Sebelius* (*Notre Dame I*), --- F. Supp. 2d ----, 2013 WL 6804773, at *14-18 (N.D. Ind. Dec. 20, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, --- F. Supp. 2d ----, 2013 WL 6729515, at *27-31 (D.D.C. 2013); *Catholic Diocese of Nashville v. Sebelius*, 2013 WL 6834375, at *5-7 (M.D. Tenn. Dec. 26, 2013); *Mich. Catholic Conf.*, 2013 WL 6838707, at *8-9; *see also, e.g.*, *MK Chambers v. HHS*, No. 13-11379, 2013 WL 1340719, at *5 (E.D. Mich. April 3, 2013) (rejecting a similar challenge to the prior version of the regulations); *accord Conestoga v. Sebelius*, 917 F. Supp. 2d 394, 409-10 (E.D. Pa. 2013); *Autocam v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *4-5 (W.D. Mich. Dec. 24, 2012). *But see Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Penn. Mar. 6, 2013); *Sharpe Holdings v. HHS*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *5 (E.D. Mo., Dec. 31, 2012).

has already stated in its complaint—that it is a religious organization that has religious objections to providing contraceptive coverage—and sending its self-certification to its TPA, which will provide or arrange payments for contraceptive services to the participants and beneficiaries of EWTN's health plan at no cost to plaintiff. As a number of courts have explained, therefore, these regulations merely "require[] [EWTN] to do what it has always done—sponsor a plan for its employees, contract with [a TPA], and notify the [TPA] that it objects to providing contraceptive coverage. Thus, [EWTN is] not require[d] to 'modify [its] behavior.'" *Mich. Catholic Conf.*, 2013 WL 6838707, at *7 (quoting *Thomas*, 450 U.S. at 718).[3] Because a law cannot be a substantial burden on religious exercise when "it involves no action or forbearance on [plaintiff's] part, nor . . . otherwise interfere[s] with any religious act in which [plaintiff] engages," *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008), the Court's inquiry should end here. *Notre Dame II*, 2014 WL 687134, at *12 ("[Plaintiff] has failed to demonstrate a substantial burden").

All of EWTN's objections to self-certification requirement are simply different forms of the same complaint—that the regulations somehow co-opt EWTN into facilitating access to contraceptive services for its employees. EWTN

[3] *See also Notre Dame I*, 2013 WL 6804773, at *12 ("Notre Dame isn't being required to do anything new or different—its action is the same, although, granted, the result is different due to the actions of [third parties]."); *Priests for Life*, 2013 WL 6672400, at *8 ("[T]he accommodations to the contraceptive mandate simply do not require Plaintiffs to modify their religious behavior.").

is already in an existing relationship with an insurer or TPA. The accommodations do not require EWTN to find a new one, nor to modify its existing contracts or arrangements with its current TPAs. Once EWTN satisfies the self-certification requirement, it is the TPA that will provide payments for contraceptive services.

EWTN need *only* self-certify that it is a non-profit religious organization with a religious objection to providing contraceptive coverage and to provide a copy of that self-certification to its TPA. Thus, EWTN is required to convey to its TPA that it does not wish to cover or pay for contraceptive services, which it presumably has done or would have to do voluntarily anyway even absent these regulations in order to ensure that they are not responsible for contracting, arranging, paying, or referring for contraceptive coverage. The sole difference is that EWTN must inform its TPA that EWTN is a religious organization and that its desire not to cover or pay for contraceptive services is due to a religious objection—a statement that ETWN has already made repeatedly in this litigation and elsewhere. Any burden imposed by this purely administrative self-certification requirement—which should take EWTN a matter of minutes—is, at most, *de minimis*, and thus cannot be "substantial" under RFRA. *See* Defs.' Mem. at 14-15.

Ultimately, EWTN's complaint is that informing its TPA of its intention not to provide contraceptive coverage to its employees no longer has the *effect* of preventing its employees from receiving such coverage. Prior to adoption of the

challenged regulations, EWTN's refusal to provide contraceptive coverage to its employees effectively meant that those employees went without it, giving EWTN a veto over the health coverage that its employees received. Now, EWTN no longer exercises such a veto over its employees' health coverage. But, contrary to EWTN's argument, the fact that its employees will now receive contraceptive coverage does not mean that EWTN is put in the position of authorizing, or in any other way condoning, the provision of such coverage to its employees. EWTN's employees will receive coverage for contraceptive services from another source *despite* EWTN's objections, not *because* of those objections.

EWTN's claim rests on a sweeping and "virtually unprecedented" theory of what it means for religious exercise to be burdened. *Notre Dame II*, 2014 WL 687134, at *11 ("The novelty of [plaintiff's] claim . . . deserves emphasis."). Moreover, EWTN's characterization of the self-certification as a "trigger" is inaccurate, as the Seventh Circuit recognized. *Id.* at *5 ("[Plaintiff] treats this regulation as making its mailing the certification form . . . the *cause* of the provision of contraceptive services to its employees, in violation of its religious beliefs. Not so."). Rather, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers . . . to cover contraceptive services." *Id.* at *7. Thus, "[t]he accommodation . . . consists in the [eligible]

organization's . . . washing its hands of any involvement in contraceptive coverage." *Id.* at *10.[4]

Finally, as defendants have explained, even if the regulations were found to impose some burden on EWTN's religious exercise, any such burden would be too attenuated to amount to a *substantial* burden under RFRA. *See* Defs.' Mem. at 16-19. Indeed, courts have held that claims raised by for-profit companies, which under the regulations are *themselves* required to provide the relevant coverage, are too attenuated to succeed. Any burden on EWEN is even more attenuate. Not only must a "a series of events" occur before the use of contraceptives "come[s] into play," *Conestoga*, 917 F. Supp. 2d at 414-15, but EWTN is also further insulated by the fact that a third party—EWTN's TPA—and *not* EWTN, will actually provide and arrange for payments for such services. As the district court found in *Catholic Diocese of Nashville*:

> The services to which the Plaintiffs object will only be provided in the event one of their employees independently requests the services, and in the event such a request is made, the regulation prohibits any costs of those services, directly or indirectly, to be imposed on the Plaintiffs. In other words, Plaintiffs bear no costs for the services and nothing is provided unless a third

[4] As defendants explained in their opening brief, the logical conclusion of EWTN's argument is that even the government could not provide contraceptive coverage to EWTN's employees over EWTN's objections, because such coverage would be "triggered" by EWTN's refusal to provide coverage itself. *See* Defs.' Mem. at 12-13. In its opposition brief, EWTN does nothing to refute this argument, except to say that it *may not* object to certain ways in which the government could provide contraceptive coverage. *See* EWTN's Resp. in Opp'n to Defs.' Mot. ("EWTN's Opp'n") at 7-8. EWTN's theory would still allow it to prevent even the government from acting on its own if EWTN were to determine—unilaterally—that it found the government's actions objectionable.

> party employee independently requests the services from yet another third party—the insurer. It is only the independent actions of third parties that result in anyone obtaining contraceptive services.

2013 WL 6834375, at *5. "Such a 'burden' is too attenuated and speculative to be substantial." *Id.*; *see Mich. Catholic Conf.*, 2013 WL 6838707, at *7 ("It is difficult to see how a substantial burden exists when the relationship to the objectionable act is so attenuated.").

Under EWTN's theory, its religious exercise is substantially burdened when one if its employees and her doctor make an independent determination that the use of contraceptive services is appropriate. An employer, however, has no right to control the choices of its employees—who may not share its religious beliefs—when making use of their benefits. Under the regulations that EWTN challenges, EWTN remains free to refuse to contract, arrange, pay, or refer for contraceptive coverage; to voice its disapproval of contraception; and to encourage its employees to refrain from using contraceptive services. The regulations therefore affect EWTN's religious practice, if at all, in a highly attenuated way. Because the preventive services coverage regulations "are several degrees removed from imposing a substantial burden on [plaintiff]," *O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1160 (E.D. Mo. 2012), the Court should dismiss EWTN's RFRA claim or grant summary judgment to defendants.[5]

[5] EWTN's only response to this argument is to claim, again, that the government asks this Court to engage in impermissible line drawing regarding EWTN's religious beliefs. *See* EWTN's

### B. Even If There Were A Substantial Burden On Religious Exercise, The Regulations Satisfy Strict Scrutiny

Even if the Court were to determine that EWTN had made out a *prima facie* case under RFRA, the regulations are justified by compelling governmental interests and are the least restrictive means to achieve them. Defendants have identified two unquestionably compelling interests: the promotion of public health, and ensuring that women have equal access to health-care services. *See* Defs.' Mem. at 19-21. The government's compelling interests, moreover, are not undermined by any of the so-called "exemptions" that EWTN points to. An exemption undermines a compelling interest only if "it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). But the "exemptions" relied on by EWTN—unlike the exemption that EWTN seeks—do little or no damage to the government's compelling interests. *See* Defs.' Mem. at 21-24. In fact, aside from the religious employer exemption, the "exemptions" referred to by EWTN are not exemptions from the contraceptive coverage requirement at all, but are instead provisions of the ACA that exclude entities from various requirements imposed by the ACA. They reflect the government's attempt to balance other significant

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Opp'n at 8-9. Not so. Defendants understand that EWTN has a religious objection to what it views as "complicity" in providing contraceptive products and services to which they object. The Court need not question the nature of these beliefs nor their sincerity. But the Court must determine whether the alleged burden is too indirect and attenuated—viewed from the perspective of an objective observer—and therefore fails to rise to the level of "substantial." *See, e.g.*, *Notre Dame II*, 2014 WL 687134, at *11 ("[S]bstantiality . . . is for the court to decide").

interests supporting a complex administrative scheme *See Lee*, 455 U.S. at 259; *United States v. Winddancer*, 435 F. Supp. 687, 695-98 (M.D. Tenn. 2006).

The regulations are also the least restrictive means of furthering the government's compelling interests, and EWTN has not refuted any of defendants' arguments. As defendants have explained, to satisfy the least restrictive means test, the government need not refute every conceivable alternative to a regulatory scheme; rather, it need only "refute the alternative schemes offered by the challenger." *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). Defendants have done so here. *See* Defs.' Mem. at 24-26.

## II. EWTN's Purported "Intentional Discrimination Claims" Lack Merit and Do Not Preclude Dismissal or Summary Judgment

Although defendants have made extensive efforts to accommodate religion, EWTN remarkably asserts that defendants have engaged in intentional discrimination and that this allegation should prevent the Court from reviewing its claims at this time. As defendants will explain in their forthcoming opposition to EWTN's motion for discovery under Rule 56(d), even assuming that a claim of intentional discrimination were plausible—which it is not—the subjective motivation of government employees is simply not an element of any of EWTN's claims. *See, e.g., Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292-94 & n.3 (7th Cir. 1996). The Court may properly dismiss or, in the alternative, grant summary judgment in favor of defendants without further delay.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in their opening brief, defendants respectfully ask that the Court grant defendants' motion to dismiss or, in the alternative, for summary judgment on all of EWTN's claims.

Respectfully submitted this 11th day of March, 2014,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

*/s/ Bradley P. Humphreys*
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