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—Movant,

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—Respondents.

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

ETERNAL WORD TELEVISION NETWORK'S TIME SENSITIVE MOTION FOR INJUNCTION PENDING APPEAL—RELIEF REQUESTED BY JUNE 30, 2014

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June 18, 2014

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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)

American Civil Liberties Union of Alabama (amici curiae)

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INTRODUCTION

Eternal Word Television Network ("EWTN") is the world's largest Catholic media network. Founded in 1981 by a cloistered nun, EWTN devotes every hour of every day to proclaiming the Catholic faith that animates everything it does.

Without immediate relief from this Court, however, EWTN must publicly violate its faith by July 1 or incur more than $10 million in fines. That is because a federal regulation ("the Mandate") requires EWTN to either provide free access to contraceptives and sterilization or to sign a federal form ("EBSA Form 700") that would deputize EWTN's third party administrator ("TPA") to do the same thing in EWTN's place. Either choice would violate EWTN's sincere religious beliefs.

This use of severe punishments to coerce EWTN to violate its faith is a textbook substantial burden under the Religious Freedom Restoration Act ("RFRA"). *See, e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("substantial burden" means "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."). RFRA bars such burdens, unless the government satisfies strict scrutiny, which it cannot do here.

The trial court nevertheless denied EWTN summary judgment or preliminary injunctive relief, and entered summary judgment against EWTN, because it believed coercing EWTN to sign EBSA Form 700 did not seriously burden EWTN's religious exercise. The court thought Form 700 was "innocuous," that it "contains nothing . .

. that is contrary to EWTN's religious beliefs," and that EWTN's religious objection to signing merely "hinges upon the effect" signing "will have on other parties." Op. at 6, 8, 10. Thus, the trial court found that RFRA prevents no bar to the government's forcing EWTN do something directly contrary to its religious exercise. Op. at 10.

The trial court misunderstood RFRA, EWTN's religious beliefs, and the role of EBSA Form 700 in the government's contraceptive delivery system. First, RFRA broadly protects "any" exercise of religion. 42 U.S.C. § 2000cc-5. Yet the trial court wrongly declared one particular type of religious exercise—namely, one's *avoiding* doing something that is believed to facilitate immoral conduct or create other negative consequences—beyond RFRA's reach. That narrow conception of religious exercise would exclude the Amish parent who cannot send a child to high school, the Jehovah's Witness who cannot build tanks, and the religious opponent of capital punishment who cannot sign an execution order. All of those people's religiously grounded abstentions plainly fit within the protections of RFRA and the First Amendment. *See Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) ("[T]he 'exercise of religion' often involves not only belief and profession but the performance (or abstention from) physical acts"). EWTN's desire not to participate in the government's scheme is entitled to no less protection.

Second, it is undisputed here that EWTN's religion *in fact* does prohibit EWTN from signing EBSA Form 700. *See Defs.' Resp. to EWTN's Statement of Material*

Facts, ¶¶41, 43 (Dkt. 36-1) (hereafter "Defs.' Resp."). The trial court exceeded its authority to second-guess that religious judgment, to deem "innocuous" an act EWTN's faith deems forbidden, to claim to understand EWTN's religious obligations "more accurately" than EWTN does, and to instruct EWTN that the Form "does not conflict with EWTN's religious beliefs." Op. 6.

Third, the trial court simply misunderstood the function of EBSA Form 700 in the government's contraceptive delivery system. The very purpose of that Form—and the reason the government needs to force EWTN to sign it—is to "ensure[ ] that there is a party with legal authority" to make payments for contraceptive services to beneficiaries of EWTN's plan. 78 Fed. Reg. 39870, 39880 (July 2, 2013). If EWTN does not sign and deliver that Form, its TPA is under no legal obligation, has no legal authority, and receives no legal incentive to make such payments. Religious beliefs do not need to be reasonable to be protected, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981), but EWTN's religious refusal to sign the Form is manifestly reasonable in light of the government's own characterization of why it needs to force EWTN's participation in this system.

For these reasons, the trial court's ruling was error. That error will expose EWTN to massive financial penalties for its religious exercise in less than two weeks. Although EWTN has moved for an injunction pending appeal in the trial court, it is impracticable to await final disposition of that motion. Further, the trial court has

already denied a temporary injunction on the very grounds argued here. Thus, EWTN respectfully requests an injunction pending appeal prior to July 1. Most courts in similar cases have entered injunctions to protect plaintiffs from being forced to execute the Form or incur fines during their cases. *See, e.g.*, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (S. Ct. Jan. 24, 2014) (granting injunction pending appeal).[1] Similar relief is appropriate here. EWTN also requests a temporary injunction pending disposition of this motion, an expedited briefing schedule on this motion, and expedited briefing and argument on its appeal.

BACKGROUND

I. EWTN. EWTN's Catholic faith infuses everything it does: every minute of its programming, every aspect of its campus (including its chapel, its shrine, and its Stations of the Cross devotional area), and every part of its operations. Dkt 29-9 at ¶¶ 6, 8-11. EWTN sincerely holds and professes traditional Catholic teachings concerning contraception, sterilization and the sanctity of human life. *Id.* at ¶¶ 12-14. A non-negotiable part of EWTN's Catholic identity is its health plan, which has been carefully constructed to follow Catholic teachings. *Id.* ¶ 20.

II. The Mandate. The Affordable Care Act mandates that any "group health

[1] To date, 23 of 28 similar cases have resulted in injunctions. *See* http://www.becketfund.org/hhsinformationcentral/ (tracking cases). The *Little Sisters* injunction was granted despite the government's claim that "the requirement that they sign the certification form" did not impose a burden. Gov't Br. at 30.

plan" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). Congress did not define "preventive care" but instead allowed Appellee HHS to define the term. 42 U.S.C. § 300gg-13(a)(4). Its definition includes all FDA-approved contraceptive methods and sterilization procedures, including abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). Dkt. 1-2 at 2, 11-12.[2] Failure to provide this coverage triggers a severe penalties. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ($100 per day per affected individual); 26 U.S.C. § 4980H(c)(1) ($2000 per year per full-time employee if coverage not provided by 2015).

"Exempt" employers. Many employers are exempt from the Mandate. Employers with "grandfathered" health care plans, which cover tens of millions of Americans, are exempt from the Mandate. *See* 42 U.S.C. § 18011 (2010); Dkt. 1-4 at 5; *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *cert. granted* 134 S. Ct. 678 (2013) ("Grandfathered plans may remain so indefinitely."). Employers with fewer than fifty employees, covering an estimated 31 million Americans, may avoid the Mandate by not offering insurance at all. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); Dkt. 1-6 at 3. A narrow subset of "religious employers"—churches and religious orders—are also exempt. 78 Fed. at 39874; 45 C.F.R. 147.131

[2] The FDA's Birth Control Guide notes that these drugs and devices may prevent "attachment (implantation)" of a fertilized egg in the uterus. Dkt. 1-2 at 11-12.

(a). These employers are all automatically exempt; they are not compelled to certify religious beliefs to anyone, to sign EBSA Form 700, or otherwise designate, authorize, incentivize, or obligate anyone else to provide contraceptive coverage.

"Non-Exempt" Employers and EBSA Form 700. Religious entities like EWTN, who do not qualify as "religious employers," sought an exemption. Dkt. 1 at ¶¶ 98-99. Instead, the government developed an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501 (March 21, 2012). Unlike the grandfathering and religious employer exemptions, the government said that the "accommodation" would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage." *Id.* at 16503.

The resulting final rule requires non-exempt religious organizations to execute and deliver EBSA Form 700 to their third party administrators. 78 Fed. Reg. at 39875; 26 C.F.R. 54.9815–2713A. The government imposed the requirement to sign and deliver EBSA Form 700 as part of its effort to ensure that beneficiaries of plans of non-exempt employers "will still benefit from separate payments for contraceptive services without cost sharing or other charge." 78 Fed. Reg. at 39874. Non-exempt employers with self-insured plans are required to 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 EBSA 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). 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). The Form states:

> 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; entire Form attached in the Addendum at 1. Through this legally operative language, the Form (a) directs the TPA to the Mandate's requirement that the TPA "shall be responsible for" payments for contraceptive services, (b) instructs the TPA as to the TPA's "obligations," and (c) purports to make the Form, including

the Notice section thereof, "an instrument under which the plan is operated."[3]

III. EWTN's undisputed religious exercise. As a matter of religious exercise, EWTN can neither provide the mandated coverage nor execute and deliver EBSA Form 700 to its TPA. The sincerity of these beliefs is entirely undisputed. *See Defs.' Resp.*, ¶¶41, 43 (Dkt. 36-1). And as a religious matter, it is undisputed that signing the form "would do nothing to lessen EWTN's complicity" in providing contraceptive coverage, would require EWTN to "act[] in a way that violates Catholic teaching," would require EWTN 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." *Id.* at ¶¶ 48-49.

EWTN's next insurance plan year begins on July 1, 2014. Dkt. 29-9 at ¶ 28. On that day, it will become subject to the Mandate. *Id.* If it does not sign and deliver EBSA Form 700 prior to that date, and maintains the same religiously compliant plan that it has today, it will be subject to fines of $12,775,000 per year for its failure to comply with the Mandate. *Id.* at ¶ 58; 26 U.S.C. § 4980D(b)(1).

[3] To induce TPAs to provide the coverage, the regulations also offer a "carrot": an extra government payment to make the scheme profitable. In particular, a separate regulation provides that, if a TPA obtains Form 700 from a non-exempt employer, the TPA becomes eligible for government payments that will both cover the TPA's costs and include an additional payment. 45 C.F.R. 156.50. Defendants acknowledge that this bonus payment is dependent on receipt of the Form. Dkt. 29-12 at 97.

PROCEDURAL HISTORY

Plaintiffs filed their complaint on October 28, 2013. Dkt. 1. On December 31, 2013, EWTN filed a motion for summary judgment on Counts I, II, V, and IX. Dkt. 29. EWTN requested the court to expedite consideration or grant preliminary injunctive relief. *Id.* The government consented to expedite while opposing EWTN's other motions and filing 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 motion for summary judgment on Counts I, II, V, and IX. Dkt. 61. By separate order, the court also ruled on the government's motions regarding Plaintiffs' thirteen remaining claims. Dkt. 62. On June 18, the court certified that its ruling on Counts I, II, V, and IX was final, entered an order of final judgment on those claims, and stayed litigation on all other claims. Dkts. 65-66. EWTN then filed its notice of appeal. Dkt. 68.[4]

ARGUMENT

EWTN need only show that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). "A

[4] EWTN also sought an injunction pending appeal. Dkt. 64. The court has ordered the government to respond by June 20, and EWTN to reply by June 23. Dkt. 67.

substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain, success." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005) (emphasis omitted).

I. EWTN is substantially likely to succeed on the merits of its claims.

A. The Mandate imposes a substantial burden on a religious exercise.

A law imposes a substantial burden on religion where, as here, it "requires participation in an activity prohibited by religion." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).[5] Here, the Mandate requires EWTN's participation in the government's contraceptive delivery system by forcing EWTN to execute and deliver EBSA Form 700. It is undisputed that EWTN is religiously prohibited from signing and delivering this form, and that EWTN's religious beliefs are sincere. *See Defs.' Resp.* ¶¶41, 43 (Dkt. 36-1); *see also* Warsaw Decl. ¶¶ 12-65; Haas Decl. ¶¶ 8-69. The lower court ignored that religious exercise as beyond RFRA's protection. Op. 10. But both RFRA's text and controlling precedent protect EWTN's religious exercise.

Errors of fact. The lower court's ruling is premised upon mistakes of fact.[6] The court misstated the text of Form 700: "The form itself is innocuous, containing only

[5] *Midrash* addressed RFRA's companion law, 42 U.S.C. § 2000cc, which uses a nearly identical standard. *See Knight v. Thompson*, 723 F.3d 1275, 1282 (11th Cir. 2013).

[6] Summary judgments are reviewed *de novo*, with all evidence and factual inferences in favor of EWTN. *Rojas v. Florida*, 285 F.3d 1339, 1341–42 (11th Cir. 2002).

one operative provision, which does not conflict with EWTN's religious beliefs . . . ." This is clear error. As reproduced on p. 7 above, and attached, the form contains multiple operative provisions: certifying EWTN's objection, ***and the notice to and designation of its third-party administrator to distribute the drugs.***

The Form's operative language is not mere bureaucratic throat-clearing. It is legally operative, according to the government: "the self-certification [form] is one of the instruments under which the employer's plan is operated under ERISA section 3(16)(A)(i)" and "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39879. Under the particular system the government chose to establish, such language is necessary under ERISA to authorize and obligate the administrator to provide drugs to EWTN's employees on EWTN's behalf. Indeed, the government candidly admits that this forced designation is necessary to "ensure[]" that EWTN's administrator has "legal authority to arrange for payments for contraceptive services and administer claims in accordance with ERISA's protections for plan participants and beneficiaries." *Id.* at 39880.

It is no answer to say that the "conversion" of EWTN's health plan occurs through operation of law and not through any action taken by EWTN itself.[7] The

[7] *See* Op. 9 ("To the extent that EWTN's third-party administrator is under compulsion to act, that compulsion comes from the law, not from Form 700.").

government has constructed a scheme in which EWTN's participation is essential—both as the purchaser of the health coverage and as the executor of the Form that converts that health coverage into the vehicle for delivering contraception. The government's own action in this case makes this clear: if the provision of contraceptive methods were truly independent of EWTN, then the government would have been satisfied with the arrangement devised by the Supreme Court in *Little Sisters of the Poor v. Sebelius* in which the Little Sisters informed the *government* that they objected to providing contraceptives.[8] Indeed, if mere operation of law could achieve the government's goals, it is difficult to fathom why the government would claim a *compelling* government interest in forcing EWTN to sign and tender that very particular government form.[9] But in this case and dozens like it, the government continues to insist that religious objectors sign and deliver not just a notice, but a legally operative plan instrument, to their health benefits provider.[10] The lower court's construction of Form 700 is unsupportable.

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[8] Likewise, exempted "religious employers" do not need to execute EBSA Form 700 or otherwise trigger anyone else's obligation to provide coverage. 78 Fed. at 39874; 45 C.F.R. 147.131 (a).

[9] That position is particularly puzzling since EWTN's objections are well-known. The Form exists not to provide notice, but to change EWTN's insurance contracts.

[10] *See* 26 C.F.R. § 54.9815-2713A (b)(iii)(2) (obligation for TPA only arises "***if*** a third party administrator ***receives a copy of the self-certification*** described in paragraph (a)(4) of this section, ***and agrees to enter into or remain in a contractual relationship***"), *id.* at (c)(2) (imposing requirement on a "group health insurance issuer ***that receives a copy of the self-certification***") (emphases supplied).

Errors of law. The lower court also erred in applying the law of this Court and the U.S. Supreme Court. The decision erroneously concludes that a religious exercise is excluded from RFRA if the believer seeks to avoid participating in immoral activity *by third parties*: "EWTN's only religious objection to the mandate hinges upon the effect it will have on other parties after EWTN signs Form 700 rather than anything inherent to the act of signing and delivering Form 700 itself . . . ." Op. 10. Not only is there no basis for this distinction in the law, but it completely misses why EWTN objects to signing the form. EWTN's *own* action in signing the form is the sole legal trigger that will cause contraceptives to flow to other people. EWTN believes it cannot participate in that scheme because *its own action* would facilitate an activity it believes to be wrong.

The Supreme Court has long recognized religious objections based upon the desire to *abstain* from participating in other people's actions. In *Wisconsin v. Yoder*, the Amish parents objected to sending their children to school precisely because of the anticipated effect of allowing their children to be exposed to high school. 406 U.S. 205, 210-11 (1972) (The Amish "view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."). In *Thomas v. Review Board*, a Jehovah's Witness objected to

making tank turrets—not because he himself would use the turrets in battle, but because it would facilitate others people in waging war. As the Court explained, "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. 707, 715 (1981). 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.[11]

This understanding is incorporated into RFRA. *See* 42 U.S.C. § 2000bb(b)(1) (incorporating *Yoder*). RFRA broadly protects "any" exercise of religion. 42 U.S.C. § 2000cc-5. It is undisputed here that EWTN's religion prohibits it from signing EBSA Form 700. *See Defs.' Resp.* ¶¶41, 43. 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. EWTN is no different from the Amish parent in *Yoder*, the Jehovah's Witness plaintiff in *Thomas*, or a religious death penalty opponent in this regard. It was not the province of the trial court to second-guess EWTN's line-drawing, but only to determine whether this religious exercise was substantially burdened by the pressure the government is imposing.

Nothing in RFRA's broad protection of religious exercise is contrary to *Bowen*

[11] Likewise, driving a friend to the bank may be permissible as a general matter, but would become immoral (and criminal) if one knows the friend plans to rob the bank.

v. Roy. *Cf.* Op. 8. The problem in *Bowen* was that the claimant was not required to take any action *at all*. In other words, he was not engaged in any protectable "exercise of religion," but instead objected to "the statutory requirement that each state agency 'shall utilize' a Social Security number" for the plaintiff's daughter. *Bowen v. Roy*, 476 U.S. 693, 700-01 (1986). The court rejected this challenge to an internal government action, because the plaintiff was not being required to do anything. *Id.*[12] But EWTN does not claim to be burdened by the existence of independent government programs funding contraception. Nor does it claim burden when its employees independently contract for contraceptive coverage, nor when they choose to use contraceptives they obtain themselves. EWTN only objects when a government mandate forces EWTN itself to take actions to designate, authorize, incentivize, and obligate those actions. EWTN is being coerced to actively "participat[e] in an activity prohibited by religion." *Midrash*, 366 F.3d at 1227.[13]

The court also relied on *University of Notre Dame v. Sebelius*, 743 F.3d 547, 554

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[12] The court splintered on a second, more analogous, issue: the requirement that plaintiff "*shall furnish* to the State agency his social security account number . . . ." *Bowen*, 476 U.S. at 701 (emphasis in original). On that issue, "five Members of the Court agree[d] that *Sherbert* and *Thomas*, in which the government was required to accommodate sincere religious beliefs, control the outcome of this case . . . ." *Id.* at 731 (O'Connor, J., concurring in part and dissenting in part).

[13] The *Kaemmerling* comparison fails for the same reason. There, the plaintiff could not "identify any 'exercise' which is the subject of the burden to which he objects." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). But here, EWTN objects to a specific required action: signing Form 700.

(7th Cir. 2014), and *Michigan Catholic Conf. v. Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753, at *9 - *11 (6th Cir. June 11, 2014). But those decisions are distinct. Unlike Notre Dame, EWTN has never signed Form 700 and cannot, in good conscience, do so. *See Defs.' Resp.*, ¶¶41, 43, 48-49. And reliance upon the *Notre Dame* opinion is particularly questionable, since this Court has explicitly "decline[d] to adopt the Seventh Circuit's definition" of "substantial burden." *Midrash*, 366 F.3d at 1227. Both decisions also rest on the premise that EBSA Form 700 has no legal effect—a premise the government's own admissions prove false. *See supra.*

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 [g]overnment." *Gonzalez v. O Centro*, 546 U.S. 418, 429 (2006); 42 U.S.C. § 2000bb-1(b). No court to reach strict scrutiny has held that the Mandate can withstand it. This case is no different.

Compelling interest. To be compelling, an interest cannot be "broadly formulated," but must be shown to apply particularly "to the person." *O Centro*, 546 U.S. at 430-31. Yet thus far, the government has articulated only "broadly formulated interests" in public health and gender equality, and offered almost no justification for not "granting [a] specific exemption[] to [EWTN]." *O Centro*, 546 U.S. at 431; Dkt. 35 at 24-26; Dkt. 53 at 10.

Moreover, the government has failed to show with any "particularity" how its

interests would be "adversely affected" by granting an exemption to EWTN, because the Mandate contains myriad exemptions that leave the government's supposed interests unprotected. *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 430-33. The government has offered exemptions to thousands of religious employers who it has deemed to deserve "protect[ion]" from the Mandate, and it has exempted plans covering tens of millions of employees for secular reasons. *See supra* at 5. Given these enormous gaps, the government cannot plausibly maintain that its interests are compelling. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

Least restrictive means. EWTN proposed multiple less restrictive means in the district court. Defendants failed to even seriously address them, let alone rebut them. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (if a less restrictive alternative would serve the government's purpose, "the legislature must use that alternative."); Dkt. 30 at 33-36. There are many ways Defendants could "promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

C. The Mandate violates the First Amendment's Free Speech Clause.

The First Amendment protects EWTN's right to be free from government efforts

to compel its speech. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988). Here, the government seeks to compel EWTN to speak in a very particular way—namely, to execute EBSA Form 700. The government acknowledges that EWTN has publicly stated its religious objections already. But the government needs to force EWTN to do so "in a form and manner specified by the Secretary," 45 C.F.R. § 147.131 (b)(4), (c), because coercing EWTN to designate its TPA "solely for the purpose of providing" contraceptive coverage will "ensure" that the TPA has "legal authority" to do so. 78 Fed. Reg. 39879-80; 26 C.F.R. 54.9815–2713A.

EWTN cannot be coerced to engage in this forced speech. It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 61 (2006)).[14] The government has many ways to coerce third parties to act; it cannot commandeer EWTN's mouth or its pen to force EWTN to order them to do so.

The district court was also wrong that the speech requirement is "a regulation of

[14] The lower court wrongly believed the prohibition on compelled speech only "prohibits the government from compelling citizens to express beliefs that they do not hold." Op. at 15-16. Not so. "[T]he 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 citation omitted). Speakers have the "right to tailor speech" to avoid even "minimal" statements that are allegedly "factual." *Id.*; *accord Riley*, 487 U.S. at 797 (both "compelled statements of opinion" and "compelled statements of 'fact'" receive First Amendment scrutiny).

conduct, not speech." Op. 15-16 (citing, inter alia, *FAIR*, 547 U.S. at 61). 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 forced speech is the essential act EWTN must engage in, because the government views that forced speech as necessary to "ensure" that EWTN gives "legal authority" to its TPA to provide coverage. That central role for the compelled speech explains Defendants' stalwart insistence on forcing EWTN to speak in this manner.

II. The other preliminary injunction factors are satisfied.

Irreparable Injury. 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, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006) (quotation omitted). The analysis is identical for RFRA, since "RFRA protects First Amendment free-exercise rights[.]" *Korte*, 735 F.3d at 666.

Balance of Harms. The measure of the third factor is whether "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 can point to no damage that will occur to *it* under an injunction.

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 (2006). Simply put, "[t]he public has no interest in enforcing an unconstitutional [regulation]." *KH Outdoor*, 458 F.3d at 1272.

CONCLUSION

EWTN respectfully requests that the Court (1) enter an injunction against Appellees during the pendency of this appeal enjoining them from enforcing the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and from assessing penalties, fines, or taking any other enforcement actions for noncompliance related thereto, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d against EWTN and its TPA; (2) enter a temporary injunction pending the disposition of this motion; (3) order an expedited briefing schedule on this motion, and (4) order expedited briefing and argument on this appeal.[15]

[15] EWTN contacted Appellees concerning these requests. Appellees stated that they opposed the request for injunction pending appeal and a temporary injunction pending disposition of this motion. The parties were not able to come to agreement on expedited briefing schedules by the time of this filing.

Respectfully submitted,

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Dated: June 18, 2014

CERTIFICATE OF SERVICE

I certify that on June 18, 2014, I caused the foregoing *Time Sensitive Motion for Injunction Pending Appeal* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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All other case participants will be served via the Court's electronic filing system as well. I have also caused all of the counsel listed above to be served via email.

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Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

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