No. 14-12696-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETERNAL WORD TELEVISION NETWORK,
Plaintiff-Appellant,
v.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama
No. 1:13-cv-00521-CG-C

AMICUS BRIEF OF ALABAMA, FLORIDA, AND GEORGIA, AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

Pam Bondi
Florida Attorney General
The Capitol, PL 01
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 487-2564

Sam Olens
Georgia Attorney General
40 Capitol Square, SW
Atlanta, GA 30334-1300
(404) 656-3300
(404) 657-8733

Luther Strange
Alabama Attorney General
Andrew L. Brasher
Solicitor General
Megan A. Kirkpatrick
Assistant Solicitor General
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2188
(334) 242-4891 (fax)
mkirkpatrick@ago.state.al.us

August 4, 2014

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

The *amici* states of Alabama, Florida, and Georgia certify that the following persons, firms, and entities have an interest in the outcome of this case:

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

Alabama Physicians for Life (amicus curiae)

American Association of Pro-Life Obstetricians & Gynecologists (amicus curiae)

American Bible Society (amicus curiae)

American Civil Liberties Union (amici curiae)

American Civil Liberties Union of Alabama (amici curiae)

Amiri, Brigitte (counsel for amici curiae)

Association of American Physicians & Surgeons, Inc. (amicus curiae)

Association of Christian Schools International (amicus curiae)

Association of Gospel Rescue Missions (amicus curiae)

Becket Fund for Religious Liberty (law firm for appellant)

Blomberg, Daniel Howard (counsel for the appellant)

Bondi, Pam (counsel for State of Florida)

Brasher, Andrew L. (counsel for State of Alabama)

Burwell, Sylvia (appellee)

Cassady, William E. (Magistrate Judge)

Catholic Medical Association (amicus curiae)

Christian Legal Society (amicus curiae)

Christian Medical Association (amicus curiae)

Colby, Kimberlee Wood (counsel for amici curiae)

Dewart, Deborah Jane (counsel for amicus curiae)

Duncan PLLC (law firm for appellant)

Duncan, Stuart Kyle (counsel for the appellant)

Eternal Word Television Network, Inc. (appellant)

Ethics & Religious Liberty Commission of the Southern Baptist Convention (amicus curiae)

Fellowship Ministries (amicus curiae)

Granade, Callie V. S. (District Court Judge)

Humphreys, Bradley Philip (counsel for the appellees)

Institutional Religious Freedom Alliance (amicus curiae)

Jed, Adam C. (counsel for appellee)

Kirkpatrick, Megan A. (counsel for State of Alabama)

Klein, Alisa B. (counsel for appellee)

Lee, Jennifer (counsel for amici curiae)

Lew, Jacob (appellee)

Liberty, Life, and Law Foundation (amicus curiae)

Mach, Daniel (counsel for amici curiae)

Marshall, Randall C. (counsel for amici curiae)

National Association of Catholic Nurses (amicus curiae)

National Association of Evangelicals (amicus curiae)

National Association of Pro Life Nurses (amicus curiae)

Nemeroff, Patrick G. (counsel for appellee)

Olens, Sam (counsel for State of Georgia)

Parker, Jr., William G. (counsel for State of Alabama)

Perez, Thomas (appellee)

Prison Fellowship Ministries (amicus curiae)

Rassbach, Eric (counsel for the appellant)

Rienzi, Mark (counsel for the appellant)

Smith, Mailee R. (counsel for amicus curiae)

State of Alabama (amicus curiae)

State of Florida (amicus curiae)

State of Georgia (amicus curiae)

The Lutheran Church-Missouri Synod (amicus curiae)

The National Catholic Bioethics Center (amicus curiae)

United States Department of Health and Human Services (appellee)

United States Department of Labor (appellee)

United States Department of the Treasury (appellee)

Verm, Diana (counsel for the appellant)

Windham, Lori (counsel for the appellant)

Respectfully submitted,

Luther Strange
Alabama Attorney General
Andrew L. Brasher
Solicitor General
s/ Megan A. Kirkpatrick
Assistant Solicitor General
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2188
(334) 242-4891 (fax)
mkirkpatrick@ago.state.al.us

Attorneys for Amici Curiae

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Identity of *Amici* Curiae[1]

The *amici* states of Alabama, Florida, and Georgia have an interest in protecting the religious liberty of their citizens. All three states have strong constitutional and statutory protections for religious freedom. *See, e.g.*, Ala. Const. art. I, § 3; Fla. Const art. 1, § 3; Ga. Const. art. 1, § 1, ¶¶ III-IV. Alabama added the equivalent of the Religious Freedom Restoration Act ("RFRA") to its constitution in 1999. Ala. Const. art. I, § 3.01. Florida provides such protections by statute. Fla. Stat. §§ 761–761.05. These States also provide specific protections for the religious liberty of their citizens in special health care facilities, Ala. Code § 11-62-14 & Ga. Code Ann. § 31-8-111(2), with developmental disabilities, Fla. Stat. § 393.13(3)(b), in non-public schools, Ala. Code § 16-1-11.1(5) & Fla. Stat. § 1002.42(2)(h), in foster homes, Fla. Stat. § 409.175(5)(e), and even for those undergoing treatment for tuberculosis, Ala. Code § 22-11A-10. And the *amici* states have a strong interest in maintaining the very broad protections for religious liberty in the federal RFRA, as well.

These protections reflect the *amici* states' belief that religious freedom is a fundamental part of our society. As the Supreme Court recently explained, citizens

[1] Although *amici* file this brief pursuant to Fed.R.App.P. 29(a), they also certify pursuant to Rule 29(c)(5) that no party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No other person contributed money that was intended to fund preparing or submitting the brief.

do not forfeit this freedom by participating in business. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, ___, 134 S.Ct. 2751, 2767–75 (2014). And the *amici* states have an interest in creating a climate where diverse businesses and nonprofits, helmed by people of various faiths, thrive and create jobs.

The district court's decision in this case obstructs such religious diversity. The district court wrongly accepted the government's evaluation of what constitutes a substantial burden instead of relying on the Eternal World Television Network's ("EWTN") own beliefs. The *amici* states believe that the government should not be permitted to define-down the burden imposed under RFRA, so that RFRA will continue to provide broad protections for all persons. The *amici* states ask this Court to protect the religious liberty of their citizens, including religious nonprofit ministries like EWTN, and reverse the district court's decision.

SUMMARY OF THE ARGUMENT

In *Hobby Lobby*, the Supreme Court demonstrated how to evaluate whether a governmental action places a substantial burden on the religious freedom of a person under RFRA, crediting the plaintiffs' own articulation of their religious beliefs. The district court wrongly analyzed this question, accepting the government's characterization of EWTN's objections and essentially concluding that EWTN's religious beliefs were unreasonable. This Court should follow the Supreme Court's lead and binding precedent to conclude that the contraception mandate, as enforced through the federal government's regulations, imposes a substantial burden on EWTN.

Because of its incorrect conclusion on the substantial burden issue, the district court failed to consider whether the government had a compelling interest and whether it used the least restrictive means to further that interest. With an existing alternative scheme for churches, as well as several other options, the government cannot rely on the allegedly burdensome nature of the regulatory process to show that there is no other less restrictive way to pursue its interest. The district court should be reversed.

ARGUMENT

I. *Hobby Lobby* confirms that the district court failed to properly analyze the substantial burden on EWTN's religious beliefs.

The district court's decision is at odds with binding precedent. Both this Court's precedent and Supreme Court precedent have long dictated that courts should avoid evaluating the reasonableness of religious beliefs. The district court wrongly relied on unpersuasive out-of-circuit precedent to disregard EWTN's characterization of its religious beliefs, particularly about moral complicity. Doc. 61 at 5–10.

Under RFRA, the federal government, as a general matter, "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). It may justify such a burden only if the burden "(1) is in furtherance of a compelling governmental interest" and "(2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). The Supreme Court has explained that "exercise of religion" includes "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2762 (quoting 42 U.S.C. § 2000cc-5(7)(A)).

The district court's evaluation and rejection of EWTN's religious beliefs about moral complicity is contrary to the Supreme Court's decision in *Hobby*

Lobby. In *Hobby Lobby*, the Supreme Court did not evaluate the religious plaintiffs' objections for reasonableness. Instead, it recounted the plaintiffs' objections, as explained by the plaintiffs, noting that these beliefs were sincere. *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2775–76. The Court also rejected the argument that dropping health care coverage would solve the plaintiffs' problem, "doubt[ing] that the Congress that enacted RFRA—or, for that matter, [the Affordable Care Act]—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans." *Id.* at ___, 134 S.Ct. at 2777. This reasoning surely applies to a nonprofit ministry like EWTN, established by a cloistered nun to proclaim Catholic teachings, with a professed moral imperative to provide health care to its employees. Doc. 29-9 ¶¶ 6, 63 (Warsaw Declaration).

The Court also rejected the government's argument that the burden was insubstantial because the connection between the religious plaintiffs' conduct and the provision of contraceptive services was "too attenuated." *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2777. This argument, in the Court's view, "dodges the question that RFRA presents . . . and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at ___, 134 S.Ct. at 2778. The

morality of the religious plaintiffs' mandatory involvement in the provision of certain contraceptive services was "a difficult and important question of religion and moral philosophy" that the Court refused to evaluate. *Id.* Because the plaintiffs would be forced to "pay an enormous sum of money" if they refused to comply, the Court concluded that "the mandate clearly imposes a substantial burden on [the plaintiffs'] beliefs." *Id.* at ___, 134 S.Ct. at 2779.

The Court's reasoning in *Hobby Lobby* is consistent with its reasoning in other contexts when a plaintiff alleged that a particular law burdened his or her exercise of religion. For example, in *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051 (1982), the Supreme Court "accept[ed the plaintiff's] contention that both payment and receipt of social security benefits is forbidden by the Amish faith." 455 U.S. at 257, 102 S.Ct. at 1055. The only question was whether the law nonetheless satisfied strict scrutiny—whether the burden was "essential to accomplish an overriding governmental interest." 455 U.S. at 257, 102 S.Ct. at 1055. In *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 109 S.Ct. 2136 (1989), the Court expressed doubts about whether the denial of tax deductions for payments made in exchange for Scientology audits was a substantial burden. 490 U.S. at 699, 102 S.Ct. at 2149. But the Court sidestepped the substantial burden question. *Id.* In *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Court concluded that "it is clear" that a plaintiff's disqualification

for unemployment benefits as a result of her belief that working on Saturday was immoral "impose[d] a burden on the free exercise of [her] religion," "even though the burden may be characterized as being only indirect." 374 U.S. at 403–04, 83 S.Ct. at 1793–94 (internal quotation marks omitted). In each of these cases, the Court avoided "tell[ing] the plaintiffs that their beliefs are flawed" and instead accepted the plaintiffs' own view of religious exercise and morality as a given. *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2778.

And as the Supreme Court explained in *Hobby Lobby*, its analysis under RFRA continues this well-reasoned tradition of avoiding a reasonableness inquiry about a religious plaintiff's beliefs. *Id.* at ___, 134 S.Ct. at 2778–79. The Court reaffirmed its analysis in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425 (1981). *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2778–79. In *Thomas*, a former steel worker fabricated sheet steel until his employer closed his division, leaving open only positions where he would have to fabricate steel turrets for military tanks. 450 U.S. at 710, 101 S.Ct. at 1428. Because his religious beliefs prevented him from working on weapons, he quit his job. *Id.* Noting that the worker did not object to producing materials that might later be used in weapons, the Court observed that the worker "drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 711, 715, 101 S.Ct. at 1428, 1430. Relying on *Sherbert*, the Court concluded that the state

"put[] substantial pressure" on the worker "to modify his behavior and to violate his beliefs," then proceeded in short order to consider whether the State's interest was compelling and whether its "inroad on religious liberty" was the least restrictive means of furthering that interest. *Id.* at 717–19, 101 S.Ct. at 1431–32.

This Court's precedents are consistent with Supreme Court case law. In two decisions, this Court has concluded that government requirements did not substantially burden a plaintiff's religious exercise because the plaintiffs did not contend that the particular requirement violated specific religious beliefs. Considering a challenge to the Freedom of Access to Clinic Entrances Act ("FACE Act") by two women who wished to protest abortion, this Court noted that the women merely claimed that the FACE Act "chill[ed] their expression" of their "sincerely held religious belief that abortion is murder." *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995). Because the FACE Act prohibited the use of force to block clinic entrances, and the women "d[id] not assert that the exercise of their religion requires them to use physical force or threats of physical force to prevent abortions" or "physically obstruct clinic entrances," the FACE Act did not substantially burden the women's religious exercise. *Id.*

Similarly, this Court characterized a burden as incidental, rather than substantial, when two synagogues challenged a zoning ordinance that required them to apply for a conditional use permit. *Midrash Sephardi v. Town of Surfside*,

366 F.3d 1214, 1219, 1227–28 (11th Cir. 2004). The synagogues did not allege that their preferred location had religious significance or that requiring congregants to "walk farther" specifically prevented religious exercise, especially because congregants tended to move closer to synagogues instead of expecting synagogues "to move closer to them." *Id.* at 1228. As a result, the synagogues did not show that compliance with the ordinance violated their religious beliefs.

In light of this body of law, the district court was wrong to follow the reasoning of the Seventh Circuit in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). The Seventh Circuit's analysis of Form 700 is distinguishable, nonbinding, and unpersuasive. In *Notre Dame*, the Seventh Circuit considered whether the district court abused its discretion by denying a preliminary injunction to Notre Dame, which had at that point "gone ahead and signed Form 700." 743 F.3d at 551–52. The court noted that Notre Dame waited until the last minute to file suit, *id.* at 553, did not explain what it wanted the court to enjoin, *id.* at 554, and could not show that it was likely to succeed on the merits, *id.* at 554–62. Notre Dame made what the court called a "trigger" argument about moral complicity for the first time on appeal, and the court deemed it forfeited. *Id.* at 554–55. Unlike Notre Dame, EWTN filed suit months in advance of the deadline, created a summary judgment record, and has not forfeited its moral complicity argument.

The *Notre Dame* court considered the merits, too, but its reasoning is unpersuasive. It spent several pages criticizing Notre Dame's moral complicity argument, instead of recognizing that "it is not for [courts] to say that the line [Notre Dame] drew was an unreasonable one." *Id.* at 555–61; *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2778 (internal quotation marks omitted). For example, the court compared Notre Dame's moral complicity argument to the following hypothetical: A Quaker who is a pacifist for religious reasons proclaims his conscientious objection to the selective service system, and the officer tells him, "You know this means we'll have to draft someone in place of you." *Notre Dame*, 743 F.3d at 556. But this hypothetical misses the point entirely. A closer analogue would be the selective service officer telling the Quaker, "Go find your replacement. Give us permission to draft him, and tell him that he must fight in your place. Unless you do this, you'll be punished for failing to comply."

It is easy to understand why the Quaker in that situation, like EWTN, would believe himself to be morally complicit in what he considers to be immoral conduct, forced to further the government's scheme in violation of his religious beliefs. Regardless, both the Seventh Circuit and the district court missed the fundamental point that they should not have been weighing the limits of moral complicity in the first place. That is a religious and moral question upon which the federal courts cannot take a position. Because the Seventh Circuit decided *Notre*

Dame in February 2014, before the Supreme Court issued *Hobby Lobby* in July 2014, it is even less persuasive. Having the benefit of the Supreme Court's analysis in *Hobby Lobby*, this Court should correct the district court's error and perform the proper substantial burden analysis, in keeping with RFRA's "very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2760.

* * *

This Court should apply the Supreme Court's hands-off approach here. EWTN has assured the district court, through argument and evidence, that its sincere religious beliefs are burdened by a regulation that requires it to provide sterilization and contraception coverage or facilitate another entity's provision of such coverage. The district court's substantial burden analysis is inconsistent with the Supreme Court's reasoning in *Hobby Lobby* and other binding precedent.

II. The federal government's requirement that EWTN sign Form 700 and deliver it to its third party administrator, along with the sanctions imposed for failing to do so, substantially burdens EWTN's exercise of religion.

Applying *Hobby Lobby* and binding precedent reveals that the district court's analysis was wrong. This Court should correct its analysis, rejecting the idea that EWTN's religious objections are too attenuated. EWTN has explained that signing Form 700 and delivering it to its third party administrator violates its religious beliefs because the Form becomes part of the insurance plan and the

administrator must provide the sterilization and contraception coverage to which EWTN religiously objects.

A. EWTN's sincere religious beliefs prevent it from providing sterilization or contraception coverage, being morally complicit in the provision of such services, or ceasing the provision of insurance for its employees.

EWTN has shown in great detail below that its sincere religious beliefs dictate that it refrain from providing certain sterilization or contraception to anyone, including its employees. Doc. 29-9 ¶ 19 (Warsaw Declaration). This is because EWTN, a Catholic nonprofit organization, believes that "human sexuality has two primary purposes—namely, to unite husband and wife and for the generation of new lives—that cannot be properly separated." *Id.* ¶ 14 (internal quotations and alterations omitted). EWTN also believes "that sterilization and contraceptives are not properly understood as health care, since pregnancy and the natural process of human reproduction are not diseases to be cured." *Id.* ¶ 15.

EWTN also believes that executing Form 700 would render it morally complicit in the provision of sterilization and contraception services. Doc. 29-10 ¶ 58–68 (Haas Declaration). In addition to a certification that the signing entity has a religious objection to providing contraceptive coverage, Form 700 states that "[t]he organization or its plan must provide a copy of this certification to the plan's . . . third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement." Doc.

29-11 (Form 700). It also indicates that the "certification is an instrument under which the plan is operated." *Id.*

EWTN believes that completing this certification would be "an immoral act" because "notification [is] provided to the insurance companies that they have to cover the cost of the immoral practices" and "the certificate that is submitted is what brings about these actions and therefore serves as an essential circumstance to the provision of the evil itself to which the employer is objecting[.]" Doc. 29-10 ¶ 65 (Haas Declaration); *see also* Doc. 29-9 ¶¶ 24–65 (Warsaw Declaration). Provision of the form is a "necessary condition" for the third-party administrator's provision of what EWTN believes to be immoral services, rendering EWTN morally complicit in that behavior. Doc. 29-10 ¶ 68 (Haas Declaration); *see also* Doc. 29-9 ¶ 64 (Warsaw Declaration). EWTN does not challenge what the government does with Form 700. *See Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147 (1986); *Kaemmerling v. Lappin*, 553 F.3d 669, 677–80 (D.C. Cir. 2008). EWTN challenges what the government requires it to do with Form 700.

B. The government's regulatory scheme substantially burdens EWTN's freedom to exercise religion.

Like the plaintiffs in *Hobby Lobby*, EWTN sincerely believes that taking any of the actions insisted upon by the government would violate its religious beliefs. And like the plaintiffs in *Hobby Lobby*, EWTN faces steep fines for noncompliance. If EWTN refuses to provide coverage or complete Form 700, it

faces the prospect of steep fines. 26 U.S.C. §§ 4980D(b), 4980H(c) The government could levy $35,000 daily and up to $12,775,000 or more annually. Doc. 29-9 ¶ 58 (Warsaw Declaration). Should EWTN choose to drop insurance coverage for its employees altogether, it faces an annual fine of approximately $700,000. *Id.* ¶ 61. Dropping insurance coverage would also violate EWTN's religious beliefs because "EWTN's Catholic faith compels it to promote the spiritual and physical well-being of its employees by providing them with generous health services." *Id.* ¶ 63. Under RFRA, EWTN should not be forced to choose between its religious beliefs and paying draconian fines. *See Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2779.

* * *

Because completing Form 700 and delivering it to EWTN's third party administrator would violate EWTN's religious beliefs, and EWTN faces millions of dollars in fines for noncompliance, the government's regulations impose a substantial burden on EWTN.

III. The government's so-called accommodation is not the least restrictive means of furthering its alleged compelling interest in providing sterilization and contraceptive care.

Because the district court wrongly analyzed the substantial burden on EWTN's religious exercise, it did not consider whether the government used the least restrictive means to achieve its goals. Assuming for the purposes of this brief

that the government has a compelling interest in providing free contraception and sterilization, *see Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2779–80; Appellant Br. at 41–45, it is clear that the government failed to use the least restrictive means to accomplish these ends.

An exemption regime could work in many other ways without substantially burdening EWTN's religious exercise. The government already exempts churches and their auxiliaries from any requirement to provide sterilization or contraception coverage or to fill out Form 700. 45 C.F.R. § 147.131(a), 26 U.S.C. § 6033(a)(3)(A)(i) & (iii). The government could simply require other "[e]ligible organizations" like EWTN, described in 45 C.F.R. § 147.131(b), to complete a form containing only the certification that appears on the first page of Form 700 and mail that form to the government. Or EWTN could "inform[] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014); *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2763 n.9; *see also Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, No. 14-12696-CC, 2014 WL 2931940 at *10 (11th Cir. June 30, 2014) (Pryor, J., concurring). The government could also provide tax credits to employees who purchase these services. *See* Doc. 30 at 26 (EWTN Mem. in Supp. of Summary

Judgment). None of these methods, or others suggested by EWTN, ensnare EWTN in what it considers to be immoral conduct. Appellant Br. at 47–48. And they are all less restrictive than HHS's more complicated regime for providing free sterilization and contraception.

It is no answer to say, as the government has, that these other accommodations would be inconvenient. *See* Doc. 35 at 24–26; *see also* 42 U.S.C. § 2000cc-3(c) ("[Religious Land Use and Institutionalized Person's Act] may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). Congress has not passed a law that requires religious employers to provide contraception coverage to their employees. Instead, the decision to require sterilization and contraception coverage came through the regulatory process. *See* 42 U.S.C. § 300gg-13(a)(4). And the government created Form 700 and its attendant requirements through the regulatory process. *See* 78 Fed.Reg. 39870-01. Assuming for the purposes of this brief that the government has the authority to establish this scheme by regulation, then it can easily fix this scheme through the regulatory process as well.

CONCLUSION

This Court should correct the district court's erroneous reasoning and result, protect EWTN's religious liberty, and follow binding precedent from the Supreme Court. The district court's judgment should be **REVERSED**.

Respectfully submitted,

Luther Strange
Alabama Attorney General
Andrew L. Brasher
Solicitor General
s/ Megan A. Kirkpatrick
Assistant Solicitor General
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2188
(334) 242-4891 (fax)
mkirkpatrick@ago.state.al.us

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3, 691 words, excluding the parts of the brief exempted by 11th Circuit Rule 32-4. I have relied upon Microsoft Word 2007 to determine the word count.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s Megan A. Kirkpatrick
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will serve electronic notice upon the following participants:

Daniel Howard Blomberg
Eric C. Rassbach
Diana Verm
Lori Halstead Windham
Mark Rienzi
The Becket Fund for Religious Liberty
3000 K St. NW, Ste. 220
Washington, DC 20007

Stuart Kyle Duncan
Duncan PLLC
1629 K St. NW, Ste. 300
Washington, DC 20006

Patrick Nemeroff
Adam C. Jed
Alisa Beth Klein
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Bradley Philip Humphreys
20 Massachusetts Ave. NW, Rm. 7108
Washington, DC 20529

Deborah Jane Dewart
Deborah J. Dewart, Attorney at Law
620 E Sabiston Drive
Swansboro, NC 28584

Brigitte Amiri
Jennifer Lee
New York Civil Liberties Union (NYCLU)
125 Broad St., Fl. 18
New York, NY 10004

Daniel Mach
ACLU
915 15th St. NW
Washington, DC 20005-2302

Randall C. Marshall
American Civil Liberties Union
P.O. Box 6179
Montgomery, AL 36106-0179

Kimberlee Wood Colby
Center for Law & Religious Freedom
8001 Braddock Rd., Ste. 302
Springfield, VA 22151-2110

Mailee R. Smith
Americans United for Life
655 15th St., NW, Ste. 410
Washington, DC 20005

/s Megan A. Kirkpatrick
Of Counsel