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 REPLY BRIEF IN SUPPORT OF TIME SENSITIVE MOTION FOR INJUNCTION PENDING APPEAL—RELIEF REQUESTED BY JUNE 30, 2014

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INTRODUCTION

Twenty-four years ago, Mother Angelica created EWTN as a religious ministry to proclaim the Catholic faith to the world. It is undisputed that as part of that faith Mother Angelica's ministry cannot execute and deliver EBSA Form 700. But in seven days, that ministry must either violate its faith or suffer crushing fines.

Most courts to consider the question have granted injunctions, and with good reason: the Government obviously has many ways to distribute contraceptives without dragging Mother Angelica's ministry (or any other nuns) into the process. Yet rather than defend this unnecessary and illegal coercion, the Government's brief mischaracterizes both EWTN's religious objection and the Government's own system. EWTN's religious objection is not about what the government or third parties are doing, but about *EWTN* is being forced to do by the government. And both the Federal Register and the Government's own arguments confirm that the TPA's obligations are triggered by EWTN's coerced delivery of EBSA Form 700, and not by independent legal obligations.

EWTN soon must either violate its faith or incur massive fines, all over a form EWTN insists it cannot sign and the government (absurdly) insists does not matter anyway. The Government's proposal—crushing EWTN with fines while it litigates this case—is illegal and inequitable. An injunction pending appeal should issue.

ARGUMENT

I. EWTN is substantially likely to succeed on the merits.

A. The Mandate imposes a substantial burden.

EWTN's forced participation is a substantial burden. The Government ignores controlling Eleventh Circuit caselaw defining "substantial burden"[1] and the vast majority of courts that have held that the Mandate imposes such a burden. Instead, it seeks refuge in a mischaracterization of EWTN's religious exercise, and a misstatement of the Government's own system.

1. EWTN's Religious Exercise. The Government repeatedly asserts that EWTN's religious objection is about *someone else's* conduct, rather than its own. Opp. 1, 13. According to the Government, EWTN need "only" complete a form stating that it is eligible. *Id.* at 5, 11. This is all wrong. The Government seeks to force *EWTN* to sign a form that plainly includes legally effective provisions described at Mot. 6-8.[2]

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[1] *See Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining "substantial burden" to include laws that "directly coerce[] the religious adherent to conform his or her behavior").

[2] Telling EWTN that EBSA Form 700 is "only" a statement of its religious beliefs (Opp. 5, 11) is like telling a judge a requested warrant is "only" a document describing a location. The limited truth of such characterizations is overwhelmed by the fact that they ignore the parts of the document that dictate whether one would sign. If the *Government* were actually willing to accept a form that was "only" a statement of EWTN's religious objection, then merely filing the complaint in this case would satisfy them. But it is precisely *because* the Form is much more than "only" a statement of the religious objection that the Government so aggressively demands that EWTN use that form and none other. *Cf. Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) ("applicants need not use the form prescribed by the Government and need not send copies to third-party administrators").

EWTN objects to its *own coerced participation* in the Government's contraceptive delivery system. *See, e.g.*, Warsaw Decl., Dkt. 29-9 ¶¶ 48-54 (noting *EWTN* cannot designate the TPA; doing so "would contradict *EWTN*'s public witness to Catholic beliefs"; "*EWTN* may not engage in conduct that may lead others to do evil, or lead others to think that the *EWTN* condones evil.") (emphases supplied). Longstanding and well-developed Catholic teachings preclude such participation. *See, generally*, Warsaw Decl.; Haas Decl., Dkt. 29-10. EWTN cannot trigger the provision of contraceptives, sterilization, and abortion-causing drugs without violating its faith and betraying its mission.

This participation distinguishes EWTN's case from those where a plaintiff complained about actions taken entirely by the government. *See* Mot. 14-15. *Bowen* involved an individual seeking to control not his own religious exercise, but the government's "internal procedures." *Bowen v. Roy*, 476 U.S. 693, 700 (1986). Here we have the exact opposite of *Bowen*: the *government* seeks to dictate *private* conduct by compelling EWTN to either offer religiously-objectionable services, or designate, authorize, incentivize and obligate someone to do it for them.[3]

Nor is EWTN's situation similar to the true exemption the government offers to

[3] This participation also distinguishes this case from *Tilton v. Richardson*, 403 U.S. 672 (1971). In *Tilton*, the Court rejected a Free Exercise claim regarding taxes flowing to religious groups. *Id.* at 689. But EWTN is not suing to block taxes being used by the government to subsidize contraception. To the contrary, it suggested direct government provision as a less restrictive means. *See infra* at 9.

conscientious objectors in the military. *Cf. Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014). Conscientious objectors (COs) must fill out and deliver a form *to the government* in which they may request CO status. *See*, *e.g.*, Dept. of Defense Instruction 1300.06 (May 31, 2007). A conscientious objector only opts himself out. While the government may then *choose* to draft someone else, or someone else may *choose* to enlist, both were always able to do so regardless of the objector's opt-out. For the government's analogy to be accurate, a conscientious objector would be forced to personally designate someone to take his place (someone otherwise unable to enlist or be drafted), authorize both the government to draft the person *and* the person to enlist, create obligations for the person to enlist, and trigger financial incentives for the person to enlist.[4]

2. EBSA Form 700. The Government minimizes EWTN's religious beliefs by suggesting that EWTN misunderstands the law. Opp. 17. But the Government ignores its own statement—in the Federal Register—that EWTN's coerced signature is *necessary* to "ensure[]" that the TPA has "legal authority" to provide coverage. Mot. 6-7 (quoting 78 Fed. Reg. 39870, 39880). It has openly conceded this point to

[4] The CO exemption is much more akin to the Mandate's exemption for churches, who need not execute Form 700 or otherwise trigger anyone else's obligation to provide coverage, even if the government ultimately provides contraceptives to their employees through Title X or other programs. The same approach would work here.

other courts.[5] Nor does it explain why EWTN, and this Court, must ignore *the government's own official description and litigation concessions about its own form*.

The Government's strenuous arguments against even an injunction pending appeal confirm that the Government knows EWTN's coerced execution of the Form is the trigger for contraceptive coverage. The Government argues that if EWTN does not sign the form, its employees will not get contraceptive coverage. Opp. 10, 16 (not signing "would deprive hundreds of employees and their families of medical coverage"). That argument would make no sense if TPAs provide coverage as a result of "independent legal obligations" rather than as a result of the Form.[6]

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[5] *See* Dkt. 50-3 at 7 (concession 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.") (*Archbishop of Wash.* Tr.); Dkt. 29-12 at 52 ("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.).

[6] The Government just told the trial court the following harms would occur if EWTN does not sign the Form: it 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." Opp. to Mot. for Inj'n Pending Appeal, Dkt. 70 at 4-5 (June 19, 2014). If all of these negative consequences would be triggered by *not* signing the Form, then it is clear that the Government's system *depends entirely* on EWTN's coerced signature. These government admissions demonstrate that the handful of decisions claiming the Form is not a trigger are inapplicable. *See Michigan Catholic Conference v. Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014).

3. EWTN's only real choice is between violating its faith and severe fines. The government's brief recognizes that EWTN has just four options. It may:

(1) offer its existing health plan and pay crushing fines,

(2) directly provide contraceptive coverage,

(3) drop all health benefits and pay a penalty, or

(4) sign and deliver EBSA Form 700, which will convert its current health plan into one that delivers contraceptives to EWTN's employees.

See Catholic Benefits Ass'n LCA v. Sebelius, No. 5:14-cv-240, 2014 WL 2522357, at *8 (W.D. Okla. June 4, 2014) (recognizing options).

The first option—maintaining its existing plan and paying over $12 million in fines—imposes an indisputably substantial burden on EWTN. *See, e.g.*, *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013) (en banc). The government admits that the second option, direct coverage, is contrary to EWTN's religious beliefs. Def's Resp., Dkt 36-1 ¶¶ 1-6, 7-15. The government instead urges EWTN to either drop all insurance or convert its plan by signing and delivering EBSA Form 700. Opp. 12 n.5; Opp. *passim*. Neither option is open to EWTN.

Dropping employee health coverage. EWTN's generous health plan is a non-negotiable part of its Catholic identity. Warsaw Decl. ¶¶ 18-20, 63 (citing *Economic Justice For All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* ¶103). It is undisputed that it would violate EWTN's Catholic faith to drop employee coverage—particularly now, on the brink of the July 1 deadline. *See id.;* Defs.'

Resp., Dkt. 36-1 ¶ 55; *id.* at ¶¶ 14-15.[7] And in addition to exposing EWTN to substantial penalties, dropping health benefits would place EWTN at a severe competitive disadvantage in employee recruitment. Warsaw Decl. ¶ 60; *see also Hobby Lobby*, 723 F.3d at 1140-41 (deeming this a substantial burden).[8]

Sign and deliver EBSA Form 700. The government does not dispute that signing and delivering EBSA Form 700 would require EWTN to "act[] in a way that violates Catholic teaching," and "brand itself a hypocrite." Defs.' Resp., Dkt. 36-1 ¶¶ 48-49. It now suggests that EWTN can avoid this moral complicity by dropping its self-insured plan and purchasing an insured plan instead. Opp. 18. But being compelled to shop for and hire an insurer *in order to provide its employees with contraceptives* violates EWTN's beliefs as much as—if not more than—delivering the Form to its TPA. EWTN simply cannot "participate in a scheme" to "provide payments for contraceptives" to its employees. *See* Warsaw Decl. ¶ 64. Either way, EWTN must still take action to trigger the government's scheme, *including signing the Form*.

[7] The Government argues, without apparent irony, both that a narrow and temporary "injunction pending appeal would deprive hundreds of employees and their families of medical coverage" *and* that EWTN ought to avoid the Mandate by dropping employee health coverage entirely on July 1. Opp. 16, 12 & n.5.

[8] Forced choices backed up by financial penalties are substantial burdens under RFRA. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."); 42 U.S.C. § 2000bb(b)(1) (restoring *Sherbert*).

Any of these options imposes a substantial burden on EWTN's religious exercise.

B. The Mandate cannot satisfy strict scrutiny.

Compelling interest. Defendants do not respond at all to EWTN's argument that, however important their interests, they have left them unprotected with regard to tens of millions of citizens. Mot. 17. Nor do Defendants explain how allowing EWTN a "specific exemption[]" would interfere with their "comprehensive efforts to protect the public health." *Gonzales v. O Centro Espirita*, 546 U.S. 418, 431 (2006); Opp. 18. Defendants have offered no evidence that any employee will be harmed if EWTN is given an exemption, and in this Court, "policies grounded on mere speculation . . . will not suffice." *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013). Indeed, the undisputed evidence indicates that EWTN employees will *not* be harmed if an injunction is granted. Warsaw Decl. ¶ 21 ("Many of EWTN's employees choose to work at EWTN because they share its religious beliefs"); *compare* 78 Fed. Reg. at 39874 (an exemption for employers likely to hire employees who share their religious beliefs "*does not undermine the governmental interests furthered by the contraceptive coverage requirement*.").

Finally, the government says its ability to offer religious accommodations would be impaired by granting EWTN's exemption. Opp. 19. EWTN asks only for what Congress commanded. *See* 43 U.S.C. § 2000bb-2 (RFRA applies to "a branch, department, agency . . . of the United States"). Where Congress has mandated an

exemption by statute, Defendant agencies may not narrow it by regulation.

Least restrictive means. The government grumbles that accommodating religious believers like EWTN would require the government to "fundamentally restructure its operations." Opp. 19. But the Mandate *already* exempts "religious employers" and grandfathered plans without requiring them to provide a form at all. And RFRA plainly requires the government to consider less restrictive alternative laws. *Cf. McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1458-59 (2014) (election laws failed strict scrutiny because alternative laws could be imposed). EWTN has suggested several ways of doing this, including direct provision or subsidy through existing government programs, subsidized coverage through government health exchanges, tax credits for contraceptive purchases, and publicizing the drugs' availability through publicly-funded venues. Pl. Mot., Dkt. 30 at 26. Yet the government fails to prove that any of those options are unworkable.

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

In one paragraph, the government argues that the accommodation does not violate EWTN's free speech rights because, it claims, EWTN is free to speak about its beliefs elsewhere. Opp. 20. The chance to speak *elsewhere* is not a proper remedy for compelled speech. *See, e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2331 (2013) (rejecting remedy of additional speech for

compelled speech violation).[9] Government cannot force citizens to speak out of both sides of their mouths. Further, the forced speech here *is* the essential act the government requires, not incidental to some other conduct. Such "direct regulation of speech . . . plainly violate[s] the First Amendment." *Id.* at 2327.

II. The Government concedes the other preliminary injunction factors.

Defendants' argument regarding the other injunction factors "is briefed in the most cursory fashion, and is therefore waived." *In re Globe Manufacturing Corp.*, 567 F.3d 1291, 1297 n.3 (11th Cir. 2009). The government's "public interest" argument also fails because (1) Defendants have provided ***no evidence*** that ***any*** employee will be harmed if EWTN is given an exemption, and (2) Defendants voluntarily left tens of millions of people out of the Mandate, which will not even apply to many non-profit ministries until later in 2014.[10] The public interest cannot require crushing EWTN for seeking a short delay to litigate its case.

CONCLUSION

EWTN respectfully requests that the Court grant EWTN's motions.

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[9] The speakers forced to speak in *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) could likewise speak their message elsewhere, but were nonetheless protected from compelled speech.

[10] *See, e.g.*, Dkt. 14, Defs' Unopposed Mot. to Stay Proceedings, *Belmont Abbey Coll. v. Sebelius*, No. 1:13-cv-01831 (D.D.C. filed Jan. 29, 2014) ("The challenged regulations do not apply to plaintiff until the start of its next plan year–December 1, 2014."); *see also* 78 Fed. Reg. at 39870.

Respectfully submitted,

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Dated: June 22, 2014

CERTIFICATE OF SERVICE

I certify that on June 22, 2014, I caused the foregoing *Reply in Support of EWTN's 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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Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

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