ORAL ARGUMENT REQUESTED

No. 14-12696-CC

In the United States Court of Appeals for the Eleventh Circuit

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

Appellant,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellees.

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

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July 28, 2014

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Eternal Word Television Network represents that it does not have any parent entities and does not issue stock. Counsel further certifies, to the best of his knowledge, that the following persons and entities have an interest in this appeal:

ACLU of Alabama Foundation, Inc. (privately held corporation associated with amicus curiae)

American Civil Liberties Union (amici curiae)

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Eternal Word Television Network respectfully requests oral argument in this appeal. Appellant submits that oral argument is necessary because this appeal presents issues of exceptional importance currently pending before this and several other circuits.

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STATEMENT OF JURISDICTION

Appellant Eternal Word Television Network ("EWTN"), joined by the State of Alabama, filed a complaint challenging a federal regulatory mandate ("the Mandate") under the Religious Freedom Restoration Act, the First Amendment, the Fifth Amendment, and the Administrative Procedure Act. Dkt. 1. EWTN moved for partial summary judgment or, alternatively, for preliminary injunction. Dkt. 29. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1361, and authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 2000bb, *et seq*.

The district court denied EWTN's motions and granted the government's cross-motion for summary judgment on the same claims. Dkt. 61. On June 18, the district court certified its ruling on Counts I, II, V, and IX as final under Fed. R. Civ. P. 54(b), entered final judgment on those claims, and stayed litigation on all other claims. Dkts. 65-66. EWTN filed its notice of appeal the same day. Dkt. 68. This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1292(a).

STATEMENT OF THE ISSUES

(1) *Religious Freedom Restoration Act ("RFRA")*. Does the Mandate "substantially burden" EWTN's religious exercise, and if so, is the government's interest compelling, and is application of the Mandate against EWTN the least restrictive method for the government to achieve its interest in delivering contraceptives?

(2) *First Amendment—Free Exercise Clause*. Is the Mandate a neutral, generally applicable law even though it exempts plans covering over 50 million Americans and facially discriminates on the basis of religion?

(3) *First Amendment—Establishment Clause*. Does the Mandate impermissibly discriminate among religious organizations by withholding the "religious employer" exemption from ministries like EWTN on the basis of the government's admittedly baseless predictions about the religious beliefs of EWTN's employees?

(4) *First Amendment—Speech Clause*. Does the Mandate violate the Free Speech Clause by (a) requiring that EWTN sign and deliver EBSA Form 700, and (b) commanding EWTN that it "must not, directly or indirectly, seek to influence the third party administrator's decision"

to provide the coverage?

(5) *Relief*. Was the district court correct to deny EWTN's motions for partial summary judgment and preliminary injunction, and grant summary judgment to the government?

STATEMENT OF THE CASE

I. Nature of the Case

Founded by a cloistered nun in a monastery garage, Eternal Word Television Network (EWTN) has become the world's largest Catholic media network. EWTN sees itself, not as a television station, but as a ministry encouraging others to discover and remain true to Catholic teaching. The federal Mandate at issue here, however, would force EWTN to provide employees with contraception, sterilization, and abortion-causing drugs in violation of Catholic teaching, or else pay millions in fines. When EWTN sought a religious exemption—something compelled by federal law and the First Amendment—the government instead offered a half-measure. Its "accommodation" would force EWTN to authorize its agent to provide to employees the same objectionable drugs. According to EWTN's beliefs, however, this is no solution. It is simply deputizing someone else to sin on EWTN's behalf.

The government does not see it that way, and so invited the lower

court to second-guess EWTN's faith. Unfortunately, the lower court did just that, undertaking a theological examination of EWTN's beliefs about moral complicity and, on top of that, making legal errors about the key role EWTN must play in the government's scheme. For those reasons, the lower court wrongly found EWTN's religious exercise was not "substantially" burdened by a government dictate to violate its faith on pain of massive fines. This Court should reverse that judgment.

The Court should also find that the Mandate fails strict scrutiny. The government denies any genuine exemption to EWTN, while exempting millions of others. It insists on EWTN's participation to ensure access to the objectionable drugs, but admits it has other ways to provide them. These admissions doom any claim that the Mandate passes strict scrutiny. They also show why it violates the Free Exercise Clause.

Furthermore, the government's accommodation separately violates the First Amendment by treating EWTN as a second-class ministry, entitled to less religious freedom that the Church it serves. Neither the Free Exercise nor the Establishment Clauses permits the government to pick theological winners and losers in this way.

Finally, the accommodation both compels EWTN to say words that

violate its Catholic faith and commands it *not* to say words that comply with its faith. That clearly violates the Free Speech Clause.

In sum, EWTN seeks from this Court the most basic freedom guaranteed by our Constitution and civil rights laws: to be permitted to practice what it preaches.

II. Procedural History

On December 31, 2013, EWTN filed a motion for summary judgment on its RFRA, Free Exercise, Establishment Clause, and Free Speech claims. Dkt. 29. EWTN requested that the court either expedite consideration or grant preliminary injunctive relief. *Id.* The government filed a motion for summary judgment or dismissal on all claims. Dkts. 34-36.

On June 17, the court denied EWTN's motions for partial summary judgment and preliminary injunctive relief, and granted the government's cross-motion for summary judgment on the same counts. Dkt. 61. That same day, the court issued a separate order on the government's motions regarding EWTN's and Alabama's thirteen remaining claims. Dkt. 62.

On June 18, the court certified that its ruling on EWTN's RFRA, Free Exercise, Establishment Clause, and Free Speech claims was final, entered an order of final judgment on those claims, and stayed litigation on all other claims. Dkts. 65-66. EWTN immediately filed its notice of appeal. Dkt. 68.

Also on June 18, EWTN sought an injunction pending appeal from both the district court and this Court. *See*, *e.g.*, Dkt. 64. The district court denied EWTN's motion on June 19, Dkt. 73, but this Court granted EWTN injunctive relief on June 30. Accompanying the panel's order, Judge Pryor issued a 26-page concurrence explaining why EWTN was "substantially likely to succeed on the merits of its appeal." *Eternal Word Television Network v. Burwell*, No. 14-12696 (11th Cir. June 30, 2014) (Order Granting Inj. Pending Appeal) ("Order") at 3 (Pryor, J., concurring).

III. Statement of the Facts

A. Eternal Word Television Network

EWTN was founded in 1981 by a Catholic nun, Mother Mary Angelica, and has since become the largest Catholic media network in the world. Michael Warsaw Decl., Dkt. 29-9 ¶ 4. Twenty-four hours a day, seven

days a week, it broadcasts eleven television feeds and two radio services into 230 million homes in 144 countries. *Id.* Every minute of those communications exists for one purpose: faithfully proclaiming religious truth as taught by the Roman Catholic Church. *Id.* ¶ 6. To achieve this purpose, EWTN airs daily live Masses and prayers, Catholic devotions, live coverage of Catholic Church events, teaching series, documentaries, and numerous other shows. *Id.* ¶ 6. EWTN prohibits any commercial advertising and does not charge spiritually orthodox organizations for access to its programs. *Id.* ¶¶ 6, 22.

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

EWTN sincerely holds and professes traditional Catholic teachings concerning the sanctity of life. *Id.* at ¶ 12. It believes that each human being bears the image of God, and that abortion ends a human life and is a grave sin. *Id.* Furthermore, in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, EWTN holds to traditional Catholic teaching that human sexuality has two primary purposes—to "unit[e] husband and wife" and "for the generation of new lives"—that cannot properly be separated. *Id.* ¶¶ 13-14. EWTN therefore believes that artificial contraception and sterilization are gravely immoral. *Id.*

EWTN also obeys Church teaching, articulated by Pope John Paul II, that it is "morally unacceptable to encourage . . . the use of contraception, sterilization, and abortion in order to regulate births." *Id.* (quoting Ioannes Paulus PP. II, *Evangelium Vitae* ¶ 91 (1995)). EWTN believes those practices are not "health care" and cannot in good conscience treat them as such. *Id.* ¶ 15. It often professes and teaches these beliefs to its worldwide audience. *Id.* ¶ 17.

Furthermore, as part of EWTN's religious convictions, it provides for the well-being of the employees who further its mission and form its community. *Id.* ¶ 18. It is non-negotiable that EWTN's insurance plan is

consistent with its beliefs, which is why it has taken pains for years to ensure its plan does not cover abortions, sterilization, or contraception. *Id.* ¶ 20. EWTN is self-insured, using Blue Cross Blue Shield of Alabama as its third-party administrator ("TPA"). *Id.* ¶ 24. This means EWTN controls the terms of its plan, and its TPA administers the plan according to those terms.

B. The Mandate

The Affordable Care Act requires coverage for certain "preventive care" services for women without "any cost sharing." 42 U.S.C. § 300gg-13(a). Congress did not define "preventive care" but instead allowed a division of Appellee HHS to define the term. *See* 42 U.S.C. § 300gg-13(a)(4)). HHS "in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require." *Id.* (citing 77 Fed. Reg. 8725-8726 (2012)). HHS adopted the Institute's recommendations without change, including all FDA-approved contraceptive methods and sterilization procedures. *Id.* This included abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). Dkt. 1-2 at 2, 11-12. According to HHS, such drugs and devices "may have the effect of

preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Burwell v. Hobby Lobby*, No. 13-354 (U.S. June 30, 2014), slip op. at 8; Dkt. 1-2 at 11-12.

Unless an employer is exempted from providing this coverage, failure to provide it triggers a "substantial" penalty. *Hobby Lobby*, slip op. at 7. A non-exempt employer who offers group health insurance that does not include the mandated coverage is "required to pay $100 per day for each affected 'individual.'" *Id.* at 7-8 (citing 26 U.S.C. § 4980D(b)(1)). And if the non-exempt employer ceases "providing health insurance altogether . . . the employer must pay $2,000 per year for each of its full-time employees." *Id.* at 8 (citing 26 U.S.C. § 4980H(c)(1)).

1. "Exempt" employers

Congress and HHS have completely exempted "a great many employers from most of [the Affordable Care Act's] coverage requirements"—including the Mandate. *Hobby Lobby*, slip op. at 10.

First, to save employers "the inconvenience of amending an existing plan," *id.* at 40, Congress specifically exempted "grandfathered" plans which "have not made specified changes after" March of 2010. *Id.* at 10 (citing 42 U.S.C. § 18011 (2010)); Dkt. 1-4 at 5. Even grandfathered plans

must still "provide what HHS has described as 'particularly significant protections,'" but the Mandate is not one of those protections. *Hobby Lobby*, slip op. at 40 (quoting 75 Fed. Reg. 34540 (2010)). Grandfathered plans cover "tens of millions" of Americans, *Hobby Lobby*, slip op. at 11, and may remain grandfathered "indefinitely." *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *aff'd sub nom. Burwell v. Hobby Lobby*, No. 13-354 (U.S. June 30, 2014).

Congress also exempted "small employers" (employers with fewer than fifty employees), who need not offer health insurance at all. *See Hobby Lobby*, slip op. at 25; 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Small employers employ an estimated 34 million Americans. *Hobby Lobby*, slip op. at 11; Dkt. 1-6 at 3.

Finally, HHS issued regulations exempting a subset of "religious employers" that are "organized and operate[d]" as non-profit entities and are "referred to in section 6033" of the Internal Revenue Code. *See* 45 C.F.R. 147.131(a); *see also* http://hrsa.gov/womensguidelines/. This religious exemption covers only institutional churches, their integrated auxiliaries, conventions and associations of churches, and the exclusively religious activities of a religious order. *Hobby Lobby*, slip op. at 9. HHS

explained that it exempted these religious organizations because it believed they are "more likely than other employers" to hire "people of the same faith" who would be "less likely" to use "contraceptive services." 78 Fed. Reg. at 39874. The government has admitted that it does not have any evidentiary basis for that prediction about the religious beliefs of people who work for religious ministries. Dkt. 29-13 at 5.

All three types of exempt employers—grandfathered, small business, and religious—are completely exempt from the Mandate. Grandfathered employers need only confirm that their healthcare plan qualifies as grandfathered, 26 C.F.R. 54.9815-1251T(a)(2); small businesses may choose not to offer insurance; and exempt "religious employers" need do nothing at all. None are compelled to certify religious beliefs to anyone or to sign any form designating, authorizing, incentivizing, or obligating anyone else to provide the Mandate's contraceptive coverage.

2. "Non-exempt" employers and EBSA Form 700

Religious entities such as EWTN—who do not qualify as "religious employers" because they are not integrated into an institutional church—sought an exemption. Dkt. 1 at ¶¶ 98-99. Instead, the government

developed an "accommodation" for non-exempt religious organizations. 77 Fed. Reg. 16501 (Mar. 21, 2012). Unlike the grandfathering and religious employer exemptions, the government said that this "accommodation" would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." *Id.* at 16503.

The resulting "accommodation" is available if a non-exempt religious organization self-certifies that it meets the regulatory criteria. *See* 45 C.F.R. 147.131(b). But objecting entities can only self-certify in one government-designated way: by executing EBSA Form 700 and delivering it to their insurer or third-party administrator. Order at 7 (Pryor, J., concurring); 78 Fed. Reg. at 39875; 26 C.F.R. 54.9815–2713A.

The government imposed the requirement to sign and deliver Form 700 as part of its system for ensuring that beneficiaries "will still benefit from separate payments for contraceptive services without cost sharing or other charge." 78 Fed. Reg. at 39874. Employers with self-insured plans must use the Form to expressly designate their TPA as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and

beneficiaries." *Id.* at 39879; 26 C.F.R. 54.9815–2713A. Receipt of an executed Form 700 triggers a TPA's legal 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); 26 C.F.R. 54.9815–2713A(b)(2); *accord* Order at 7 (Pryor, J., concurring) ("The form notifies the administrator of its obligation to provide contraceptives to [EWTN's] employees and beneficiaries."). Forcing the non-exempt employer to designate the TPA in this manner "ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that employees of employers with religious objections receive these drugs "so long as [they remain] enrolled in [the] group health plan." *See* 26 C.F.R. 54.9815–2713A(d); 29 C.F.R. 2590.715–2713A(d); *see also* 45 C.F.R. 147.131(c)(2)(i)(B); *accord* Order at 8 (Pryor, J., concurring) (the "form gives the third-party administrator legal authority to become the plan administrator for purposes of contraceptive coverage.").

EBSA Form 700 includes the following legally operative language:

> 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.

See also Dkt. 29-11. Through this legally operative language, the Form (a) directs the TPA to the Mandate's Form-triggered requirement that the TPA "shall be responsible for" payments for contraceptive services, (b) instructs the TPA as to the TPA's "obligations," and (c) makes the Form "an instrument under which the plan is operated." In sum, "without the form, the administrator has no legal authority to step into the shoes of [a religious objector] and provide contraceptive coverage to the employees and beneficiaries of the [objector]." Order at 21 (Pryor, J., concurring).

To induce TPAs to provide the coverage, the regulations pair these regulatory sticks with a "carrot": an extra government payment to make

the scheme profitable. If a TPA receives Form 700, the TPA becomes eligible for government payments that will both cover the costs and include an additional payment (equal to at least 10% of costs) for margin and overhead. 45 C.F.R. 156.50.[1] Defendants acknowledge that this bonus payment is dependent on receipt of the Form. Dkt. 29-12 at 97.

Finally, the regulations command that non-exempt religious organizations "must not, directly or indirectly, seek to influence the third party administrator's decision" whether to provide the coverage. *See* 26 C.F.R. 54.9815–2713A(b)(iii).

C. EWTN's undisputed religious exercise

EWTN does not qualify for any exemption from the Mandate. It does not have a grandfathered plan, nor does it qualify as a small employer. Dkt. 1 ¶ 147. And although EWTN shares the same religious beliefs as exempt Catholic "religious employers," EWTN does not fall within the Mandate's exemption for "religious employers" because it is not a church, integrated auxiliary of a church, or a religious order. *See* 26 U.S.C. § 6033(a).

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[1] HHS has issued a proposed rule setting this payment rate at 15%. *See* 78 Fed. Reg. 78322, 78364 (Dec. 2, 2013).

As part of its religious exercise, EWTN ensures that its insurance plan is consistent with its beliefs and does not cover abortions, sterilization, or contraception. Dkt. 29-9 ¶ 20. EWTN can neither provide the mandated coverage nor execute and deliver the Form to its TPA because it believes that taking those actions would make it complicit in grave sin. Dkt. 29-9 ¶¶ 12-14, 47-50; *accord* Dr. John Haas Decl., Dkt. 29-10 ¶¶ 11, 65. "EWTN's religious beliefs prohibit it from authorizing anyone to arrange for or make payments for contraceptives, sterilization, and abortifacients; tak[ing] action that triggers the provision of contraceptives, sterilization, and abortifacients; or is the but-for cause of the provision of contraceptives, sterilization, and abortifacients." Dkt. 29-9 ¶ 64; *see also* EWTN's Sugg. Determ. Undisp. Fact, Dkt. 29-14 ¶ 47. It would violate EWTN's beliefs for it to "[a]gree to refrain from instructing or asking its administrator or other organization not to deliver contraceptives, sterilization, and abortifacients to EWTN's employees," or to otherwise "[p]articipate 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." Dkt. 29-9 ¶ 64; *see also* Dkt. 29-14 ¶ 47.

The sincerity of EWTN's beliefs is entirely undisputed. *See* Defs.' Resp. to EWTN's Sugg. Det. Undisp. Fact, Dkt. 36-1 ¶¶ 41, 43. EWTN sincerely believes that signing the Form "would do nothing to lessen EWTN's complicity" in providing contraceptive coverage. Dkt. 29-14 ¶ 48. Doing so would require EWTN to "act[] in a way that violates Catholic teaching," to "brand itself a hypocrite," and would "undermine the trust placed in it by employees, viewers, and supporters[,]" "severely undermin[ing] EWTN's reliability as a witness to Catholic truth." *Compare id.* at ¶ 49 *with* Defs.' Resp. to EWTN's Sugg. Det. Undisp. Fact, Dkt. 36-1 ¶¶ 47-50.

These religious beliefs did not arise yesterday. They are based on EWTN's understanding of the authoritative teachings of the Catholic Church, are consistent with the Church's practice,[2] and are informed by the opinion of a leading Catholic moral theologian. *See* Dkt. 29-9 ¶¶ 12-

[2] For instance, in the late 1990s, Germany allowed abortion in certain cases, but only if the pregnant woman first received a certificate that she had taken state-mandated counseling. Dkt. 29-10 at ¶ 66. Catholic churches helped provide this counseling in order to discourage abortion. *Id.* But since that involvement required them to produce certificates necessary to obtain abortions, Pope John Paul II ultimately instructed churches to cease such counseling because it made them complicit in grave sin. *Id.* at 67.

23, 47-54; *see generally* Dkt. 29-10; Order at 10-11 (Pryor, J., concurring).

The Mandate penalizes EWTN's religious refusal either to provide the mandated coverage or to execute and deliver the Form. EWTN currently has about 350 employees. Dkt. 29-9 at ¶ 58. If EWTN does not comply with the Mandate and maintains its conscience-compliant employee health coverage, it will be subject to fines of $12,775,000 per year. *Id.*; 26 U.S.C. § 4980D(b)(1). If it complies with the Mandate (but violates its religious beliefs) by dropping insurance for its employees, it will be subject to fines of $700,000 per year. Dkt. 29-9 at 60-61. Either of these consequences would be catastrophic for EWTN's ability to continue its ministry. Dkt. 29-9 ¶¶ 55-62.

But it would be more catastrophic still for EWTN to forsake the reason for its existence by betraying Catholic teaching and branding itself a hypocrite in the eyes of millions of viewers around the world. Dkt. 29-9 ¶¶ 19-23, 48-53, 63. But this is precisely the dilemma created by the government's Mandate.

IV. Standard of Review

This Court "review[s] *de novo* the district court's ruling on the parties' cross-motions for summary judgment. *J.R. v. Hansen*, 736 F.3d 959, 965

(11th Cir. 2013). On preliminary injunction decisions, "[a]lthough our review is for abuse of discretion, we review and correct errors of law without deference to the district court." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1129 (11th Cir. 2005).

SUMMARY OF THE ARGUMENT

EWTN, the world's largest Catholic media network, devotes every hour of every day to proclaiming the Catholic faith that animates everything it does. EWTN sincerely affirms traditional Catholic teachings concerning contraception, sterilization and the sanctity of human life. EWTN therefore cannot participate in the government's program to distribute, subsidize, and promote the use of contraceptives, sterilization, or abortion-inducing drugs and devices. The government does not dispute the sincerity of EWTN's religious belief that it can neither provide contraceptive coverage nor participate in the "accommodation." Nevertheless, the government threatens EWTN with severe fines if it does not either provide the drugs or participate in the accommodation scheme. As a part of that scheme, the government seeks to compel EWTN to sign Form 700, which obligates, authorizes, and

designates EWTN's administrator to provide the coverage in EWTN's place.

A choice between violating one's faith and paying a fine is a textbook substantial burden under the Religious Freedom Restoration Act. *See, e.g., Hobby Lobby,* slip op. at 31. RFRA bars such burdens, unless the government satisfies strict scrutiny, which it cannot do here.

The trial court misunderstood RFRA, EWTN's religious beliefs, and the role of Form 700 in the government's contraceptive delivery system. Longstanding Catholic teaching underpins EWTN's refusal to designate, authorize, incentivize, and obligate a third party to do that which EWTN may not do directly. And regardless of what the trial court and the government think EWTN *should* believe, the undisputed fact is that it *does* believe its religion forbids it from participating in the government's scheme and signing Form 700. It was not for the district court to disagree with the moral lines drawn by EWTN. *See Hobby Lobby*, slip op. 37.

The government has also violated the EWTN's rights under the Free Exercise and Establishment Clauses of the First Amendment by discriminating against and among religious organizations. It is also violating the Free Speech Clause by compelling EWTN to both to say

things that it does not want to say and forbidding it from saying things that it *does* want to say.

These violations of fundamental rights entitle EWTN to injunctive relief. For all these reasons, the district court's judgment should be vacated, and partial summary judgment and injunctive relief entered for EWTN.

ARGUMENT

I. EWTN is entitled to summary judgment on its RFRA claim.

The Supreme Court's recent decision in *Burwell v. Hobby Lobby* requires reversal of the judgment below and entry of summary judgment in EWTN's favor. *Hobby Lobby* confirms both that the Mandate imposes a substantial burden on EWTN's religious exercise under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000 *et seq.*, and that the government cannot possibly satisfy strict scrutiny. Indeed, only three days after *Hobby Lobby*, the Supreme Court granted extraordinary relief to another plaintiff who objects to the same regulatory scheme as EWTN. *Wheaton Coll. v. Burwell*, __ S. Ct. __, 2014 WL 3020426 (July 3, 2014). It is therefore no surprise that a unanimous motions panel of this Court—not four hours after *Hobby Lobby* was issued—concluded that EWTN was

entitled to an injunction pending resolution of this appeal. *Eternal Word Television Network v. Burwell*, No. 14-12696 (11th Cir. June 30, 2014) (Order Granting Inj. Pending Appeal) ("Order"); *see also generally* Order at 3-29 (Pryor, J., concurring) (explaining EWTN is substantially likely to prevail in light of *Hobby Lobby*). This Court should reverse the decision below and direct entry of summary judgment on EWTN's RFRA claim.

A. The Mandate imposes a substantial burden on EWTN's religious exercise.

The government does not dispute the sincerity of EWTN's religious beliefs that it cannot facilitate the distribution of contraception, sterilization, and abortion-causing drugs, whether by providing the coverage directly or by participating in the government's scheme. *See* Dkt. 36-1 ¶¶ 41, 43, 47-50. Accordingly, to determine whether the government substantially burdens EWTN's religious exercise, RFRA requires a simple, two-part inquiry: the Court must (1) identify a sincere religious exercise at issue, and (2) determine whether the government has placed substantial pressure—*i.e.*, a substantial burden—on EWTN to abstain from that religious exercise. *See Hobby Lobby,* slip op. at 32 ((1) identifying "a sincere religious belief" and (2) asking whether "the

HHS mandate demands that [plaintiffs] engage in conduct that seriously violates their religious beliefs").

1. EWTN's religious exercise is sincere and undisputed.

The sincere religious exercise at issue in this case is EWTN's refusal to take part in the government's scheme to provide contraceptives, sterilization, and abortion-causing drugs to its employees.

The Mandate prohibits EWTN from engaging in its longstanding religious exercise of offering a health care plan that conforms to its religious beliefs. It is a violation of EWTN's sincere religious beliefs to allow its own insurance plan to become a conduit for these products and services. Dkt. 29-9 ¶¶ 38, 52, 58, 70-72. EWTN has always sought to avoid facilitating access to such products and services through its insurance plan, and the Mandate forces it to abandon this practice, or pay severe fines. *Id.* ¶ 43.

Thus, EWTN cannot sign and submit the Form which authorizes and obligates its plan administrator to provide the objectionable drugs to EWTN's employees. Taking that action, EWTN sincerely believes, would make it complicit in grave sin in violation of its Catholic beliefs. *See* Dkt. 29-9 at ¶¶ 12-16, 19-23, 47-54 (explaining EWTN's beliefs); Dkt. 29-10 at

¶¶ 65-69 (explaining EWTN's views on Catholic teaching); *see also Emp't Div. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599 (1990) (explaining that the "exercise of religion" often involves "abstention from … physical acts"). As explained above, that refusal is based upon EWTN's understanding of binding Catholic doctrine regarding complicity in wrongful acts, an understanding detailed in the declaration of a leading Catholic moral theologian. *See supra* at 22-25; *see generally* Dkt. 29-9 *and* Dkt. 29-10. The government does not dispute that EWTN's refusal to sign and deliver Form 700 is required by EWTN's religious beliefs. *See* Dkt. 36-1 ¶¶41, 43.

2. *The government has forced EWTN to choose between violating its faith and paying fines.*

Unless EWTN becomes complicit in the government's scheme, the government will impose enormous penalties on EWTN. Indeed, in *Hobby Lobby* the Supreme Court deemed the *very same* penalties at issue here to be a substantial burden. *Hobby Lobby,* slip op. at 32 (citing 26 U.S.C. 4980D(b) & (e)(1); 26 U.S.C. 4980H(a), (c)(1)); *see also id.* at 38 ("Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial

burden on those beliefs.").[3] As the Court explained, "If these consequences do not amount to a substantial burden, it is hard to see what would." *Hobby Lobby*, slip op. at 2; *see also* Order at 9, 23 (Pryor, J., concurring). That should end the matter.

EWTN faces penalties of either $100 a day per affected beneficiary, or an annual fine of $2,000 per full-time employee. *See* 26 U.S.C. 4980D(b) & (e)(1); 26 U.S.C. 4980H(a), (c)(1)). Those penalties impose severe pressure on EWTN to bend to the government's will. Indeed, that is precisely their point. Imposing fines on a religious exercise is the paradigm substantial burden. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 1794 (1963) (deprivation of unemployment benefits results in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18, 101 S. Ct. 1425, 1432 (1981) ("Where the state . . . put[s] substantial pressure on an adherent to modify his

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[3] The government has proposed that EWTN drop its insurance to avoid complicity. But in addition to triggering fines, dropping insurance would also run afoul of EWTN's religious beliefs, which require it to provide for its employees, and be enormously expensive and disruptive to its ministry. *See* Dkt. 29-9 ¶¶ 18-20, 63. The Supreme Court rejected this same argument in *Hobby Lobby*. *See Hobby Lobby*, slip op. at 34 & n.32 (discussing economic costs of dropping health insurance).

behavior and to violate his beliefs, a burden upon religion exists."); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (five-dollar fine on religious practice "not only severe, but inescapable").[4]

Since *Hobby Lobby*, both this Court and the Supreme Court have left little doubt that being forced to execute the government Form imposes a substantial burden on EWTN's religious exercise. This Court granted EWTN an injunction pending appeal, which indicates EWTN has a "substantial likelihood of success on the merits." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *see also* Order at 3 (finding that EWTN "is substantially likely to succeed on the merits of its appeal") (Pryor, J., concurring). In addition, two other religious ministries have sought extraordinary writs from the Supreme Court, and in both cases the Court granted them relief—one just days after the Hobby Lobby decision. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014); *Wheaton*, 2014 WL 3020426. Those injunctions relieved them of the

[4] The government is well aware that mandating objectionable insurance coverage burdens religious exercise. That is why it included a religious exemption in the first rulemaking, 76 Fed. Reg. 46621, and why it engaged in a lengthy rulemaking process to respond to public outcry from religious organizations, like EWTN, who did not qualify for the exemption. Dkt. 1 at ¶¶ 69-106 (describing rulemaking process).

burden of executing the Form. *Id.* While these orders are not rulings on the merits, the applicants had to establish an "indisputably clear" right to such relief under the All Writs Act. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 107 S. Ct. 682 (1986) (Scalia, J., in chambers).

3. The district court's reasons for granting summary judgment were erroneous.

The district court made two basic errors in finding there was no substantial burden on EWTN's religious exercise. First, the court reasoned that EWTN's beliefs were unprotected by RFRA because its own actions are too far removed from the provision of objectionable drugs. But that is precisely the "attenuation" argument the Supreme Court has now definitively rejected in *Hobby Lobby*. Second, the district court thought that EWTN misunderstood how Form 700 works. But it was the district court, not EWTN, that was mistaken about the Form.

a. EWTN's objection is based upon its own forced participation in the government's scheme.

The lower court mistakenly reasoned that EWTN is not protected by RFRA because other parties besides EWTN are involved in the government's contraceptive delivery scheme. The court emphasized that

EWTN's beliefs make "reference to the obligation that the mandate will impose upon others after EWTN delivers the form." Op. at 9; *see also id.* at 10 (mistakenly reasoning that RFRA does not recognize a religious objection that "hinges upon the effect" an act "will have on other parties."). The court appeared to think that, so long as EWTN objected to the downstream consequences of signing the Form, rather than to the bare action of putting pen to paper, its religious objection was beyond the reach of RFRA. *Id.* at 2-5. The court was fundamentally mistaken.

The court's reasoning is squarely foreclosed by the recent *Hobby Lobby* decision, which rejected a similar "attenuation" argument made by the government. There, the Supreme Court rejected HHS's argument "that the connection between what the objecting parties must do" and "the end that they find to be morally wrong" was "too attenuated." Slip op. at 35. The Court explained that the plaintiffs' objection to the Mandate

> [I]mplicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a national binding answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed.

> For good reason, we have repeatedly refused to take such a step.

Id. at 36-37.

The Supreme Court's analysis is directly applicable here. It is undisputed that EWTN believes that signing the Form makes it complicit in, among other things, "the destruction of an embryo in a way that is sufficient to make it immoral for them." *Id.* at 21. As in *Hobby Lobby*, that religious belief implicates "a difficult and important question of religion and moral philosophy," and it is for EWTN, not the courts, to decide "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* at 36.[5] As the Supreme Court explained, this Court's "'narrow function … in this context is to determine' whether the line drawn reflects 'an honest conviction,' … and there is no dispute that it does.'" *Id.* at 37-38 (citations omitted). Put another way, "[i]t is neither [the courts'] duty nor the duty of the United States to tell the Network that its undisputed belief is

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[5] EWTN has described its sincere beliefs at length. *See, generally,* Dkt. 29-9 (explaining EWTN's background and beliefs); Dkt. 29-10 (explaining Catholic teachings on moral complicity).

flawed." Order at 4 (Pryor, J., concurring). For these reasons, the district court's reasoning is squarely foreclosed by *Hobby Lobby*.

The district court analogized EWTN's claim not to the similar objections in *Hobby Lobby*, but to inapposite cases where plaintiffs objected to the internal actions of the government. *See* Op. at 3-4. As Judge Pryor's concurrence correctly explained, however, "[EWTN] does not claim to be burdened by the existence of federal regulations inapplicable to the Network that require contraceptive coverage for women in the United States. Instead, the Network objects that the mandate coerces it to participate in an activity prohibited by its religion." Order at 14 (Pryor, J., concurring).

Consequently, the district court was wrong to equate EWTN with the plaintiff in *Bowen v. Roy*, 476 U.S. 693, 700, 106 S. Ct. 2147, 2152 (1986). In *Bowen*, the plaintiffs' religious claim was based on their desire to control *the government's* own "internal procedures."[6] EWTN's case

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[6] Furthermore, there was a more analogous issue additionally presented in *Bowen*, namely the requirement that a person "*shall furnish* to the State agency his social security account number" in order to apply for benefits. *Bowen*, 476 U.S. at 701, 106 S. Ct. at 2153 (emphasis in original). On that issue, "five Members of the Court agree[d] that *Sherbert* and *Thomas,* in which the government was required to

presents the exact opposite of *Bowen*: here the government seeks to control *EWTN*'s internal procedures by compelling EWTN either to offer objectionable coverage or to re-write its contract with its administrator to trigger the administrator's responsibility to provide these services in EWTN's place.

For similar reasons, the district court was also wrong to rely on the D.C. Circuit's opinion in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). In *Kaemmerling*, a prisoner objected to the government's use and storage of his DNA profile, but he had no objection to providing a tissue sample for that profile. *Id.* at 679. The court therefore found that the plaintiff could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.* Here, in sharp contrast, EWTN objects to the specific action the government requires it to undertake: signing Form 700. EWTN does not object to informing the government of its objections, and it has done so repeatedly. What it objects to is taking actions which designate, obligate, authorize and incentivize a third party to do wrong on its behalf. *See supra* at 22-25.

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accommodate sincere religious beliefs, control the outcome of this case . . . ." *Id.* at 731 (O'Connor, J., concurring in part and dissenting in part).

The Supreme Court has long recognized religious objections based upon the desire to abstain from facilitating or participating in other people's actions. The principal example is *Thomas v. Review Board*. In that case, a Jehovah's Witness objected to making tank turrets—not because he himself would use the turrets in battle, but because it would facilitate other people in waging war. *Thomas*, 450 U.S. at 715, 101 S. Ct. at 1430-1431. Similarly, a religious opponent of the death penalty might object to signing an execution warrant on similar grounds, namely that someone else would be legally authorized by the warrant to do what the believer understands to be wrong. This understanding is incorporated into RFRA, which broadly protects "any" exercise of religion. 42 U.S.C. 2000cc-5. The Supreme Court applied this reasoning in *Hobby Lobby*: "in *Thomas* . . . we considered and rejected an argument that is nearly identical to the one now urged by HHS . . . ." Slip op. at 37.

It is undisputed here that EWTN's religion prohibits it from signing EBSA Form 700. *Compare* Dkt. 36-1 at ¶¶ 47-50, with Dkt. 29-14 at ¶¶ 48-49. That EWTN's religious objection is premised, in part, upon its desire not to facilitate the actions of third parties does not change the

analysis. In this regard, EWTN is no different from the Jehovah's Witness plaintiff in *Thomas*, or a religious death penalty opponent.

The government evidently does not share EWTN's view of the moral ramifications of its actions. But it is not the government's (or the district court's) job to second-guess EWTN's religious beliefs. *See Hobby Lobby,* slip op. at 36-38. The "narrow function" of the court in this case is to determine whether EWTN is subject to "pressure that tends to force adherents to forego religious precepts." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (2004); *Hobby Lobby,* slip op. at 37-38. That pressure is severe, and therefore the burden is substantial. *Id.* at 32, 38.

b. The form functions as a trigger for the objectionable coverage.

The district court was also mistaken about the function of Form 700. The court claimed that "to the extent that EWTN's third-party administrator is under compulsion to act, that compulsion comes from the law, not from Form 700." Op. at 9. To the contrary, the record demonstrates that EBSA Form 700 serves a specific triggering function in the government's contraceptive delivery scheme. The government has admitted in the Federal Register that the employer's execution of the

Form is necessary to authorize, obligate, and incentivize the employer's plan administrator to provide the objectionable coverage. *See supra* at 19-22. And the government has stated in open court that TPAs "become a plan administrator and are required to make these payments by virtue of the fact that they receive the self-certification form from the employer."[7] EWTN's participation is integral to the government's scheme to use EWTN's administrator to provide contraceptives and abortifacients to EWTN's employees.

There need be no doubt about this, because the government has conceded the point *in this case*. In opposing EWTN's motion for injunction pending appeal, the government told this Court that not signing the Form "would deprive hundreds of employees and their families of medical coverage." Opp. to Inj. at 24. In other words, EWTN's signature on the Form is necessary to trigger contraceptive coverage. Similarly, in the court below, the government listed a litany of harms that would occur if EWTN refused to sign, including "deny[ing] EWTN's employees (and

[7] Dkt. 50-3 at 7 (*Archbishop of Wash.* Tr.); *see also* Dkt. 29-12 at 53 ("for an ERISA plan—in order for the TPA, essentially, to have the authority to provide coverage, the self-certification has to designate—has to be an instrument under which the third-party administrator is designated as a provider of those specific benefits.") (*Reaching Souls* Tr.).

their families) the benefits of the preventive services coverage."[8] These statements by the government simply belie the district court's ruling that the obligations on EWTN's administrator to provide contraceptive coverage "come[] from the law, not from Form 700." Op. at 9. To the contrary, those obligations are triggered by the Form, which is why EWTN cannot sign it. Indeed, the government would not have strenuously opposed the temporary injunction this Court granted to EWTN unless it realized that EWTN's execution of the Form is necessary to trigger contraceptive coverage.

The government's repeated admissions on this point distinguish EWTN's case from the Sixth and Seventh Circuit cases on which the district court relied. *See* Op. at 10 (citing *Mich. Catholic Conference v. Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014)); *id.* (citing *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir.

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[8] The government told the trial court that EWTN's failure to sign the Form would (1) "undermine the government's ability to achieve Congress's goal[] of improving the health of women and newborn children"; (2) "deny EWTN's employees (and their families) the benefits of the preventive services coverage"; (3) continue a situation in which "both women and developing fetuses suffer negative health consequences"; (4) "inflict a very real harm on the public"; and (5) "inflict a very real harm on * * * a readily identifiable group of individuals." Dkt. 70 at 4-5 (June 19, 2014).

2014)). Both of those cases, which involved preliminary relief rather than a full summary judgment record, wrongly assumed that the Form was meaningless. Here, the government's admissions, made to this Court and the lower court, show that it is not. *Cf. Mich. Catholic*, 2014 WL 2596753, at *10. For instance, in *Notre Dame* the Seventh Circuit pointed out that "the evidentiary record [was] virtually a blank," and the cautioned that its "opinion . . . should not be considered a forecast of the ultimate resolution of this still so young litigation." *Notre Dame,* 743 F.3d at 552. That stands in sharp contrast to this case, where both sides moved for summary judgment on a full record. The *Notre Dame* decision was also based upon procedural hurdles not present here. Because Notre Dame had already delivered Form 700 to its insurers, the majority reasoned that, "unless and until [the insurers] are joined as defendants they can't be ordered by the district court or by this court to do anything." *Id*. Here, by contrast, injunctive relief would be effective because EWTN has not signed the Form and has therefore not obligated its third-party administrator to provide the contraceptives.

Second, quite apart from the record in this case, the Sixth and Seventh Circuits were flatly wrong about how RFRA applies, and how Form 700

works. Both courts were wrong about religious exercise, accepting the same attenuation argument as the district court, an argument now foreclosed by the Supreme Court's decision in *Hobby Lobby*. *See Mich. Catholic Conference*, --- F.3d ---, 2014 WL 2596753, at *8-10 (analogizing to *Bowen* and dismissing plaintiffs' concerns about involvement); *Notre Dame,* 743 F.3d at 554-55 (disagreeing with Notre Dame's understanding of its complicity).[9] Both courts are also wrong about how the Form works. Both courts held that Form 700 does not trigger the contraceptive coverage, a view that Judge Pryor bluntly—and correctly—called "[r]ubbish." Order at 20-21 (Pryor, J., concurring).

The regulatory framework flatly rejects those circuits' conclusions. The government created Form 700 in order to "ensure[] that there is a party with legal authority" to make payments to beneficiaries for contraceptive services. 78 Fed. Reg. at 39880. Receipt and acceptance of Form 700 triggers the legal 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); 26 C.F.R. 54.9815–

[9] A petition for *en banc* rehearing is currently pending. *See Mich. Catholic Conference v. Burwell*, Nos. 13-2723, 13-6640 (6th Cir.) (*en banc* Pet. filed Jul. 25, 2014).

2713A (b)(2). Thus, EWTN is required to use the Form to designate its administrator as the "plan administrator and claims administrator *solely for the purpose of providing payments for contraceptive services* for participants and beneficiaries." *Id.* at 39879; 26 C.F.R. 54.9815–2713A (emphasis added). The Form itself states that it is "an instrument under which the plan is operated,"—a statement which is necessary to give the administrator "legal authority" to provide this coverage under ERISA. 78 Fed. Reg. at 39879-80; *see also* Order at 21 (Pryor, J., concurring) ("And why *must* the Network provide Form 700 to its administrator? Because without the form, the administrator has no legal authority to step into the shoes of the Network and provide contraceptive coverage to the employees and beneficiaries of the Network.") (citing 78 Fed. Reg. at 39879-80) (emphasis in original).

The *Notre Dame* majority downplayed the Form as a document which merely "alerts" insurers and administrators to their obligations. 743 F.3d at 550. But the very regulations the majority cited for that proposition show that the Form does much more. The majority cited 45 C.F.R. § 147.131(c)(2)(i)(B), which is limited to insurers "that receive[] a copy of the self-certification"—meaning the certification acts as a trigger. The

majority also cited 29 C.F.R. § 2590.715–2713A(b)(3), which states: "*If* a third party administrator receives a copy of the self-certification . . . the third party administrator *shall*" provide contraceptive coverage. 29 C.F.R. § 2590.715–2713A(b)(2) (emphasis added). The regulations could not make any plainer the but-for connection between the Form and the administrator's legal authority to provide the coverage.

Similarly, the Sixth Circuit concluded that the requirement to provide contraceptive coverage was imposed on TPAs, not by Form 700, but by the ACA itself. *Mich. Catholic*, 2014 WL 2596753, at *9 (relying on 42 U.S.C. § 300gg-13). This was also incorrect. The provision the Sixth Circuit relied on does not reference ERISA or explain how it might confer power on administrators to act independently of their contracts with employers. *See generally* 42 U.S.C. § 300gg-13. In any case, it is far too late for the government to claim that the statute, standing alone, requires every single plan to cover contraceptives. The government has spent three years and filled many pages of the Federal Register with rules devoted to excusing various plans from the contraceptive coverage requirement. Thus the dispute is not over whether all insurers must

comply with § 300gg-13—all parties agree the statutory requirement is not absolute—but when and how the requirement applies.

The *Notre Dame* and *Michigan Catholic* decisions were simply wrong about the pivotal role of the employer's participation in allowing the accommodation to operate.

B. The Mandate cannot satisfy strict scrutiny.

Because the Mandate substantially burdens EWTN's religious exercise, "the burden [of strict scrutiny] is placed squarely on the Government." *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 148, 429, 126 S. Ct. 1211, 1220 (2006); 42 U.S.C. 2000bb-1(b). The government must prove that coercing EWTN "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b). "In Hobby Lobby, the Supreme Court expressly refused to decide whether the accommodation provision satisfies strict scrutiny." Order at 25 (Pryor, J., concurring) (citing *Hobby Lobby*, slip op. at 43-44 & 44 n.40). But no court to reach strict scrutiny—the "most demanding test known to constitutional law," *City of Boerne v. Flores*,

521 U.S. 507, 534 (1997)—has held that the Mandate can withstand it. The Court should reach the same conclusion here.

1. *The accommodation does not serve a compelling interest in this case.*

Respondents did not demonstrate that applying the requirement to EWTN furthers any compelling interest. However compelling any asserted interest might be in the abstract, the government must prove that it is compelling as applied to EWTN. RFRA requires this "'more focused' inquiry: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Hobby Lobby*, slip op. at 39 (quoting *O Centro*, 546 U.S. at 430-31, 126 S. Ct. at 1220). In *O Centro*, even the government's obviously compelling interest in enforcing the nation's drug laws faltered when applied to the circumstances of that case. *Id.* Here, RFRA "requires us . . . to look to the marginal interest in enforcing the contraceptive mandate in [this] case[]." *Hobby Lobby*, slip op. at 39. (citing *O Centro*, 546 U.S. at 431, 126 S. Ct. at 1220).

Below, the government asserted two interests: public health and gender equality. *See* Dkt. 35 at 27-29; Dkt. 53 at 3, 10 (claiming interests

in "public health" and "gender equality").[10] The Supreme Court has since rejected these interests as overbroad: "HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting 'public health' and 'gender equality.' RFRA, however, contemplates a 'more focused' inquiry . . . ." *Hobby Lobby,* slip op. at 39 (citing *O Centro*, 546 U.S. at 430-31, 126 S. Ct. at 1220). The government failed to explain why application of *this* Mandate to *this* ministry is necessary. Nor could it. The government has admitted that it has no interest in enforcing the Mandate against EWTN.

Specifically, the government has *made a regulatory finding* that a complete exemption for houses of worship "does not undermine the governmental interests furthered by the contraceptive coverage requirement" because "[h]ouses of worship . . . are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874. But the government has never explained why EWTN—founded by a cloistered nun, wholly and openly

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[10] These interests were stated in the government's motion for summary judgment. Because the district court ruled against EWTN on substantial burden, it did not reach strict scrutiny. Op. at 10.

religious in mission and operation—does not occupy precisely the same position as an exempted house of worship. The closest the government has come is unfounded speculation that the employees of religious non-profits generally are "less likely" to share the religious beliefs of their employers than the employees of churches. 78 Fed. Reg. at 39874. HHS admits that it has no evidence to support this point. In depositions, an HHS official admitted there was "no evidence" for the government's speculation that employees of religious organizations such EWTN "are more likely not to object to the use of contraceptives." Dkt. 29-13 at 5.

The government bears the burden of proving strict scrutiny, and *the government failed to put any evidence into the record specific to EWTN on this point*. By contrast, EWTN has submitted evidence attesting that "[m]any of EWTN's employees choose to work at EWTN because they share its religious beliefs." Dkt. 29-9 ¶21. Thus, by the government's own admission, it has *no interest at all* in enforcing the Mandate against EWTN, much less a compelling interest.

On the record before this Court, the government cannot conceivably show that it is justified in distinguishing between a Catholic network run by the institutional Church (which would be exempted as a "religious

employer") and the same Catholic network run by Catholic laypeople (which is not exempted). The government simply failed to bear its burden of proof "to the person" as demanded by RFRA. *O Centro*, 546 U.S. at 430-31, 126 S. Ct. at 1220.

This conclusion is bolstered by Congress's treatment of the preventive services mandate in the ACA. The statutory text indicates that the preventive services mandate was less important to Congress than other goals. The ACA did not expressly include contraceptive coverage; it left the determination of which women's preventive services should be included to HHS. *Hobby Lobby,* slip op. at 8-9. Further, Congress specified that, whatever those preventive services might entail, grandfathered plans covering millions of Americans would not have to comply. *Id.* at 39-40. As the unanimous Supreme Court stated, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547, 113 S. Ct. 2217, 2234 (1993) (internal citation omitted). Applying that rule to the Mandate, the government's interests "cannot be compelling because the [Mandate] presently does not apply to tens of

millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Korte*, 735 F.3d 654, 686; *Gilardi*, 733 F.3d 1308, 1222; *see also Hobby Lobby,* slip op. at 39-40 ("As we have noted, many employees . . . may have no contraceptive coverage without cost sharing at all.").

Even more damning to the government's case, Congress saw fit to override the grandfathering exemption for parts of the ACA it deemed most important—but the Mandate was not among them. "Grandfathered plans are required 'to comply with a subset of the Affordable Care Act's health reform provisions' that provide what HHS has described as 'particularly significant protections.' ***But the contraceptive mandate is expressly excluded from this subset***." *Hobby Lobby*, slip op. at 40 (emphasis added) (citation omitted). Where a statute has expressly refused to treat a provision as even "particularly significant," the government should be foreclosed from arguing that its interest in that provision is compelling.

2. The government has many less-restrictive ways of accomplishing its objectives.

Since the government failed to bear its burden under the compelling interest prong, the Court need not address the least restrictive means prong of RFRA. If the Court did so, however, it would find that the government failed to bear its burden there as well.

The least restrictive means requirement is "exceptionally demanding." *Hobby Lobby*, slip op. at 40 (citing *City of Boerne*, 521 U.S. at 532). If a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *U.S. v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) (even under intermediate scrutiny, "the government must demonstrate that alternative measures . . . would fail to achieve the government's interests, not simply that the chosen route is easier.").

To make this showing, the government must *introduce evidence* into the record, *Playboy*, 529 U.S. at 816, 826, such as "the average cost per employee of providing access to contraceptives," or "the number of employees who might be affected" at EWTN should they not receive

contraceptive coverage. *Hobby Lobby*, slip op. at 41. It failed to do so. Thus, it failed to meet its burden.

Indeed, HHS has "many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte*, 735 F.3d at 686. EWTN proposed multiple less restrictive means in the trial court. The government failed to even seriously address, let alone rebut, them. Dkt. 30 at 33-36.

For example, as the Supreme Court recognized, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing" such contraceptives directly, and "HHS has not shown, *see* §2000bb–1(b)(2), that this is not a viable alternative." *Hobby Lobby* at 41. The government spends hundreds of millions a year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods . . . and services." 42 C.F.R. 59.5(a)(1).[11] The government did not explain why it could not use a pre-existing program like this to redress genuine

[11] *See also, e.g.,* RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

economic barriers to contraceptive access. *See*, *e.g.*, 42 C.F.R. 59.5(a)(7) (providing family-planning services for "persons from a low-income family"); *see also*, *e.g.*, *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting programs like Title X and the government's lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd*, 542 F. App'x 706 (10th Cir. 2013). "If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal." *Hobby Lobby*, slip op. at 41-42.

Alternatively, the government could offer subsidies to EWTN employees who wish to purchase comprehensive policies on the government-run exchanges. *See* Dkt. 30 at 34-35 (proposing such measures). The government failed to prove why EWTN's employees cannot be served by this "modification of an existing program." *Hobby Lobby*, slip op. at 42.

Nor can the government object to taking any of these steps on the grounds that they would create new expenses or require changes to existing programs. After all, the government has admitted in this litigation that: (1) it has no objection to paying for the objected-to contraceptives itself, Dkt. 70 at 2; (2) it has no objection to passing new regulations to implement its payment-and-distribution scheme. *Id.* at 14-15 (asserting that the "alternative mechanisms established by the regulations" creating the accommodation allowed "third part[ies]" to "seek reimbursement for payments for contraceptive services from the federal government").

While *Hobby Lobby* found that the "accommodation" was a less restrictive means than being directly forced to provide and pay for objectionable coverage, nothing in *Hobby Lobby* blessed the accommodation as *the* least restrictive means. On the contrary, the Supreme Court was clear that it did not "decide today whether [the accommodation] complies with RFRA for purposes of all religious claims," and it disclaimed even being "permitted to address" the accommodation's viability. *Hobby Lobby*, slip op. at 44 & n.40. There, "the plaintiffs ha[d] not criticized [the accommodation] with a specific objection that has been

considered in detail by the courts in this litigation." *Hobby Lobby*, slip op. at 3 (Kennedy, J., concurring). The opposite is true here. And if the Supreme Court had ruled otherwise, then surely it would not have expressly *reaffirmed* its decision to grant emergency relief to the Little Sisters of the Poor. *Hobby Lobby*, slip op. at 10 n.9 (citing *Little Sisters*, 134 S. Ct. 1022). The Little Sisters challenged the same accommodation as EWTN. *Id.* And just days after the *Hobby Lobby* decision, the Supreme Court once again granted extraordinary relief to another religious ministry—this time, Wheaton College—which presented the same claim as EWTN does here. *Wheaton*, 2014 WL 3020426, at *1.

In sum, the government failed to meet its steep burden to show that the Mandate satisfies strict scrutiny.

II. EWTN is entitled to summary judgment on its First Amendment claims.

A. EWTN should prevail under the Free Exercise Clause because the Mandate is neither neutral nor generally applicable.

Apart from whether the Mandate violates RFRA, it must also face strict scrutiny under the Free Exercise Clause.

1. The Mandate is not generally applicable.

A law that exempts 50 million people is not generally applicable. No law can be generally applicable "if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi,* 508 U.S. at 543–46, 113 S.Ct. 2217, 2232-34; *Fraternal Order of Police v. City of Newark,* 170 F.3d 359, 364-66 (3d Cir. 1999)) (Alito, J.).

For example, the slaughter ordinances in *Lukumi* ostensibly protected public health and prevented animal cruelty, but were not generally applicable because they exempted hunting, pest control, and euthanasia. 508 U.S. at 543-44, 113 S. Ct. at 2232. Similarly, the regulation in *Fraternal Order* prohibited police officers from growing beards for religious reasons, but allowed beards for medical reasons, thus making an unconstitutional "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order*, 170 F.3d at 366. And in *Midrash*, the zoning ordinances permitted private clubs in the

commercial district, but prohibited houses of worship. 366 F. 3d at 1235. This regulation "violate[d] the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues." *Id*. at 1235.[12]

The Mandate falls far below the limits set by *Lukumi* and *Midrash*. It allows massive categorical exemptions for secular conduct which undermines the Mandate's purposes, while denying narrow religious exemptions to organizations like EWTN. Most notably, more than 50 million Americans are covered under "grandfathered" plans that are indefinitely excused for administrative convenience. These plans need not cover contraception, sterilization, or *any* of the other mandated preventive services. Dkt. 1-4 at 4-5; 42 U.S.C. § 18011 (a)(2). These secular exemptions severely undermine the Mandate's interest in increasing coverage for *all* women's preventive services. Yet EWTN gets no exemption for its religious objections to providing the mandated

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[12] Although *Midrash* was decided under RLUIPA's Equal Terms provision, the analysis is the same under the Free Exercise Clause. "RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent." *Midrash*, 366 F.3d at 1232.

contraceptives. This is just the kind of "value judgment in favor of secular motivations, but not religious motivations" that fails general applicability and triggers strict scrutiny. *Fraternal Order*, 170 F.3d at 366.

The district court held that the Mandate was generally applicable because "Lawmakers are free to carve out exceptions from a general rule without running afoul of the Establishment [sic] Clause so long as those exceptions are equally available to secular and religious organizations." Op. at 13.[13] While it is true that not every exemption implicates Free Exercise concerns, massive categorical exemptions which undermine the purpose of a statute certainly do. *See supra*. The fact that religious organizations might take advantage of a secular exemption does not cure the violation. In *Midrash*, religious clubs like the Elks, Masons or Boy

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[13] This rationale is particularly troubling here, where the government's own actions prevented many religious organizations from avoiding the Mandate by continuing their grandfathered status. Grandfathering went into effect in March 2010, more than a year before the Mandate was promulgated *without prior notice and comment*. *See* 45 C.F.R. § 147.140 (grandfathering began Mar. 23, 2010); 76 Fed. Reg. 46621-01 (published Aug. 3, 2011) (announcing interim final rule on preventive care mandate). It would be perverse to permit the government to avoid proper notice and still benefit from the presumption that religious groups can avoid the Mandate by benefit of the grandfathering provision. *Cf.* Dkt. 62 (permitting EWTN's APA claims to proceed).

Scouts could surely meet in the commercial zone. *See* 366 F.3d at 1220 (permitting "private clubs and lodge halls"). But this is did not render either law generally applicable. The city still made a value judgment privileging a category of secular conduct over similar religious conduct.

The Mandate has done exactly that. The purpose of the grandfathering regulation is "avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, slip op. at 40. Where the government has created enormous categorical exemptions for the purpose of "avoiding [] inconvenience," it cannot deny narrow and targeted exemptions for the purpose of exercising a fundamental right.

2. The Mandate is not neutral.

The Mandate is not neutral because it expressly discriminates among religious objectors, creating a three-tiered system in which some are exempt (churches and "integrated auxiliaries"), some must comply with the "accommodation" (non-exempt religious non-profits), and some receive not even the accommodation (religious believers who run commercial businesses).

This open discrimination among religious institutions fails even "the minimum requirement of neutrality" that a law *not* discriminate on its

face. *Lukumi*, 508 U.S. at 533, 113 S. Ct. at 2227. Facially discriminating among religious institutions is "a puzzling and wholly artificial distinction" that the Free Exercise Clause cannot countenance. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259-60 (10th Cir. 2008) (McConnell, J.). Nor is this open discrimination justifiable. Defendants have admitted they have no evidence that EWTN's employees are less likely than church employees to share the same beliefs. *See* Dkt. 29-13 at 5. Defendants offer no other reason to distinguish EWTN from the more institutionally-affiliated religious employers the government has exempted. Dkt. 29-9 ¶ 20.

The district court held that "[f]or a law to be non-neutral within the meaning of the Establishment [sic] Clause, there has to be evidence of a purpose to 'infringe upon or restrict practices because of their religious motivation.'" Op. at 11. Since the distinctions were based upon the tax classification of the institutions, "[t]hat is a legitimate basis for differential treatment . . ." Op. at 12 (citing *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 90 S. Ct. 1409 (1970)). But *Walz* is an Establishment Clause case permitting differential treatment for tax purposes. This rationale proves too much: if the government's laws are presumptively neutral

because they track the tax code, then the government could impose *any* restriction on EWTN and similar ministries and still call it neutral, so long as it exempted houses of worship.[14]

B. The district court erred by holding that the Mandate does not violate the Establishment Clause.

For similar reasons, the Mandate also violates the Establishment Clause by impermissibly discriminating among religious organizations. The district court held otherwise because it did not believe the Mandate discriminated "based on [religious organization's] degree of religiosity," Op. at 14, and because it found that distinguishing between religious objectors "solely" based on "the [objecting] organization's tax structure" is "valid." Op. at 15. The district court erred.

The Mandate discriminates on its face among religious organizations. The government has exempted certain "religious employers" from the Mandate: "houses of worship," "integrated auxiliaries," and "the

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[14] *Walz* was also decided in the pre-*Smith* era, so the *Walz* Establishment Clause analysis is a particularly poor fit for the post-*Smith* Free Exercise Clause. In *Lukumi*, the Court cited not the *Walz* majority, but Justice Harlan's concurrence, which cautioned: "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534, 113 S. Ct. at 2227 (citing *Walz,* 397 U.S. at 696, 90 S. Ct. at 1425).

exclusively religious activities of any religious orders." 78 Fed. Reg. 8456-01, 8461 (Feb. 6, 2013). But not EWTN.

Far from *denying* any of this, the government instead explicitly *justifies* the discrimination via its own baseless assumptions about the degree of religiosity of religious organizations like EWTN:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds 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). In other words, the government discriminates against EWTN because it believes EWTN's religious beliefs have less influence over its operations than do a church's.[15]

The government has no business making guesses about the religious beliefs of people who work for religious ministries. Worse, the government borrowed the strict IRS rules used for the unrelated purpose of determining which religious organizations are exempt from reporting

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[15] While the government submitted no evidence to support this assumption, EWTN submitted evidence showing both that (a) the government's speculation was without any factual basis, and (b) that many of EWTN's employees choose to join its mission precisely because they share its beliefs. *See* Dkt. 29-13 at 5, Dkt. 29-9 at ¶ 21.

their income. *See* 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). Whether an entity qualifies for a religious exemption thus turns primarily on the degree of a church's control over and funding of the entity. *See* 26 C.F.R. §1.6033-2(h)(2) & (3) (affiliation); *id* § 1.6033-2(h)(4) (funding). The bottom line is that only church-controlled entities are safe from the Mandate.

Thus, the Mandate's exemption scheme turns on the religious composition of EWTN's internal authority structure and on the government's perceived religiosity of EWTN's employees. In the government's eyes, since EWTN is controlled by a board made up of Catholics, rather than the Catholic Church, the religious devotion of EWTN's workforce is diminished, and EWTN thus does not merit exemption. To put the matter bluntly: if Mother Angelica had handed her ministry over to a Catholic bishop, to be funded and controlled directly by her local diocese, the government would exempt EWTN entirely without requiring it to sign, deliver, or file any form of any kind. *See* 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). But because EWTN instead funds and controls its own ministry, it gets a faux

accommodation and faces millions of dollars in penalties if it refuses to go along.

This type of discrimination among religious organizations is impermissible under the Establishment Clause, which prohibits the government from making such "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). By preferring certain church-run organizations to other types of religious organizations, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694, 707 (2012), namely whether a religious mission is best achieved by ceding control to centralized church authorities. Doing so also requires "discrimination… [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Weaver*, 534 F.3d at 1259 (applying *Larson* to invalidate distinction between "sectarian" and

"pervasively sectarian" organizations). Such discrimination is forbidden by the Establishment Clause.

The Mandate's discrimination is even less defensible than that invalidated in *Larson*. Under the Mandate, an exempt religious organization must not "normally receive[] more than 50 percent of its support" from non-church sources—a qualification that closely parallels the condemned criteria in *Larson*. *Compare* 26 C.F.R. § 1.6033-2 (h)(2)-(4) *with Larson*, 456 U.S. at 230 (law "impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than 50% of their funds from nonmembers"). But even the law rejected in *Larson* did not justify its discrimination based on explicit—and groundless—speculation about the internal religious practices of a religious organization. *See Weaver*, 534 F.3d at 1259 (stating that distinguishing religious organizations based on their internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*" and that government cannot engage in such "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations").

None of this is permissible. The government is prohibited from selectively handing out religious exemptions based on the government's views of which openly religious organizations are "religious enough." *See*, *e.g.*, *Hobby Lobby*, slip op. at 3 (Kennedy, J., concurring) (noting that the government may not "distinguish[] between different religious believers—burdening one while accommodating the other—when it may treat both equally"). The Mandate violates the Establishment Clause.

C. The district court erred by ruling that the Mandate does not violate the First Amendment's Free Speech Clause.

The First Amendment protects EWTN's right to "deci[de] . . . both what to say and what not to say." *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988). The Mandate violates that right in both ways.

1. The Mandate compels speech.

The government seeks to compel EWTN to speak "in a form and manner specified by the Secretary." 45 C.F.R. § 147.131 (b)(4), (c). As discussed above, the purpose of this speech is to "ensure" that EWTN's TPA has "legal authority" to provide contraceptive coverage. 78 Fed. Reg. 39879-80; 26 C.F.R. 54.9815–2713A. And this forces EWTN to speak in a manner furthering a message and activities that contradict its public

witness to its religious faith. *See* Dkt. 29-9 ¶¶ 51-53; EWTN's Sugg. Determ. Undisp. Fact, Dkt. 29-14 ¶ 48-49.

But it is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("*AOSI*") (internal quotation marks omitted); *see also Sykes v. McDowell*, 786 F.2d 1098, 1104 (11th Cir. 1986) ("The right not to send messages under state coercion is a first amendment protected right."). The government has many ways to coerce third parties to act. But it cannot commandeer EWTN's mouth or its pen to force EWTN to order such third parties to do so.

The district court erred by finding that this speech requirement is "a regulation of conduct, not speech." Op. at 15-16 (citing, inter alia, *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 61 (2006)). Such regulations are only permissible when they primarily regulate what affected parties "must *do* . . . not what they may or may not *say*." *FAIR*, 547 U.S. at 60 (emphases original). The exact opposite is true here—the government is trying to control what EWTN must say. That central role for the compelled speech explains the government's stalwart insistence on forcing EWTN to speak.

The district court also erroneously held that the First Amendment bans only "compelling citizens to express beliefs that they do not hold." Op. at 15-16. Not so—"the right against compelled speech is not, and cannot be, restricted to ideological messages." *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014) (internal quotations omitted). Speakers have the "right to tailor the speech" to avoid even "minimal" statements that are allegedly "factual." *Id.* at 373; *accord Riley*, 487 U.S. at 797 (both "compelled statements of opinion" and "compelled statements of 'fact'" receive First Amendment scrutiny). Thus, the "constitutional harm of compelled speech" is "being forced to speak rather than to remain silent," a harm that "occurs regardless of whether the speech is ideological." *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013) (internal quotations omitted).[16]

It is also irrelevant that, as the government argued below, EWTN can tell its fellow Catholics that the words the government forces it to utter are "words without belief" or are "barren of meaning." *W. Va. State Bd. of*

[16] Moreover, "determining when speech is ideological and when it is not" is virtually impossible. *Cressman*, 719 F.3d at 1152. And EWTN sees the compelled speech here as having obvious, weighty ideological content and purpose. *See* Dkt. 29-9 at ¶¶ 13-23, 30-46.

Educ. v. Barnette, 319 U.S. 624, 633, 63 S. Ct. 1178, 1183 (1943); *accord Frudden v. Pilling*, 742 F.3d 1199, 1205 (9th Cir. 2014). Government may not force citizens to speak out of both sides of their mouths. This is particularly true here, where EWTN could continue to express its beliefs on contraception after executing the Form "only at the price of evident hypocrisy." *AOSI*, 133 S. Ct. at 2331.

2. The Mandate compels silence.

The Mandate expressly prohibits EWTN from engaging in speech with a particular content and viewpoint: EWTN is barred from talking to its TPA and instructing it not to provide contraceptive and abortion-inducing drugs and devices, and also barred from saying it will terminate its relationship with the TPA and find a different one. *See* 26 C.F.R. 54.9815-2713A(b)(iii) (EWTN "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements"); Dkt. 29-12 at 112-13; *accord* Dkt. 50-3 at 15-16. This violates the First Amendment. *Riley*, 487 U.S. at 797.

It is no answer to say, as the government did below, that EWTN may tell everyone *but* its TPA that it does not want its TPA to provide the coverage. A ban on "speech tailored to a particular audience . . . cannot

be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999); *accord Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1182 (11th Cir. 2009) (generally, "government may not . . . prevent[] [a] speaker[']s access to [its] audience").

The district court refused to consider EWTN's compelled silence argument because it saw the argument as a "new First Amendment claim" that could be heard only if EWTN "amended its complaint."[17] Op. at 17. But this conflated an argument with a claim. "Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 1532 (1992) (emphasis added). Here, the *claim* is that the Mandate violates the Free Speech Clause. Theories about why the Mandate does so "are not separate *claims*," but "separate *arguments* in support of a single claim." *Id.* at 535, 1532. That is particularly clear here, given the close relationship between compelled speech and compelled silence arguments.

[17] The district court also accused EWTN of improperly first raising the argument in its "reply" brief. Op. at 17. But that brief was also EWTN's *response* brief to the government's cross-motion for summary judgment, and the argument was directly refuting the government's claim that the Mandate does not "limit what EWTN may say." Dkt. 35 at 32.

Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1273 (11th Cir. 2004) (illustrating how close the "First Amendment right to remain silent" is to the "First Amendment right to affirmatively express" one's self). Yet the district court still granted summary judgment to the government on the Free Speech claim without considering EWTN's argument—even after acknowledging that other courts had found the argument meritorious. Op. at 17.

* * * *

Both the Mandate's compelled speech and compelled silence triggers strict scrutiny, *TBS, Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459 (1994), which the Mandate fails for the reasons discussed above.[18]

III. EWTN is entitled to injunctive relief.

The district court also erred by failing to grant preliminary injunctive relief to EWTN. A party seeking a preliminary injunction must show: (1) "a substantial likelihood of success on the merits," (2) "irreparable injury will be suffered" absent an injunction, (3) "the threatened injury to the

[18] Further, even if the Mandate's speech requirements were "unrelated to the content of speech," they would still be "subject to an intermediate level of scrutiny," which they would fail due to the same infirmities that cause them to fail strict scrutiny. *TBS*, 512 U.S. at 642, 114 S. Ct. at 2459.

movant outweighs whatever damage the proposed injunction may cause the opposing party," and (4) "the injunction would not be adverse to the public interest." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006) (citing *Siegel,* 234 F.3d at 1176). "For a permanent injunction, the standard is essentially the same, except that the movant must establish actual success on the merits, as opposed to a likelihood of success." *Id.* (citing *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12 (1987)).

As explained above, EWTN is likely to succeed on the merits of its claims. Without an injunction, EWTN will suffer injury to its free exercise and speech interests. "[I]t is well established that [the] loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor,* 458 F.3d at 1271-72 (quotation omitted). The analysis is identical for RFRA, since "RFRA protects First Amendment free-exercise rights[.]" *Korte*, 735 F.3d at 666. No remedy at law can protect EWTN, since the case involves "'direct penalization, as opposed to incidental inhibition' of First Amendment rights," and such deprivations can "not be remedied absent an injunction." *KH Outdoor*, 458 F.3d at 1272.

The balance of harms favors EWTN. Here, "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party." *Siegel*, 234 F.3d at 1176. EWTN will lose First Amendment freedoms and face ruinous fines without an injunction. The government will suffer no damage from an injunction, particularly since it has made a regulatory finding that it has no interest in enforcing the Mandate against an organization like EWTN. *See supra* at 58.

An injunction is also in the public interest. In a RFRA case, "there is a strong public interest in the free exercise of religion even where that interest may conflict with" another statutory scheme. *O Centro Espirita v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd* 546 U.S. 418, 126 S. Ct. 1211 (2006). Simply put, "[t]he public has no interest in enforcing an unconstitutional [regulation]." *KH Outdoor*, 458 F.3d at 1272.

CONCLUSION

For all the foregoing reasons, the district court's judgment should be vacated. The Court should direct the entry of partial summary judgment and a permanent injunction for EWTN.

Respectfully submitted,

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