No. ___-_____

In the Supreme Court of the United States

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

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,
Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

KYLE DUNCAN
DUNCAN PLLC
1629 K Street NW, Suite 300
Washington, D.C. 20006
(202) 714-9492

MARK L. RIENZI
Counsel of Record
LORI H. WINDHAM
ERIC C. RASSBACH
HANNAH C. SMITH
DANIEL BLOMBERG
DIANA M. VERM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K Street, N.W.,
Suite 220
Washington, D.C. 20007
(202) 955-0095
mrienzi@becketfund.org

Counsel for Applicant

JUNE 27, 2014

RULE 29.6 DISCLOSURE

Applicant Eternal Word Television Network, Inc. is an Alabama non-profit corporation that has no parent entities and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Regulations

To the Honorable Clarence Thomas, Associate Justice of the United States and Circuit Justice for the Eleventh Circuit:

In less than four days, on July 1, a regulatory mandate will expose Applicant Eternal Word Television Network (EWTN) to draconian financial penalties, unless it abandons its religious convictions and participates in the government's system to distribute and subsidize contraception, sterilization, and abortion-inducing drugs and devices. EWTN now seeks the same relief—from the same government mandate—that this Court granted to another religious ministry, the Little Sisters of the Poor. *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 893 (Dec. 31, 2013) (Sotomayor, J., in chambers); *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (2014).

As the world's largest non-profit Catholic media network, EWTN has an undisputedly sincere religious objection to complying with the Mandate. Yet the district court denied EWTN relief from the Mandate on June 17, and although EWTN requested emergency relief from the Eleventh Circuit by the next day, that court has yet to rule. Without an injunction from this Court, EWTN has to choose between two courses of action: (a) execute a self-certification form, thereby violating its religious beliefs; or (b) refuse to sign the form and incur ruinous fines. EWTN must make that decision by midnight on Monday, unless relief is granted by this Court.

This Court has already granted the same relief to the Little Sisters of the Poor, who received a temporary injunction from Justice Sotomayor on New Year's Eve and an injunction from the Court on January 24. That injunction is still in force. EWTN

is willing to comply with the same condition the Court placed on the injunction granted to the Little Sisters, namely that it will notify the government in writing that it has a religious objection to providing coverage for contraceptive services.

EWTN seeks relief under the Religious Freedom Restoration Act ("RFRA"). The RFRA violation is straightforward: EWTN faces a substantial burden on its religious exercise because its religious beliefs and objections are undisputed and sincere, and because the government is imposing massive pressure on it to violate those beliefs. The government has no prospect of surviving the strict scrutiny test under RFRA.

The only reason EWTN did not obtain relief below is that the trial court sought to revise its beliefs: the court believed that religious exercises based on clear Catholic teachings about material cooperation were beyond the reach of RFRA and the First Amendment. But, as this Court has explained, courts are not to second-guess the lines drawn by sincere religious believers. See *Thomas* v. *Review Bd.*, 450 U.S. 707, 715-16 (1981) (because Jehovah's Witness "drew a line" against participating in tank manufacturing, "it is not for us to say that the line he drew was an unreasonable one"). And RFRA broadly protects "any" religious exercise. 42 U.S.C. 2000cc-5.

The district court compounded this error by saying that the form EWTN must sign does not really mean anything at all—an argument contradicted by the plain text of the form, the government's repeated admissions about the Form's effect, and this Court's order that the Little Sisters of the Poor were not required to sign the same form. And if the Form really were meaningless, it would be beyond perverse for the government to crush non-profit religious ministries like EWTN for not signing

meaningless forms. Yet that is precisely what the government will do unless EWTN gives up its religious exercise by Monday night.

Injunctive relief under the All Writs Act is necessary to prevent immediate and irreparable harm to Applicant during the appellate process, including any further review by this Court. The issues presented here are already the subject of decisions by dozens of federal district and circuit courts, and are at issue in the *Hobby Lobby* and *Conestoga* cases currently pending before the Court.[1] Furthermore, because of the overriding importance of the legal issues presented in this case, because numerous lower courts have already reached conflicting decisions concerning them, and because this Court is already considering other matters raising similar RFRA challenges to the Mandate, EWTN also asks the Court to grant a temporary injunction while EWTN seeks certiorari before judgment.

Finally, at a minimum, EWTN requests a temporary injunction to allow for full briefing and consideration of this Application, without the accumulation of daily fines. See, *e.g.*, *Little Sisters*, 134 S. Ct. 893; *Little Sisters*, 134 S. Ct. 1022.

JURISDICTION

EWTN filed its complaint on October 27, 2013, challenging the mandate under the Religious Freedom Restoration Act, the First Amendment, the Fourteenth

---

[1] *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted,* 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted,* 134 S. Ct. 678 (2013).

Amendment, and the Administrative Procedure Act. Dkt. 1, Compl. (Appendix at 26).[2] On December 31, 2013, EWTN filed a motion for summary judgment on Counts I, II, V, and IX, and requested that the court expedite consideration or grant preliminary injunctive relief. Dkt. 29. The government consented to expediting while opposing EWTN's other motions and filing a motion for summary judgment or dismissal on all claims. Dkts. 34-36. The district court had jurisdiction over EWTN's lawsuit under 28 U.S.C. 1331 and 1361 and had 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 partial motion for summary judgment and preliminary injunctive relief on Counts I, II, V, and IX on June 17, 2014, and granted summary judgment to the government on those same counts. Dkt. 61, Opinion ("Op.") (Appendix at 1). On June 18, the court certified that its ruling on Count 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 (Appendix at 20-22). EWTN filed its notice of appeal to the Eleventh Circuit and its motion for injunction pending appeal that same day. Dkt. 68, Notice of Appeal (Appendix at 23). Applicant also moved for an injunction pending appeal with the district court, Dkt. 64, which that court denied. Dkt. 73. The Eleventh Circuit had jurisdiction over this appeal under 28 U.S.C. 1292(a). The Eleventh Circuit has yet to rule on EWTN's motion for injunction pending appeal.

[2] "Dkt." refers to docket entries in the district court. "Appendix" refers to the appendix to this application, and the cited page is to the first page of the relevant document within the appendix.

This Court has jurisdiction over this Application under 28 U.S.C. 1254(1) and has authority to grant EWTN's requested relief under the All Writs Act, 28 U.S.C. 1651.

BACKGROUND AND PROCEDURAL HISTORY

I. EWTN. In 1981, Mother Angelica, a cloistered Franciscan nun, founded EWTN in a garage on the grounds of Our Lady of the Angels Monastery in Irondale, Alabama. Dkt. 29-9 at ¶ 4, Warsaw Decl. (Appendix at 75). Ever since then, EWTN's Catholic faith has infused 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 (including hosting daily Masses, celebrated by an order of Franciscan friars housed on EWTN's campus). *Id.* at ¶¶ 6, 8-11. Indeed, as a media ministry, EWTN's whole reason for being is expressing and witnessing to its Catholic beliefs before a worldwide audience that now extends to more than 140 countries and territories and 230 million television households. *Id.* at ¶ 4. EWTN broadcasts in English, Spanish, French, and German, and through television, radio, satellite radio, and the internet. *Id.* EWTN is a non-profit that is supported by its viewers, which enables it to broadcast commercial-free and avoid broadcasting anything other than Catholic programming. *Id.* at ¶¶ 5-10, 22.

EWTN sincerely believes and proclaims traditional Catholic teachings concerning contraception, sterilization and the sanctity of human life. *Id.* at ¶¶ 12-14. It consistently proclaims these Catholic teachings to its audience around the world. *Id.* EWTN strives to be true to its Catholic identity in all of its operations, to include its health plan, which has been carefully constructed to provide for the well-being of its employees in accordance with Catholic teachings. *Id.* at ¶¶ 18-20. Among other

things, this means that the plan does not cover or in any way facilitate access to sterilization, contraception, or abortion. *Id.* at ¶ 20.

II. The Mandate. A provision of the Affordable Care Act requires some employers to provide coverage for "preventive care" in their employee group health plans. 42 U.S.C. 300gg-13(a). Under regulations issued by Respondents, "preventive care" has been defined to include coverage for all FDA-approved contraceptive methods (including "emergency" contraceptives), sterilization procedures, and related patient education and counseling. Dkt. 1-2 at 2, 11-12. As the government acknowledges, several of these methods may prevent pregnancy by stopping implantation of an already-fertilized egg. *Ibid.* Failure to comply with this Mandate triggers severe penalties, including large daily and annual fines. See, *e.g.,* 26 U.S.C. 4980D(b)(1) ("$100 for each day in the noncompliance period with respect to each individual to whom such failure relates" for providing non-compliant coverage); 26 U.S.C. 4980H(c)(1) ($2000 annually per full-time employee for providing no health coverage).

"Exempt" employers. Many employers are exempt from the mandate, including employers with "grandfathered" health care plans, which cover millions; employers with fewer than fifty employees, which may decline to offer coverage; and a narrow subset of "religious employers," limited to churches and religious orders. See 42 U.S.C. 18011 (grandfathering); 26 U.S.C. 4980H (c)(2)(A) (employer mandate); 26 U.S.C. 4980D (d) (same); 78 Fed. Reg. 39870, 39874 (July 2, 2013) (religious employers); 45 C.F.R. 147.131(a) (same).

All of these employers are 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 non-profits such as EWTN, which do not qualify as "religious employers," sought an exemption. Dkt. 1 at ¶¶ 98-99. Instead, defendant agencies 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 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 (TPAs). 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. This form has important legal ramifications.

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. Doing so 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.

Dkt. 29-11, EBSA Form 700 (Appendix at 117). 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) makes the Form, including the Notice section thereof, "an instrument under which the plan is operated." Non-exempt employers who sign the Form are also barred from "directly or indirectly" "seek[ing] to influence the third party administrator's decision to" make arrangements to pay for contraceptive services. 29 C.F.R. 2590.715-2713A(b)(1)(iii). The Form is *the* trigger

that gives TPAs both the legal authority and the legal obligation to provide objectionable coverage on behalf of religious objectors.

Respondents have repeatedly admitted in court that the Form has these legal effects. For instance, Respondents have conceded 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*." See Dkt. 49-3 at 7, *Archbishop of Wash.* Tr. (Appendix at 166) (emphasis added). They also stated in open court that, "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." Dkt. 29-12 at 53, *Reaching Souls* Tr. (Appendix at 120). Respondents have also conceded that, after delivery of Form 700, "technically, the contraceptive coverage is part of [the religious objector's health care] plan." Dkt. 49-3 at 12.

Not only does EBSA Form 700 trigger the administrators' legal obligations, it also triggers government incentives in the form of extra government payment to TPAs. Those payments cover not only the costs, but also an additional payment to make Respondents' scheme profitable. 45 C.F.R. 156.50. Respondents acknowledge that this bonus payment is wholly dependent on receipt of Form 700. Dkt. 29-12 at 97 ("I will concede that the TPA is eligible—once—if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.").

III. EWTN's undisputed religious exercise. Because of its religious beliefs that forbid it from facilitating immoral conduct, EWTN can neither provide the mandated coverage nor execute and deliver EBSA Form 700 to its TPA. See, generally, Dkt. 29-9 (describing EWTN's Catholic beliefs); Dkt. 29-10, Haas Decl. (Appendix at 92) (describing Catholic teaching on moral complicity). The sincerity of these beliefs is entirely undisputed. See Dkt. 36-1 at ¶¶41, 43, *Def.'s Resp. to EWTN's Undisp. Fact* (Appendix at 161). It is also undisputed that—from the perspective of EWTN's religious beliefs—signing the form "would do nothing to lessen EWTN's complicity" in providing contraceptive coverage. Compare *id.* at ¶¶ 47-50 with Dkt. 29-14 at ¶ 48, *EWTN's Sugg. Determ. of Undisp. Fact* (Appendix at 129). It would require EWTN to "act[ ] in a way that violates Catholic teaching"—and in doing so would require EWTN to "brand itself a hypocrite," practicing one thing while preaching another. Dkt. 29-14 at ¶ 49. It would "undermine the trust placed in it by employees, viewers, and supporters"—those who commit their time and money to ensure that EWTN can continue to teach. *Id.* Violating its beliefs in this way would "severely undermine EWTN's reliability as a witness to Catholic truth." *Id.*

EWTN's next insurance plan year begins on July 1. Dkt. 29-9 at ¶ 28. On that day, it will become subject to the Mandate. *Ibid.* If it does not abandon its religious exercise and either submit EBSA Form 700 or compromise the 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).

IV. The judgment below. On June 17, the district court denied EWTN's motions for summary judgment and injunctive relief. The court believed forcing EWTN to sign "a short form" did not seriously burden EWTN's religious exercise because the Form is "innocuous," includes "nothing * * * that is contrary to EWTN's religious beliefs," and EWTN's religious objection to signing it merely "hinges upon the effect" signing "will have on other parties." Op. at 3, 6, 8, 10. The court further concluded that Form 700 "contain[s] only one operative provision," which "serves only to provide notice of EWTN's decision to opt out of the mandate's contraceptive coverage requirement." Op. at 6, 9. Thus, the trial court concluded that RFRA is no bar to the government's attempt to force EWTN do something directly contrary to its faith. Op. at 10.

EWTN filed its motion for injunction pending appeal with the Eleventh Circuit on June 18. The Eleventh Circuit ordered expedited briefing, which closed with EWTN's reply brief on June 22. The Eleventh Circuit has not yet ruled on EWTN's motion.

This application followed.

ARGUMENT

The All Writs Act, 28 U.S.C. 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. 1651(a)) (alterations in original). This

extraordinary relief is warranted in cases involving the imminent and indisputable violation of civil rights. See *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act); *Am. Trucking Ass'ns* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same). Just as the Little Sisters merited relief from this Court, EWTN merits the same relief.

I. EWTN faces critical and exigent circumstances.

In three days, EWTN faces an impossible choice: sign and submit a form forbidden by its faith, or decline to do so and incur millions of dollars in penalties. The Religious Freedom Restoration Act exists precisely to prevent this type of enormous government pressure to violate one's religious beliefs. Without emergency relief from this Court, EWTN will suffer this illegal coercion beginning at midnight Monday night and continuing each and every day thereafter. Those penalties will continue to accumulate, day by day, unless and until EWTN abandons its religious exercise or collapses from the mounting burden.

EWTN has no acceptable options. If it violates its faith under this enormous pressure and participates in the Mandate (either by providing the drugs or by executing authorization forms authorizing, ordering, and incentivizing others to do so), no future relief can repair the injury to its religious liberty. If EWTN remains true to the teachings it was founded to spread, the penalties for doing so are potentially so large that it is unclear whether EWTN could bear the risk long enough to pursue its case. In short, EWTN finds itself in "the most critical and exigent

circumstances," *Fishman*, 429 U.S. at 1326 (Marshall, J., in chambers), both as to its ability to exercise its faith and as to the continued viability of its ministry.

The threat to EWTN's religious freedom derives from the sheer enormity of the government's pressure on it to forego a particular religious exercise. It is black letter law that a violation of constitutional rights constitutes irreparable injury. See, *e.g.,* *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (3d ed. 1998) ("When an alleged deprivation of a constitutional right is involved, * * * most courts hold that no further showing of irreparable injury is necessary."). Few laws in American history have threatened financial penalties as severe as those potentially available under the Mandate; no law has ever imposed such a price on the exercise of religion. Such unprecedented government pressure to abandon a religious exercise by midnight Monday creates extraordinarily exigent circumstances for EWTN.

Additionally, EWTN faces critical and exigent circumstances concerning the financial viability of its ministry. As the Court explained in *Doran* v. *Salem Inn, Inc.*, where a business "would suffer a substantial loss of business and perhaps even bankruptcy," the case "[c]ertainly * * * meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless." 422 U.S. 922, 932 (1975); *cf. Conkright* v. *Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (denying a stay where applicants did not allege that required payments would "place the [benefit] plan itself in jeopardy"). That is exactly what EWTN faces.

If it terminates health insurance for its approximately 350 employees, it will face penalties totaling more than $700,000 per year, have to increase its wages by an undetermined amount to make up for the fact that it could no longer offer its employees health benefits, and betray its religious obligation to provide for its employees in accordance with Catholic teaching. Dkt. 29-9 at ¶¶ 58, 61. If EWTN chooses to maintain the same excellent, religiously compliant health insurance policy it maintains today, EWTN will face daily fines of $35,000, totaling more than $12,775,000 per year.[3] *Id.* at ¶ 58. Even profit-making businesses could not endure daily, recurring fines of that magnitude for any extended period of time. Nor could they long continue to hire new employees and serve the public in the face of such overwhelming potential liabilities. EWTN is a non-profit religious ministry, supported and sustained by the donations of those who share its faith and support its mission. *Id.* at ¶ 22. The daily fines would force it to choose between the reason it exists, and its very existence.

These exigencies are compounded by the unique confluence of (a) the start of EWTN's plan year at midnight on June 30, (b) the end of this Court's term on June 30, and (c) the expected decision of this Court concerning the same civil rights statute and the same regulatory Mandate in the *Hobby Lobby* litigation, also on June 30.

[3] Respondents have never fully explained how they intend to calculate the § 4980D fines. Over the two years of litigation concerning the HHS Mandate, however, most Plaintiffs have alleged that the fine might be calculated on a per-employee basis (i.e., fine = (number of employees) * ($100) * (number of days refusing to cover contraceptives)). EWTN's counsel is not aware of any case in which Respondents have disputed this method of calculating such fines.

These circumstances will make it virtually impossible for the lower courts to apply this Court's decision before EWTN is irreparably harmed at midnight.

In light of the burden on religious exercise to be imposed by the Mandate on Tuesday, and the massive fines threatened against any organization that fails to comply, EWTN faces critical and exigent circumstances.

II. EWTN has an indisputably clear right to relief.

EWTN asks for the same relief that this Court granted to the Little Sisters of the Poor. *Little Sisters*, 134 S. Ct. 1022. There, the Court held that the Sisters "need not use the form prescribed by the Government and need not send copies to third party-administrators," and instead could merely inform Respondents in writing that the Little Sisters are a non-profit organization that holds itself out as religious and has religious objections to participating in Respondents' scheme.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (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).

EWTN presents a straightforward RFRA claim and, as a result, has an overwhelming likelihood of prevailing. As the great majority of courts to consider this precise issue have found, threatening to severely fine non-profit religious organizations unless they abandon their objection to participating in the Mandate—either by providing drugs or authorization forms—substantially burdens religion,

triggering strict scrutiny.[4] In finding otherwise, however, the court below failed to apply the controlling legal standard for "substantial burden" and inappropriately second-guessed the substance of EWTN's religious beliefs.

---

[4] Injunctions have been granted in twenty-six cases. See *Little Sisters of the Poor* v. *Sebelius*, No. 13–cv–2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, 134 S.Ct. 1022 (2014); *Catholic Charities, Archdiocese of Philadelphia* v. *Sec'y, Dep't of Health & Human Servs.*, No. 14-3120 (3d Cir., court of appeals granted temporary injunction June 27, 2014); *Roman Catholic Archbishop of Wash.* v. *Sebelius*, No. 13–1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13–5371 (D.C. Cir. Dec. 31, 2013); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Colo. Christian Univ.* v. *Burwell*, No. 13-cv-2105 (D. Colo. June 20, 2014) (granting injunction); *Brandt* v. *Burwell*, No. 14-cv-681 (W.D. Pa. June 20, 2014); *Catholic Benefits Ass'n LCA* v. *Sebelius*, No. 14-cv-240, 2014 WL 2522357 (W.D. Okla. June 4, 2014); *Dordt Coll.* v. *Sebelius*, No. 13-cv-4100, 2014 WL 2115252 (N.D. Iowa May 21, 2014); *Union Univ.* v. *Sebelius*, No. 14-cv-1079 (W.D. Tenn. Apr. 29, 2014); *Fellowship of Catholic Univ. Students* v. *Sebelius*, 13-cv-3263 (D. Colo. Apr. 23, 2014); *Dobson* v. *Sebelius*, No. 13-cv-3326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman Catholic Archdiocese of Atlanta* v. *Sebelius*, No. 12-cv-3489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Catholic Diocese of Beaumont* v. *Sebelius*, No. 13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014); *Ave Maria Found.* v. *Sebelius*, No. 13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting relief to the University of Dallas); *Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, No. 12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *E. Tex. Baptist Univ.* v. *Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Grace Schs.* v. *Sebelius,* No. 12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc.* v. *Sebelius*, No. 12-cv-159 (N.D. Ind. Dec. 27, 2013); *Geneva Coll.* v. *Sebelius,* No. 12-cv-00207 (W.D. Pa. Dec. 23 2013); *S. Nazarene Univ.* v. *Sebelius,* No. 13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc.* v. *Sebelius,* No. 13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus* v. *Sebelius,* No. 12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico* v. *Sebelius*, No. 13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik* v. *Sebelius*, No. 13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013).

Relief has been denied in five cases other than EWTN's. See *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11,

A. EWTN asks for the same relief this Court has already granted to others.

EWTN's request is neither novel nor unprecedented—this Court recently granted the same relief from the same Mandate to ministries that share the same beliefs. On December 31, 2013, the Little Sisters of the Poor, their church plan provider, and other members of the plan sought emergency relief from this Court. Justice Sotomayor, as Circuit Justice, granted a temporary injunction to protect the ministries from the fines long enough to permit a response and consideration of the application. *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 893 (Dec. 31, 2013) (Sotomayor, J., in chambers). A little over three weeks later, the full Court entered the following order:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

2014) (order denying preliminary injunction); *Catholic Diocese of Nashville* v. *Sebelius*, No. 13-2723, 2014 WL 2596753 (6th Cir. June 11, 2014); *Univ. of Notre Dame* v. *Sebelius,* 743 F.3d 547 (7th Cir. 2014); *Wheaton Coll.* v. *Burwell*, No. 13-cv-8910 (N.D. Ill. June 23, 2014), emergency motion for injunction pending appeal filed June 26, 2014 (7th Cir.); *Diocese of Cheyenne* v. *Sebelius*, No. 14-cv-00021 (D. Wyo. May 13, 2014), motion for injunction pending appeal filed May 29, 2014, No. 14-8040 (10th Cir.).

Little Sisters, 134 S. Ct. 1022. EWTN seeks the same relief. It has no objection to informing the Secretary of its religious objections to the Mandate—it has done so repeatedly. What it objects to is executing the government's Form to designate, obligate, and incentivize its third-party administrator to provide religiously objectionable drugs on its behalf. The relief this Court provided to the Little Sisters would be consistent with EWTN's religious beliefs, satisfy the government's desire for notice of EWTN's objection, and stave off ruinous penalties long enough for the litigation to proceed, without forcing EWTN to betray its Catholic mission. Since the Mandate itself has been delayed multiple times, and is implemented on a rolling basis through the end of 2014, the government can have no real interest in preventing a brief delay while this case proceeds.[5]

Below, the government raised two objections to this request. First, it claimed that an administrator's legal obligations flow from independent regulations, not the Form. But this contradicts the government's statements in the Federal Register, in open court, and to the district court and Eleventh Circuit. See *supra* at 8-9, *infra* at 24-25.

Second, it claims that the relief awarded to the Little Sisters was dependent upon its use of a church plan, for which the government is not currently enforcing the

[5] Dkt. 1 at ¶ 81 (quoting Respondent HHS's January 20, 2012 statement that, because of "the important concerns some have raised about religious liberty," religious objectors would be "provided an additional year * * * to comply with the new law."); ¶ 82 (HHS's creation of a "safe harbor" preventing enforcement of the Mandate before August 1, 2013); ¶¶ 103-111 (noting that 78 Fed. Reg. at 39875, extended the "safe harbor," so the Mandate is implemented on a rolling basis with the start of a religious objector's insurance plan year in 2014).

Mandate against TPAs. It is true that the Little Sisters' plan is a church plan under ERISA,[6] and that the government has taken the litigation position that—for now—it cannot force the administrators of such plans to actually provide the objectionable drugs and devices. EWTN does not offer a church plan. But the government's interest in enforcing the mandate against EWTN is little, if any, different than it was in *Little Sisters*. It is undisputed that EWTN's Catholic faith pervades every aspect of its operations, and that "[m]any of EWTN's employees choose to work at EWTN because they share its religious beliefs." Dkt. 29-9 at ¶ 21, see also *id.* at ¶ 11; compare Dkt. 29-14 at ¶¶ 4-5, 49, with Dkt. 36-1 at ¶¶ 1-6, 47-50. This was the reason the government gave for exempting churches from the Mandate. 78 Fed. Reg. at 39874. The government reasoned that the exemption "*does not undermine the governmental interests furthered by the contraceptive coverage requirement*." *Ibid.* (emphasis added). But churches are not required to certify that they only hire employees that share their faith. *Ibid*. (removing this requirement in final rule). Nor are they required to prove that their employees are likely to agree with them about contraception and abortion-causing drugs. *Ibid.* The government simply accepts it as true that its interests are not undermined in such circumstances. EWTN presents the same circumstance: it has certified that its employees are likely to share its faith. Therefore, the government's own conduct confirms that a similar exemption for EWTN "does not undermine the governmental interests" at stake in this litigation.

---

[6] *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, __F. Supp. 2d__, 2013 WL 6839900, at *3 (D. Colo. Dec. 27, 2013).

The government's argument fails for a second, more fundamental reason: it cannot be good for EWTN's employees for EWTN to be fined out of existence. It cannot further the government's interests to terminate these employees' health insurance without notice, forcing the employees forced to seek replacement policies on the exchanges, with only a moment's notice. It cannot further the government's interest for EWTN to violate the faith it preaches and the trust placed in it by its supporters, endangering both its witness and its future. The best option—for EWTN, for the employees who depend upon it, for the government's interest in promoting affordable health care—is to protect EWTN from this Mandate. EWTN should be afforded the same relief given to the Little Sisters of the Poor.

B. EWTN has clearly established a substantial burden on a religious exercise.

The government does not dispute the existence, religiosity, or sincerity of EWTN's religious beliefs. Accordingly, RFRA's substantial burden test involves a simple, two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—*i.e.*, a substantial burden—on the plaintiff to abstain from that religious exercise. Cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").

As discussed above, EWTN has identified a specific religious exercise: refusal to sign and submit the Form which authorizes and obligates EWTN's plan administrator to provide contraceptives, sterilization, and abortion-inducing drugs to

EWTN's employees in EWTN's place. See Dkt. 29-9 at ¶¶ 12-16, 19-23, 47-54; Dkt. 29-10 at ¶¶ 65-69; 42 U.S.C. 2000bb-2(4), *as amended by* 42 U.S.C. 2000cc-5(7)(A); see also *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (explaining "the 'exercise of religion often involves not only belief and profession but the performance (or abstention from) physical acts"). That refusal is required by EWTN's religious beliefs.

In turn, the government has imposed a substantial burden on EWTN's exercise of religion: enormous government penalties. If EWTN fails cease its religious exercise, it will face 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)). It could also face the ruinous practical consequences of its inability to offer healthcare benefits to employees at all. As described above, these penalties, which involve millions of dollars in fines, impose severe pressure on EWTN's religious exercise. Indeed, it is surely *the point* of such massive fines to impose severe pressure on employers to comply with the government's will.

Such burdens on religious practice easily qualify as "substantial." See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable" "pressure upon [applicant] to forego [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *Thomas*, 450 U.S. at 717-18 (*"*Where the state * * * put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."). Imposing monetary penalties on people who refuse to violate their faith is a paradigmatic

substantial burden. *Sherbert,* 374 U.S. at 404. This Court has deemed a modest fine of *five dollars* for believers' refusal to violate their faith a substantial burden. *Wisconsin* v. *Yoder*, 406 U.S. 205, 208, 218 (1972) (fine "not only severe, but inescapable"). This formulation of "substantial burden" is widely shared among Courts of Appeals under RFRA and its companion statute, RLUIPA.[7] As this Court

---

[7] See, *e.g., Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief * * * , such as where the government presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) ("a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion * * * on the other hand.'") (quoting *Sherbert*, 374 U.S. at 404); *Washington* v. *Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (a substantial burden exists, among other situations, where "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."); *Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) ("a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,'") (citing *Thomas*, 450 U.S. at 718); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs"); *Living Water Church of God* v. *Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between 'following the precepts of her religion and forfeiting benefits' or when the action in question placed 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'"); *Navajo Nation* v. *U.S. Forest Ser*v., 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or

is well aware, in the for-profit Mandate challenges, every circuit to reach substantial burden has strongly reaffirmed it.[8]

The burden on EWTN is nothing less than substantial. The government cannot be blind to this fact, since even its first rulemaking, the interim final rule, contained an exemption for religious organizations. 76 Fed. Reg. 46621 (Aug. 3, 2011). It then engaged in a lengthy rulemaking process to respond to the public outcry from religious organizations, like EWTN, who did not qualify for the narrow exemption and would soon face heavy fines. Dkt. 1 at ¶¶ 69-106 (describing rulemaking process). This chain of events demonstrates that the government is well aware that its mandate burdens religious organizations.

C. The District Court ignored this Court's precedents by replacing its judgment for EWTN's religious beliefs.

---

her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.").

[8] See, *e.g., Hobby Lobby*, 723 F.3d at 1137 (rejecting "an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs") (emphasis in original); *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013) ("A 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"); *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) ("[T]he substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions.").

Both of the circuits to rule against the for-profit mandate plaintiffs have done so without reaching the substantial burden inquiry. See *Conestoga*, 724 F.3d at 389*cert. granted,* 134 S. Ct. 678 ("We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself."); *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 626 (6th Cir. 2013) ("[W]e do not reach the . . . arguments that the mandate fails to impose a substantial burden on Autocam.").

In the face of a clear substantial burden on religious exercise, the government has made two erroneous arguments. Those arguments were adopted by the lower court. First, the government claims that the Form means nothing, and that EWTN's plan administrator has an independent legal obligation to provide contraceptives, sterilization, and abortion-causing drugs with or without EWTN's consent. See, e.g., Br. for Resp't at 10, *EWTN* v. *Burwell*, No. 14-12696 (11th Cir. June 20, 2014) ("If third parties step in and provide coverage, they do so as a result of legal obligations imposed by the government or the availability of payment by the government"). Second, the government claims that EWTN's religious exercise is not protected by RFRA because it is based on religious beliefs about participation in and facilitation of the actions of third parties. *Ibid.* Both arguments are wrong.

First, the record is clear that the Form means something. As demonstrated above, the government has admitted in the Federal Register and represented in open court that the Form is necessary to trigger, obligate, empower and incentivize the plan administrator to provide this coverage. The government has even conceded that point in this case, telling the Eleventh Circuit that, if EWTN is not compelled to sign the form, its employees will not get contraceptive coverage. *Id.* at 24 (not signing "would deprive hundreds of employees and their families of medical coverage"). Before the district court, the government listed a litany of harms that would occur if EWTN refused to sign.[9] That argument would make no sense if administrators provide

[9] In district court briefing on EWTN's motion for injunction pending appeal, the government told the trial court the following harms would occur if EWTN does not

coverage as a result of "independent legal obligations" rather than as a result of the 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. These repeated admissions demonstrate that EWTN's case is distinct from the cases upon which the lower court relied. See *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir. June 11, 2014); *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. Feb. 12, 2014). Both those cases, which involved preliminary relief rather than a full record on summary judgment,[10] presumed the Form was meaningless. Here, the government's admissions, made to and/or placed in evidence before the lower court, make it clear that it was not.

Second, the government, and the lower court, impermissibly sought to replace EWTN's religious beliefs with judicial guesswork about EWTN's degree of moral complicity. In so doing, the lower court failed to apply this Court's precedents. It is

---

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.

[10] The *Notre Dame* majority emphasized the fact that "the evidentiary record [was] virtually a blank,"and cautioned that "this opinion * * * should not be considered a forecast of the ultimate resolution of this still so young litigation." *Notre Dame,* 743 F.3d at 552. In this case, both sides presented evidence and moved for summary judgment on the RFRA claims.

for EWTN, not the trial judge, to decide whether a particular action violates its religious beliefs. If EWTN interprets the "creeds" of Catholicism to prohibit compliance with the Mandate, as it does, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989). As in *Thomas*, EWTN "drew a line" between religiously permissible and impermissible conduct, and "it [wa]s not for [the court] to say [the line was] unreasonable." 450 U.S. at 715, 718. *Thomas* recognized that some beliefs might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection," *id*. at 715, but that is not the case here.[11] *Hernandez* and *Thomas* are clear that, while the civil courts may examine the sincerity of a religious exercise, and the pressure brought to bear upon it, they may not assess the *validity* of the exercise itself.

Nor were the district court's reasons for replacing its beliefs for EWTN's permissible. The court concluded that a religious objection to taking action that "hinges upon the effect" that act "will have on other parties" is not protected by RFRA. Op. at 10; *accord id.* at 9 (rejecting EWTN's religious objection because "EWTN cannot explain how that act violates its religion without reference to the obligation that the mandate will impose upon others after EWTN delivers the form."). Not only is there no basis for this distinction in the law—RFRA expressly protects "any" religious exercise, 42 U.S.C. 2000cc-5.—but it completely misses why EWTN objects to signing the form. EWTN's *own* action in signing the form is *the* legal trigger that

[11] See, generally, Dkt. 29-9 (explaining EWTN's background and beliefs); Dkt. 29-10 (explaining Catholic teachings on moral complicity).

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. See *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20 (Rosenthal, J.) ("The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms.").

This distinguishes EWTN from the plaintiff in *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986). In *Bowen*, the plaintiffs' religious claim was based on their desire to control *the government's* own "internal procedures."[12] EWTN's case presents the exact opposite of *Bowen*: here we have the *government* seeking to control *private* conduct by compelling EWTN to either offer religiously-objectionable services, or trigger someone else's responsibility to do it for EWTN.[13]

The Supreme Court has long recognized religious objections based upon the desire to abstain from facilitating or participating in other people's actions. In *Wisconsin* v.

---

[12] In *Bowen*, the Court rejected the plaintiff's challenge to the Social Security Administration's practice of assigning a social security number to his daughter. *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986). The Court splintered on a second, more analogous, issue: the requirement that plaintiff "*shall furnish* to the State agency his social security account number" in order to apply for benefits. *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 district court's *Kaemmerling* comparison fails for similar reasons. 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.

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. at 210-11 (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 other people in waging war. *Thomas*, 450 U.S. at 715. 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.[14]

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. 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. 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-

[14] 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.

guess EWTN's line-drawing, but only to determine whether this religious exercise was substantially burdened by the pressure Respondents are imposing.

D. Over eighty percent of courts to have considered the issue have granted preliminary injunctions.

The vast majority of lower court cases—twenty-six out of thirty-two—to consider the impact of the Mandate on non-profit ministries have found that the religious objectors do suffer a substantial burden.[15] The great weight of authority explains why the district court's analysis was mistaken.

Several other courts to consider this very issue have rejected the government's position as misconstruing the religious objection: "Plaintiffs' religious objection is not only to the use of contraceptives, but also being required to actively participate in a scheme to provide such services." *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *14. The accommodation requires objectors themselves to sign a form that is, "in effect, a permission slip." *S. Nazarene Univ.*, 2013 WL 6804265, at *8. The question is "not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.'" *Reaching Souls*, 2013 WL 6804259, at *7 (quoting *Hobby*

---

[15] See *supra* at n.4. Three out of five federal courts of appeals have concluded that the Mandate burdens the religious exercise of for-profit corporations. *Hobby Lobby*, 723 F.3d at 1137-1145, (holding that the Mandate substantially burdened the religious exercise of a for-profit corporation); see also *Gilardi*, 733 F.3d 1208 (same); *Korte*, 735 F.3d 654 (same); but see *Conestoga*, 724 F.3d 377, *cert. granted* 134 S. Ct. 678 ; *Autocam*, 730 F.3d 618 . And, overall, forty out of forty-six Mandate challenges brought by for-profits have concluded that the government's scheme likely violates RFRA. See The Becket Fund for Religious Liberty, HHS Information Central, http://www.becketfund.org/hhsinformationcentral/ (collecting cases) (last visited June 26, 2014).

Lobby, 723 F.3d at 1137). And because EWTN views completing the self-certification itself as forbidden complicity with the government's scheme, "regardless of the effect of plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion." *Roman Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *7; *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20 (Rosenthal, J.) ("The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms.").

In sum, most other courts have appropriately recognized that the government's imposition of severe pressure on religious objectors to comply notwithstanding their religious objection to participation is a substantial burden on their exercise of religion. See *S. Nazarene Univ.*, 2013 WL 6804265, at * 9 ("The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.").

In contrast, the handful of courts that have denied injunctions have committed the same errors that happened here: (1) the courts did not apply a proper substantial burden inquiry and incorrectly substituted their own religious judgment for the plaintiffs, and (2) the courts misconstrued the legal effect of Form 700. See, *e.g., Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (6th Cir.

June 11, 2014) (construing Form 700 to act solely as a notice, not as a trigger of changes to legal relations). These conclusions are irreconcilable both with RFRA's plain text (which protects "any" exercise of religion) and with common sense (why would the government bother trying to force EWTN to sign the Form if "independent legal obligations" do all the work?). The conclusion is clear: the Mandate places a substantial burden on EWTN's religious exercise.

E. The Mandate cannot survive strict scrutiny.

Because the government has placed a substantial burden on EWTN's religious exercise, it must now face strict scrutiny. Congress has prescribed the standard: when an agency regulation substantially burdens religious exercise, the claimant is entitled to an exemption, unless the agency can demonstrate that the burden "(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. Respondent agencies are not permitted to substitute their own judgment for the test that Congress prescribed. See 42 U.S.C. 2000bb-2 (RFRA applies to "a branch, department, agency * * * of the United States").

Because the Mandate substantially burdens EWTN's religious exercise, "the burden [of strict scrutiny] is placed squarely on the Government." *O Centro*, 546 U.S. at 429 ; 42 U.S.C. 2000bb-1(b). 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. This case is no different.

Compelling Interest. Respondents did not demonstrate that applying the requirement to EWTN furthers any compelling interest. To be compelling, the

interest cannot be "broadly formulated," but must be shown to apply to "the particular claimant." *O Centro*, 546 U.S. at 431 (citing *Yoder*, 406 U.S. at 236). Yet below, Respondents articulated only the same "broadly formulated interests" in public health and gender equality that they have offered in all of their Mandate-related litigation. See Dkt. 35 at 27-29; Dkt. 53 at 3, 10 (claiming interests in "public health" and "gender equality"). Simply put, Respondents failed to show with *any* "particularity" how its interests would be "adversely affected" by granting an exemption ***to EWTN***. *Yoder*, 406 U.S. at 236. That lack of specificity dooms a compelling interest claim under RFRA. See, *e.g., O Centro*, 546 U.S. at 430-31.

That failure is particularly glaring here. For instance, the government has offered religious exemptions to thousands of religious entities, exemptions which, in the government's own words, are necessary to "protect[]" objecting organizations from an identical burden on their religious beliefs. 78 Fed. Reg. at 39872. Yet Respondents failed to explain why EWTN—founded by a cloistered nun, wholly and openly religious in mission and operation—does not deserve the same "protection." The closest Respondents have come is unfounded speculation that employees of religious non-profits generally are "less likely" to share the religious beliefs of their employers than employees of churches. 78 Fed. Reg. at 39874; see also Dkt. 29-13 at 5 (government deposition testimony admitting there is "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."); *contra* Dkt. 29-9 ¶21 ("[m]any of EWTN's employees choose to work at EWTN because they share its religious

beliefs."). Even if Respondents had shown that their interests were marginally stronger in exempting Catholic bishops running Catholic churches providing Catholic catechism and not Catholic laity providing Catholic media outlets for Catholic catechism, the Mandate must still fail, for "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n. 9 (2011).

Worse still, the government exempts countless secular employers based on nothing more than its interests in administrative convenience and appropriate "transition" rules. As several courts of appeals, including the *en banc* Tenth Circuit, properly concluded, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222. Given these enormous gaps, the government cannot plausibly maintain its interests are compelling. See, *e.g., 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).

Narrow Tailoring. The Mandate also fails strict scrutiny because Respondents did not prove it is the least restrictive means of furthering their interests. *United States* v. *Playboy Ent'mt 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."

(emphasis added)). EWTN proposed multiple less restrictive means in the trial court. Respondents failed to even seriously address, let alone rebut, them. Dkt. 30 at 33-36.

For instance, 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).[16] Respondents did not explain why they could not use a pre-existing program like this to redress genuine 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"). The government could also offer subsidies to employees who wish to purchase contraceptive coverage on the government-run exchanges. See Dkt. 30 at 34-35 (proposing such measures). 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; 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).

III. Injunctive relief would aid this Court's jurisdiction.

A. Temporary injunctive relief will preserve the Court's ability to hear this case after an Eleventh Circuit appeal has been completed.

---

[16] 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.").

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. See 28 U.S.C. 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *F.T.C* v. *Dean Foods Co.,* 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910).

The Court should exercise that authority here because the fines for non-compliance with the Mandate—which begin at midnight Monday evening—threaten the continued existence of EWTN's ministry. See Section I *supra.* EWTN faces exposure to potentially massive daily fines and therefore will suffer palpable and rapidly mounting burdens on its religious exercise. And it is precisely because those burdens will increase during the appellate process—inflicting greater and greater harm on EWTN's ministry, until EWTN either abandons its religious exercise or collapses—that EWTN needs temporary injunctive relief from this Court. Otherwise, the Mandate's punitive fines risk scuttling the process of review before EWTN can complete the process of appellate review, including any further review by this Court.

B. Temporary injunctive relief will allow the Court to consider a petition for certiorari before judgment.

In addition, injunctive relief would also be in aid of this Court's jurisdiction to review EWTN's anticipated petition for certiorari before judgment. See *N.Y. Natural Res. Def. Council* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim

decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.").

In this case, EWTN anticipates—subject to the effect on this litigation of the Court's impending decision in *Hobby Lobby*—submitting a petition for certiorari before judgment. Although certiorari before judgment is uncommon, there are several reasons we believe the Court will want to consider such a petition carefully, and should therefore act now to preserve its ability to consider such a petition.

First, the Court is likely to decide one of the non-profit Mandate cases next Term. As the Court is already aware, Respondents' rulemaking staggered Mandate litigation into two waves—first the for-profit cases, and then the non-profit cases. The government's creation of a one-year "safe harbor" ensured that the for-profit Mandate cases would reach this Court about a year before the non-profit Mandate cases. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 77 Fed. Reg. 8725, 8728 (February 15, 2012). Therefore the Court can expect to receive a number of petitions for certiorari during the summer and fall:

The Sixth and Seventh Circuits have already ruled on three non-profit appeals. *Notre Dame*, 743 F.3d 547; *Michigan Catholic Conf.* v. *Burwell*, Nos. 13-2723, 13-6640, 2014 WL 2596753 (June 11, 2014). Justice Kagan recently granted an extension of time to file a petition for certiorari in one of those appeals. See *Univ. of Notre Dame* v. *Burwell*, No. 13A1238 (extension of time granted by Kagan, J., June 16, 2014).

The D.C. Circuit has heard argument but not yet ruled in three consolidated non-profit Mandate appeals. *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No.

13-5368 (D.C. Cir, argued May 8, 2014); *Roman Catholic Archbishop* v. *Burwell*, Nos. 13-5371, 14-5021 (D.C. Cir, argued May 8, 2014). The Tenth Circuit has three fully-briefed non-profit appeals that have not yet been set for argument. See *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-1540 (10th Cir., briefing completed Apr. 17, 2014); *S. Nazarene Univ.* v. *Burwell*, No. 14-6026 (10th Cir., briefing completed June 13, 2014); *Reaching Souls Int'l, Inc.* v. *Burwell*, No. 14-6028 (10th Cir., briefing completed June 24, 2014).

Pending before the Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits are twenty non-profit Mandate appeals that have not been fully briefed, including this one.[17] And there are at least fifteen other non-profit Mandate

---

[17] *Roman Catholic Archdiocese of N.Y.* v. *Burwell*, No. 14-427 (2d Cir., Government's opening brief filed May 27, 2014); *Geneva Coll.* v. *U.S. Dep't of Health & Human Servs.*, Nos. 13-3536, 14-1374 (3d Cir., Government's opening brief filed June 10, 2014); *Persico* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, No. 14-1376 (3d Cir., Government's opening brief filed June 10, 2014); *Zubik* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, No. 14-1377 (3d Cir., Government's opening brief filed June 10, 2014); *Catholic Charities, Archdiocese of Philadelphia* v. *Sec'y, Dep't of Health & Human Servs.*, No. 14-3120 (3d Cir., court of appeals granted temporary injunction June 27, 2014); *Univ. of Dallas* v. *Burwell*, No. 14-10241 (5th Cir.); *E. Tex. Baptist Univ.* v. *Sebelius*, No. 14-20112 (5th Cir.); *Catholic Diocese of Beaumont* v. *Sebelius,* No. 14-40212 (5th Cir.); *Roman Catholic Diocese of Ft. Worth* v. *Burwell*, No. 14-10661 (5th Cir.); *Weingartz Supply Co.* v. *Burwell*, No. 14-1183 (6th Cir.) (combined for-profit and non-profit case); *Ave Maria Found.* v. *Burwell*, No. 14-1310 (6th Cir.); *Grace Schs.* v. *Burwell*, No. 14-1430 (7th Cir., Government's reply brief due July 10, 2014); *Diocese of Fort Wayne-South Bend* v. *Burwell*, No. 14-1431 (7th Cir., Government's reply brief due July 10, 2014); *Wheaton Coll.* v. *Burwell*, No. 14-2396 (7th Cir., docketed June 26, 2014); *Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, No. 14-1507 (8th Cir., plaintiffs-appellees' brief due July 21, 2014) (combined for-profit and non-profit case); *Diocese of Cheyenne* v. *Burwell*, No. 14-8040 (10th Cir., briefing on injunction pending appeal completed June 13, 2014); *Dobson* v. *Burwell*, No. 14-1233 (10th Cir., Government's opening brief due Aug. 5, 2014); *Roman Catholic Archdiocese of Atlanta* v. *Burwell*, No. 12-cv-3489 (N.D. Ga.) (notice of appeal

cases now pending in the district courts.[18]

Given the great number of appeals and the nature of the dispute, it is likely that the Court will see many petitions for certiorari over the next half-year. And although there is no significant Circuit split to date, it appears that a number of Courts of Appeals are waiting on the outcome of *Hobby Lobby* to proceed, and others are at the initial stages.[19] Once *Hobby Lobby* issues, the appeals will likely accelerate, inevitably resulting in splits that will precipitate the need for this Court's review.

Second, given the great likelihood of a grant next Term, the Court can begin to consider now which cases present the best vehicle for deciding whether the Government's non-profit scheme passes muster under RFRA. This appeal presents a particularly good vehicle for addressing the conflict between the Government's system for religious non-profits and RFRA.

- The appeal results from a final summary judgment on EWTN's RFRA claims, rather than a preliminary injunction ruling, as in many of the other appeals.
- EWTN is a standalone plaintiff.
- EWTN cannot be classified as exempt under the Government's system.

---

filed May 23, 2014, not yet docketed).

[18] See Becket Fund for Religious Liberty, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral (updated as new decisions arrive).

[19] The split thus far is between the Sixth and Seventh Circuits and the D.C. Circuit's ruling on the preliminary injunction pending appeal in *Priests for Life* and *Roman Catholic Bishop*, Nos. 13-5368, 13-5371 (D.C. Cir. Dec. 31, 2013) (per curiam order granting preliminary injunction pending appeal).

- No for-profit entities are part of EWTN's appeal.

The Court will want to at least consider such a vehicle for deciding the non-profit Mandate issue it will have before it next Term. Therefore, in order to preserve its ability to do so, the Court should grant the temporary injunction requested.

CONCLUSION

EWTN respectfully asks the Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal enjoining them, their agents, officers, and employees, and others working in concert with them from any application or enforcement of the requirements imposed in 42 U.S.C. 300gg-13(a)(4), Pub. L. 111-148, § 1563(e)-(f), the application of the penalties found in 26 U.S.C. 4980D and 4980H and 29 U.S.C. 1132, and any other requirement that EWTN or those acting in concert with them (including specifically EWTN's third party administrator) provide, facilitate, contract for, or otherwise enable access to the objectionable drugs or devices.

At a minimum, EWTN respectfully seeks a temporary injunction to allow for orderly briefing and disposition of this Application.

Respectfully submitted.

KYLE DUNCAN
DUNCAN PLLC
1629 K Street NW, Suite 300
Washington, D.C. 20006
(202) 714-9492

MARK L. RIENZI
Counsel of Record
LORI H. WINDHAM
ERIC C. RASSBACH
HANNAH C. SMITH
DANIEL BLOMBERG
DIANA VERM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K Street, N.W.,
Suite 220
Washington, D.C. 20007
(202) 955-0095
mrienzi@becketfund.org

Counsel for Applicant

JUNE 27, 2014