ORAL ARGUMENT REQUESTED

No. 14-12696-CC

In the United States Court of Appeals for the Eleventh Circuit

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

Appellant,

v.

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

Appellees.

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

This certificate has been amended with the names of additional counsel for appellee and amici curiae on appeal; all amendments in boldface type. Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Eternal Word Television Network represents that it does not have any parent entities and does not issue stock. Counsel further certifies, to the best of his knowledge, that the following persons and entities have an interest in this appeal:

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

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)

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF CITATIONS iii

INTRODUCTION 1

ARGUMENT 2

I. EWTN is entitled to summary judgment under RFRA. 2

A. The Mandate imposes a substantial burden on EWTN's religious exercise. 2

1. Binding precedent confirms the proper substantial burden analysis. 3

2. The "augmented" regulations substantially burden EWTN's religious exercise. 5

3. Neither *Hobby Lobby* dicta nor pre-*Hobby Lobby* cases alter the analysis 11

B. The Mandate fails strict scrutiny 18

1. The government has no compelling interest. 18

2. The government did not use the least restrictive means. 23

II. EWTN is entitled to summary judgment on its First Amendment claims. 27

A. The Mandate violates the Free Exercise Clause. 27

B. The Mandate violates the Establishment Clause. 30

C. The Mandate violates the Free Speech Clause..... 33

CONCLUSION 36

CERTIFICATE OF SERVICE..... 38

CERTIFICATE OF COMPLIANCE 40

TABLE OF CITATIONS

Cases **Page(s)**

Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,
133 S. Ct. 2321 (2013) 35

Beckerman v. City of Tupelo, Miss.,
664 F.2d 502 (5th Cir. 1981) 35

Blackhawk v. Pennsylvania,
381 F.3d 202 (3d Cir. 2004) 28, 29

Bowen v. Roy,
476 U.S. 693, 106 S. Ct. 2147 (1986) 22

Brown v. Borough of Mahaffey, Pa.,
35 F.3d 846 (3d Cir. 1994) 29

Brown v. Entm't Merchs. Ass'n,
131 S. Ct. 2729 (2011) 19

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) ..... passim

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520, 113 S. Ct. 2217 (1993) 20, 30

City of Boerne v. Flores,
521 U.S. 507, 117 S. Ct. 2157 (1997) 22

Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta,
219 F.3d 1301 (11th Cir. 2000) 34

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 31, 33

Covenant Christian Ministries, Inc. v. City of Marietta, Ga.,
654 F.3d 1231 (11th Cir. 2011) 20

Eternal Word Television Network, Inc. v.
Sec'y, U.S. Dep't of Health & Human Servs.,
756 F.3d 1339 (2014) 9, 14, 15

Fraternal Order of Police v. City of Newark,
170 F.3d 359 (3d Cir. 1999) 28, 29

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418, 126 S. Ct. 1211 (2006) 20

Konikov v. Orange Cnty., Fla.,

410 F.3d 1317 (11th Cir. 2005) 5, 20

Larson v. Valente,

456 U.S. 228, 102 S. Ct. 1673 (1982) 31, 33

Little Sisters of the Poor v. Sebelius,

571 U.S. —,134 S. Ct. 1022 (2014) 12

Lyng v. Nw. Indian Cemetery Protective Ass'n,

485 U.S. 439, 108 S. Ct. 1319 (1988) 16

Mich. Catholic Conference and Catholic Family Servs. v. Burwell,

755 F.3d 372 (6th Cir. 2014) 13

Midrash Sephardi, Inc. v. Town of Surfside,

366 F.3d 1214 (11th Cir. 2004) 4, 28, 29

Ne. Fla. Chapter of the Assoc'd. Gen. Contractors v.

City of Jacksonville, Fla.,

508 U.S. 656, 113 S. Ct. 2297 (1993) 33, 34

O'Bryan v. Bureau of Prisons,

349 F.3d 399 (7th Cir. 2003) 23

Rich v. Sec'y, Fla. Dep't of Corr.,

716 F.3d 525 (11th Cir. 2013) 20, 23, 26

Roman Catholic Archbishop of Wash. v. Sebelius,

2013 WL 6729515 (D.D.C. Dec. 20, 2013) 6

Rumsfeld v. FAIR, Inc.,

547 U.S. 47, 126 S. Ct. 1297 (2006) 34

Sherbert v. Verner,

374 U.S. 398, 83 S. Ct. 1790 (1963) 4

Solantic, LLC v. City of Neptune Beach,

410 F.3d 1250 (11th Cir. 2005) 20

Spencer v. World Vision, Inc.,

633 F.3d 723 (9th Cir. 2011) 32

Tagore v. United States,

735 F.3d 324 (5th Cir. 2013) 20, 27

Thomas v. Review Bd. of Ind. Emp't Sec. Div.,

450 U.S. 707, 101 S. Ct. 1425 (1981) 16

Univ. of Great Falls v. NLRB,

278 F.3d 1335 (D.C. Cir. 2002) 31

Univ. of Notre Dame v. Sebelius,

743 F.3d 547 (7th Cir. 2014) 13, 15, 17

Wheaton Coll. v. Burwell,

134 S. Ct. 2806 (2014) 12, 14

Statutes

26 U.S.C. § 4980D 4

26 U.S.C. § 6033 33

42 U.S.C.A. § 300a-4 25

Other Authorities

10 Charles Alan Wright & Arthur R. Miller,

Federal Practice & Procedure § 2667 (2014) 35

Appellant's Status Report, *Wheaton Coll. v. Burwell*

(7th Cir. July 17, 2014) (No. 14-2396) 13

Brief for *Amicus Curiae* the United States,

Spencer v. World Vision, Inc.,

2008 WL 5549423 (9th Cir. No. 08-35532) 32

CCIIO Fact Sheet: Women's Preventive Services Coverage,

Non-Profit Religious Organizations, and Closely-Held

For-Profit Entities..... 7

EEOC Manual,

http://www.eeoc.gov/policy/docs/religion.html#_ftnref175..... 16

Gov't Letter to the Clerk,

Roman Catholic Archbishop of Wash. v. Burwell,

No. 14-5371 (D.C. Cir. Aug. 22, 2014)..... 11

IOM, *Clinical Preventive Services for Women:*

Closing the Gaps (2011) 22

Opp'n, *Wheaton Coll. v. Burwell*,

134 S. Ct. 2806 (2014) (No. 13A1284) (U.S. July 2, 2014) 14

S. Rep. No. 103–111..... 26

Regulations

26 C.F.R. § 54.9815–2713A (.....6, 9

26 C.F.R. § 54.9815-2713AT.....7, 8, 9

29 C.F.R. § 2510.3-16.....6

29 C.F.R. § 2590.715-2713A(d).....10

42 C.F.R. § 59.5(a)(8).....25

78 Fed. Reg. 39870-01 (July 2, 2013).....7, 8, 18

79 Fed. Reg. 51092-01 (Aug. 27, 2014) ..... passim

INTRODUCTION

A Catholic television network should be free to live out Catholic teachings. That right is guaranteed to EWTN by the Supreme Court's decision in *Hobby Lobby* and its emergency orders in the *Little Sisters of the Poor* and *Wheaton College*. The principles applied in those cases demand broad respect for religious exercise, particularly where the government has many other ways to achieve its objectives.

The government's actions essentially admit it cannot prevail in this case. Since EWTN filed its opening brief, the government has changed its "accommodation" once again. It trumpets this change as the solution to EWTN's moral conundrum, while assuring others the change is minimal, having no real impact upon the existing, deeply flawed system. The latest edition of the accommodation merely offers EWTN another way to violate its beliefs.

Lacking support in law, the government resorts to hyperbole. The government repeatedly claims that EWTN is trying to "block access" to contraceptives. Nonsense. EWTN suggested numerous alternatives that would allow the government to distribute contraceptives without EWTN's involvement. The government also claims that religious

exemptions would be unworkable if RFRA is taken seriously. But courts have been applying it for twenty years and the sky has not fallen. EWTN simply asks that its own religious exercise be respected, as RFRA and the Constitution require.

ARGUMENT

I. EWTN is entitled to summary judgment under RFRA.

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

The government's scheme burdens EWTN by imposing severe penalties on a sincere religious exercise. Br. 39-44. *Hobby Lobby* thus controls. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Yet rather than discuss (or even acknowledge) that binding precedent, the government devotes its 13-page burden section to (a) speculating about *Hobby Lobby*'s references to the "accommodation," (b) discussing pre-*Hobby Lobby* and pre-RFRA cases, and (c) describing the government's latest change to the Mandate, which changes nothing of substance for EWTN (or the government). The government does not even bother to identify the substantial burden standard. *See* Opp. 23-36.

These misdirections cannot change *Hobby Lobby*'s analysis. The test is simple, and the conclusion is clear: the Mandate substantially burdens EWTN's religious exercise.

1. Binding precedent confirms the proper substantial burden analysis.

RFRA mandates a two-part substantial burden inquiry: the Court must (1) identify the sincere religious exercise, and (2) determine whether the government has placed substantial pressure—*i.e.*, a substantial burden—on EWTN to abstain from that religious exercise. In *Hobby Lobby*, the Court first identified the exercise: "the plaintiffs . . . assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity." *Hobby Lobby*, 134 S. Ct. at 2779. Then the Court identified the burden, *i.e.*, the government pressure to forsake that exercise: "Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

Here, the religious exercise is undisputed: EWTN believes that it must provide insurance coverage consistent with its Catholic beliefs, without

signing Form 700 or otherwise participating in the government's scheme for providing contraception to its employees. Br. 15-18. The government does not dispute that this religious exercise is sincere. *See* EWTN's Sugg. Det. Undisp. Fact, Dkt. 29-14 ¶ 49; Defs.' Resp. to EWTN's Sugg. Det. Undisp. Fact, Dkt. 36-1 ¶¶ 47-50. Nor does it dispute that if EWTN engages in this religious exercise, it will be forced to pay the same "enormous sum[s] of money" as Hobby Lobby. *See Hobby Lobby*, 134 S. Ct. at 2779; 26 U.S.C. § 4980D(b)(1); *see also* Dkt. 29-14 ¶ 49; Dkt. 36-1 ¶¶ 47-50; Michael Warsaw Decl., Dkt. 29-9 ¶ 58. The Supreme Court has already declared precisely that scenario to be a substantial burden. *Hobby Lobby*, 134 S. Ct. at 2779.

Government fines on a religious exercise are the paradigmatic example of "pressure that tends to force adherents to forego religious precepts." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 1794 (1963) (analogizing burden to "a fine imposed against appellant for her Saturday worship."). This Court need go no further.[1]

[1] The analysis may be more searching when the pressure is more subtle, such as "walking a few extra blocks" to synagogue, *Midrash*, 366 F.3d at

2. The "augmented" regulations substantially burden EWTN's religious exercise.

Effectively conceding that it cannot win under the existing rules, the government raises a new argument based upon a new "augmentation" to the Mandate. But its own admissions demonstrate that nothing has changed. EWTN must still choose between its religious exercise and massive penalties.

1. EWTN's religious beliefs are undisputed. *See* Dkt. 36-1 ¶¶ 41, 43. In accordance with those beliefs, EWTN provides excellent health benefits for its employees and ensures those benefits are consistent with EWTN's Catholic faith. *See* Dkt. 29-9 ¶ 18. EWTN has always striven to keep its health plan from covering contraceptives—particularly those with an abortifacient effect—and sterilization. Dkt. 29-9 ¶ 20. In short, EWTN practices what it preaches. *Id.* ¶ 51.

EWTN cannot, in good conscience, take "action that triggers the provision" of contraceptives or is the "but-for cause" of such provision. *Id.* ¶ 64; *see also* Dkt. 29-14 ¶ 47. It cannot "participate" in the government's

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1228; or applying for the proper zoning permit for religious meetings, *Konikov v. Orange Cnty., Fla.*, 410 F.3d 1317, 1323 (11th Cir. 2005). But nothing is subtle about the pressure here.

scheme to provide contraceptives "to EWTN's plan employees or other beneficiaries." *Id.* ¶ 64; *see also* Dkt. 29-14 ¶ 47. Doing so would make it complicit in grave sin. *Id.* ¶¶ 12-14, 47-50, 64; *accord* Dr. John Haas Decl., Dkt. 29-10 ¶¶ 11, 65. Further, EWTN must avoid contradicting its public witness to Catholic beliefs, thus causing moral scandal. *See* Dkt. 29-9 ¶¶ 21, 51, 53. These beliefs are sincere and undisputed. Br. 32-35.

2. The augmented accommodation changes nothing. It keeps Form 700 and merely adds an "alternative" way for EWTN to violate its faith. In all the morally relevant features, the accommodation is unchanged:

- It uses the same vehicle—EWTN's plan. *See* 29 C.F.R. § 2510.3-16(b) (2014) (Either Form 700 or its "alternative" are "instrument[s] under which the plan is operated."); *Roman Catholic Archbishop of Wash. v. Sebelius*, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (Government admits that "the contraceptive coverage is part of the [self-insured organization's health] plan."). The coverage would be available to individual employees only "so long as they [are] enrolled" in EWTN's plan. 26 C.F.R. § 54.9815–2713A(d) (2014). It would be provided subject to the same network and medical management

limitations as all other coverage under the plan. 78 Fed. Reg. 39870-01, 39873 (July 2, 2013).[2] *See* Dkt. 29-9 ¶¶ 20, 31, 34, 37-38 (detailing religious objections to these aspects of the accommodation).

- It has the same effect: "Regardless of whether the eligible organization" uses Form 700 or "provides notice to HHS in accordance with the August 2014 [augmentation], the obligations of insurers and/or TPAs . . . are the same." CCIIO Fact Sheet: Women's Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html; *accord* 26 C.F.R. § 54.9815-2713AT(b)(2) (whether Form 700 or the alternative is used, "the [TPA] shall provide or arrange payments for contraceptive services"). *See* Dkt. 29-9 ¶¶ 30, 41-43, 49, 64

[2] The government admits as much when it insists on using "the existing *employer-based system of health coverage*." Opp. 60-61 (emphasis added). This concession belies an earlier misstatement that the accommodation "is distinct and independent from that coverage." Opp. 45.

(detailing religious objections to these aspects of the accommodation).

- It uses the same incentives: upon receipt of either Form 700 or notification triggered by EWTN's submission of an alternative form—and only upon such receipt—the TPA becomes eligible for 115% reimbursement for the costs of providing contraceptives. *See* 26 C.F.R. § 54.9815-2713AT(b)(3). *See* Dkt. 29-9 ¶¶ 30, 50, 53 (detailing religious objections to these aspects of the accommodation).
- It places the same duty on EWTN: it must maintain a contractual relationship with a TPA that will provide objectionable coverage on its plan. 78 Fed. Reg. at 39880. *See* Dkt. 29-9 ¶¶ 30, 40, 50, 64 (detailing religious objections to these aspects of the accommodation).

In sum, the augmented accommodation is just as bad as before.

To use this alternative, EWTN "must" submit a form identifying its religious objection, the name and type of its plan, and—for the first time—"the name and contact information for any of the plan's [TPAs]." 79 Fed. Reg. 51092-01, 51094-095 (Aug. 27, 2014). If—and only if—

EWTN submits this "necessary" information, the government "will send a separate notification to" EWTN's TPA creating the "obligations of the [TPA] under . . . this section and under § 54.9815-2713A"—which includes the TPA's obligation to deliver contraceptives to participants in EWTN's health plan. *Id.* at 51098; *see* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B). This paperwork shuffling merely adds another link in the causal chain between EWTN's actions and contraceptive coverage under EWTN's plan. It does nothing to solve the underlying moral problem.

That moral problem has three main features. First, as with the German Catholic situation, where "the certification issued by the churches was a necessary condition for abortion," *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1343 (2014) (Pryor, J., concurring), EWTN's compliance by providing a plan and submitting either Form 700 or its alternative are "necessary condition[s]" for contraceptive coverage. Dkt. 29-10 ¶ 68.

Second, the government is co-opting EWTN's plan. Imagine if the government ordered hospitals to perform elective surgical abortions. *See*, *e.g.*, *Hobby Lobby*, 134 S. Ct. at 2783 (raising a similar illustration). If

religious hospitals object, the government allows their doctors to "opt out" of performing the elective abortions *if* the objecting hospitals allow external doctors to perform the abortions in the hospital. Because the "opt-out" still requires *the hospital's facilities* for the abortions, the hospital would still be participating. In the same way, the government's insistence on hijacking *EWTN's plan* to provide contraceptives forces EWTN to be complicit in grave sin. Dkt. 29-9 ¶ 19.

Third, by participating in the government's scheme, EWTN would contradict its public witness to Catholic beliefs and cause moral scandal. *Id.* ¶¶ 51, 53. EWTN's employees would know that EWTN had violated its beliefs the moment they received, for the first time, a statement notifying them of contraceptive benefits available "for so long as [they] are enrolled in [EWTN's] group health plan." 29 C.F.R. § 2590.715-2713A(d). They would be reminded of the violation annually, at the same time they received other notices about EWTN's health plan. *Id.*; Dkt. 29-9 ¶ 21 (attesting to the harm this would do to EWTN's relationship with its employees and its mission). EWTN's compliance would undermine its public message and harm its witness to those who look to it for Catholic teaching. *Id.* ¶¶ 51-53.

EWTN's sincere beliefs bar it from participating in or facilitating any such contraceptive delivery system. Dkt. 29-9 ¶¶ 12-14, 47-50; *accord* Dkt. 29-10 ¶¶ 11, 65. The government knew that. The day it released the augmentation, it told the D.C. Circuit that the "type of relief" offered there "does not meet [the] concerns" of Catholic ministries with objections identical to EWTN's. *See* Gov't Letter to the Clerk at 2, *Roman Catholic Archbishop of Wash. v. Burwell*, No. 14-5371 (D.C. Cir. Aug. 22, 2014). Yet the government still insists on making EWTN choose between following its faith and paying massive penalties. If that is not a substantial burden on religion, "it is hard to see what would [be]." *Hobby Lobby*, 134 S. Ct. at 2759.

3. Neither Hobby Lobby *dicta nor pre*-Hobby Lobby *cases alter the analysis.*

Despite feeling the need to "augment" the accommodation, the government argues that *Hobby Lobby* blessed the original accommodation. But *Hobby Lobby* was clear: the Court did "not decide today whether an [accommodation] of this type complies with RFRA for purposes of all religious claims," and stressed that the accommodation "accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address." *Hobby Lobby*, 134 S. Ct.

at 2782 & n.40. The Court even reaffirmed its unanimous order in *Little Sisters*, which enjoined the accommodation. *Hobby Lobby*, 134 S. Ct. at 2763 & n.9 (citing *Little Sisters of the Poor v. Sebelius,* 571 U.S. —,134 S. Ct. 1022 (2014)). If any doubt remained, the Court erased it three days later, when it granted extraordinary relief to Wheaton College. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

The government struggles to paint its actions as consistent with *Wheaton*, but the Supreme Court merely granted Wheaton the same relief it gave to the Little Sisters of the Poor: Wheaton was required only to notify the Secretary of its objection in order to gain a complete exemption. *Compare* 134 S. Ct. 2806 *with* 134 S. Ct. 1022. In *Wheaton*, the Court noted the parties' competing interpretations of federal law: the government contended the TPA was "required by federal law to provide full contraceptive coverage," while Wheaton contended "by contrast, that the obligations of its health insurance issuer and third-party administrator are dependent on their receipt of notice." *See* 134 S. Ct. at 2807. So the Court put the government to the test: "But the applicant has already notified the Government . . . Nothing in this order precludes the Government from relying on this notice[.]" *Id.*

The government failed that test. After the *Wheaton* order, the government still could not make its accommodation work—*so it was forced to enact yet another regulatory modification*. *See* Opp. 44; *see also* 79 Fed. Reg. at 50195 (modification is necessary to deem TPA as plan administrator). Indeed, Wheaton's TPA did not provide the drugs based on the notification approved by the Supreme Court. Appellant's Status Report at 2, *Wheaton Coll. v. Burwell* (7th Cir. July 17, 2014) (No. 14-2396) ("[E]mergency contraceptives are not being provided in connection with Wheaton's plans."). This is proof that EWTN was (and is) correct: the obligations do not arise through independent operation of law, but through EWTN's actions.

Nor can the government rescue its "substantial burden" argument by continued reliance on *Michigan Catholic* and *Notre Dame*. Those decisions were outliers even *before* the Supreme Court's decision in *Hobby Lobby*; they are utterly unpersuasive now.

First, both decisions incorrectly state that coverage is not attributable to the religious objector's actions, but rather to federal law. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014); *Mich. Catholic Conference and Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387 (6th

Cir. 2014). That analysis is, as Judge Pryor correctly noted, "[r]ubbish." *EWTN*, 756 F.3d at 1347 (Pryor, J., concurring). If EWTN does not either submit Form 700 or the new "alternative" form, contraceptive coverage will *not* be provided on EWTN's plan. *See supra; see also Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) ("A TPA 'bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification.') (emphasis added). The government has admitted as much to this Court and the Supreme Court. *See, e.g.*, Opp. to Inj. at 24 (government claim that allowing EWTN to avoid signing "would deprive hundreds of employees and their families of medical coverage."); Opp'n at 36, *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284) (U.S. July 2, 2014), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/US-reply-Wheaton-College-7-2-142.pdf (government claim that allowing Wheaton to avoid signing "would deprive hundreds of employees and students" of contraceptive coverage). The *Notre Dame* and *Michigan Catholic* conclusions on this point are simply wrong.

Second, both decisions mistakenly reason that the *government* can decide when coverage is "distinct and independent" enough to be morally

permissible. Thus, like the district court below, the *Notre Dame* majority thought that self-certification was not a "substantial" burden because "[t]he form is two pages long," and "[s]igning the form and mailing it . . . could have taken no more than five minutes." 743 F.3d at 554; *accord* Op. at 6 ("the form itself is innocuous"). That fails to appreciate that whether a particular action makes the plaintiff complicit in providing contraceptive coverage is a religious judgment, not a legal one. *See Notre Dame,* 743 F.3d at 566 (Flaum, J., dissenting) (employer's objection turns not on "legal causation but … religious faith"); *EWTN*, 756 F.3d at 1348 (Pryor, J., concurring). As *Hobby Lobby* teaches, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious and philosophical question" of when it is wrong to "enabl[e] or facilitate[e] the commission of an immoral act by another." 134 S. Ct. at 2778. *Notre Dame* and *Michigan Catholic* did exactly that.

The government urges the Court to water down the substantial burden standard, raising the fear that if courts apply RFRA as written, religious exemption schemes will come tumbling down. Not even its own citations support this outlandish claim. Opp. 30-31. In *Thomas*, the plaintiff left his job after determining that all available alternatives also violated his

beliefs. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710, 101 S. Ct. 1425, 1428 (1981). It was then entirely up to Thomas's employer—not Thomas—whether and how to employ another person to make tank turrets. Likewise, the EEOC guidelines recognize that even under the Title VII standard—which is far more deferential than RFRA—"it would pose an undue hardship to require employees *involuntarily* to substitute for one another," and "if the employer is on notice that the employee's religious beliefs preclude him not only from working on his Sabbath ***but also from inducing others to do so,*** reasonable accommodation requires more than merely permitting the employee to swap."[3] Prior exemption schemes recognize and account for religious objections to obligating and inducing another to sin on one's behalf. [4]

Furthermore, the *Notre Dame* majority's analogy to conscientious

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[3] EEOC Manual, http://www.eeoc.gov/policy/docs/religion.html#_ftnref175.

[4] The analogy to *Bowen* and *Kaemmerling* thus fails. Br. 47-48. *Lyng* is inapposite for the same reason: the government could build on its own property without any participation from the plaintiff tribes. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448, 108 S. Ct. 1319, 1325 (1988).

objectors withstands no scrutiny. *Cf. Notre Dame*, 743 F.3d at 556. Any force behind the analogy stems not from the question of burden, but from the government's compelling need to raise an army. For *Notre Dame*'s analogy to be accurate, an objector would be forced to:

- designate an otherwise ineligible person to take his place,
- authorize the government to draft the person,
- authorize and obligate the person to enlist,
- trigger financial incentives for the person to enlist,
- maintain a continuing relationship with that person to ensure his continued enlistment, and
- seek out and contract with a new substitute should the first substitute quit.

The analogy does not hold up, nor does the rest of the decision's reasoning. The *Notre Dame* and *Michigan Catholic* decisions are based upon legal conclusions since undone by government admissions and binding precedent. Indeed, the government unsuccessfully made *precisely the same argument* to this Court and to the Supreme Court.

EWTN suffers a substantial burden, so the Mandate must face strict scrutiny.

B. The Mandate fails strict scrutiny.

1. The government has no compelling interest.

The government fails to prove that the mandate is compelling as applied to EWTN. Br. 57-62. RFRA requires the Court "to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." *Hobby Lobby*, 134 S. Ct. at 2779.

The government has already admitted it has *no interest* in enforcing the mandate against ministries like EWTN. Br. 59-61. It made a regulatory finding that exempting certain religious organizations "does not undermine the governmental interests furthered by the contraceptive coverage requirement" because their employees are more likely to share their faith. Br. 59 (quoting 78 Fed. Reg. at 39874).[5] And EWTN presented

[5] Nor can the distinction be justified by the constitution's "special solicitude" for religious organizations. Opp.55. Indeed, the premise of the government's claimed "accommodation" is that EWTN *is* a religious

uncontradicted evidence that its employees are also likely to share its faith. Br. 60. In response, the government offers no evidence to explain why this logic applies to some Catholic groups, but not EWTN. *See* Opp. 55.[6] Absent such proof, the government cannot establish a compelling interest here.

Although the government claims that its interests are compelling as applied to EWTN's 350 employees, the Supreme Court explained that "the contraceptive mandate 'presently does not apply to tens of millions of people.'" *Hobby Lobby*, 134 S. Ct. at 2764.[7] Even particularly significant interests are not compelling when the government pursues

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organization. The government offers no support for its unprecedented effort to parcel out this "special solicitude" only to *certain* religious organizations.

[6] To distract from its lack of evidence, the government resorts to scare tactics about intrusive discovery for employees. Opp. 54. This merely illustrates the dangers of government decisions about which religious organizations are sufficiently religious. *See infra* II.B. Since the government faces strict scrutiny, "it bears the risk of uncertainty." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011).

[7] The government claims that grandfathering is "a transition period," but "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

them only some of the time.[8] This rule applies even to critically important interests such as enforcing the nation's drug laws, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433, 126 S. Ct. 1211, 1222 (2006); prison safety, *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013); prevention of animal cruelty, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543-44, 546, 113 S. Ct. 2217, 2232-2234 (1993); traffic safety, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267-68 (11th Cir. 2005); protecting federal buildings, *Tagore v. United States*, 735 F.3d 324, 330-31 (5th Cir. 2013); controlling government costs, *Rich*, 716 F.3d at 533; and, yes, protecting public health, *Lukumi*, 508 U.S. at 544-45, 113 S. Ct. at 2233.[9]

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[8] This Court correctly refuses to find compelling interests in underinclusive laws. *See, e.g., Covenant Christian Ministries, Inc. v. City of Marietta, Ga.*, 654 F.3d 1231, 1246 (11th Cir. 2011) (city could not satisfy strict scrutiny where it permitted "analogous nonreligious conduct"); *Konikov*, 410 F.3d at 1329 (county failed strict scrutiny because it "appl[ied] different standards for religious gatherings and nonreligious gatherings").

[9] The government points to other statutes with grandfather or small business exceptions. Opp. 56-57 & n.11. But none of those is comparable to the sweeping exemption scheme at work here. And none involves a regulatory concession that an exemption for an organization like EWTN "does not undermine the governmental interests."

The government urges the Court to ignore this wealth of precedent and the conclusions from the *Hobby Lobby* opinion—joined in full by five justices—and instead focus on a single line from the concurrence. But that line only reiterates the Court's "assumption" that the mandate generally serves a "legitimate and compelling interest in the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). It says nothing about whether that interest would be compelling as applied "to the person" here—a Catholic media network with undisputedly sincere objections to the particular regulatory scheme.

The government should also be foreclosed from asserting new "compelling" interests for the first time on appeal. The government invokes a new interest, this time in "seamlessly providing contraceptive coverage." Opp. 49.[10] But it offers no evidence to prove that "seamless" coverage rises to the level of compelling interest. This argument fails, for all the reasons discussed below. *See infra* I.B.1. The government also lists several general statements about adverse pregnancy outcomes and

[10] *See* Dkt. 35 at 27 (arguing "the challenged regulations are justified by two compelling governmental interests," in public health and gender equality).

medical costs as alleged compelling interests. Opp. 51-53.[11] But in order to meet the "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S. Ct. 2157, 2171 (1997), the government must demonstrate why the Mandate must be applied *to EWTN*, even while it exempts plans covering millions.

The government attempts to justify its myriad exemptions by relying upon pre-RFRA cases *Lee* and *Bowen*. Opp. 51, 55-57. This merely repackages its failed substantial burden argument claiming that EWTN seeks to control the government's conduct, rather than its own. *See supra* I.A.3.[12] The government complains that it should not have to

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[11] The government relies heavily on the IOM report. But IOM did not make recommendations about "coverage decisions," which "often consider a host of other issues, such as . . . ethical, legal, and social issues; and availability of alternatives." IOM, *Clinical Preventive Services for Women: Closing the Gaps* 6-7 (2011) (IOM Report); *id.* at 2 (HRSA charge).

[12] *Lee* and *Bowen* are not controlling. *Bowen* never applied strict scrutiny. *See Bowen v. Roy*, 476 U.S. 693, 707, 106 S. Ct. 2147, 2156 (1986) ("The test applied in cases like *Wisconsin v. Yoder* is not appropriate in this setting.") (citation omitted). Moreover, under the strict scrutiny prong, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 & n.3.

"fundamentally restructure its operations"—but it was the government that chose to "create entirely new programs," Opp. 50, 60, to apply to a narrow class of religious objectors like EWTN. Its own actions prove its interest cannot be compelling here.

2. The government did not use the least restrictive means.

EWTN identified several less restrictive alternatives to the Mandate. The government offers no *evidence* to prove those means ineffective. The government bears the burden to "*demonstrate*, and not just assert, that the rule at issue is the least restrictive means . . . ." *O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003). The government cannot meet it by relying on "speculative" evidence "based on assumptions that were unsupported by the record." *Rich*, 716 F.3d at 533. The government repeatedly claims that EWTN demands that no "third party" can provide contraceptives to its employees. *See, e.g.*, Opp. 17, 31, 43-44. That is false. EWTN has never objected to truly independent government actions—it objects to its own coerced participation, and to the government's interference in its private health benefit plan and private contract with its TPA. *See supra* pp. 2-11. It has proposed several independent

alternatives, and the government fails to prove that any of them would be ineffective.

EWTN suggested that the government allow employees to obtain subsidized, *comprehensive* policies on the exchanges. Br. 65. The government responds with a non sequitur about *contraceptive-only* policies. Opp. 61. The government thus abandons any argument that it could not offer subsidized, comprehensive policies on the exchanges for any EWTN employees who wished to use them. This is precisely how the government ensures contraceptive coverage to millions of Americans who work for small employers. The government represents to this Court that the small-employer exemption does not undermine its interests because "if employers with fewer than 50 employees do not offer any health coverage, then many of their employees may be able to obtain subsidies to purchase health insurance that covers all essential health benefits including contraceptive benefits." Opp. 57 & n.11. The government selected this means for a large swath of the population, so it cannot claim this means is ineffective.

An exemption for EWTN would affect less than *one-thousandth of one percent* as many people as the small business exception. *Compare* Dkt.

29-9 ¶¶ 21, 58 (EWTN has roughly 350 employees, many of whom share its beliefs) *with Hobby Lobby*, 134 S. Ct. at 2764 (small business exception applies to "34 million workers"). These subsidies are part of an existing system, so the government would not need to create a new program. If the exchanges satisfy the government's interests as to 34 million employees, surely the same exchanges can satisfy the government should an EWTN employee or two want insurance the ministry cannot provide.

The Supreme Court said that "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing" contraceptives directly. *Hobby Lobby*, 134 S. Ct. at 2780. The government does not offer any evidence why this would be ineffective. Opp. 59-60.[13] EWTN proposed doing this through the Title X program. Br. 64. The government argues that Title X is limited to low-income families. Opp. 60. But the statute only requires that "priority will be given" to low-income families; it does not exclude others. 42 U.S.C.A. § 300a-4. Further, the definition of "low income" was set by HHS itself. 42 C.F.R. §

[13] Nor can the government explain why it could not otherwise directly provide contraceptives, or provide tax credits to women who purchase them. Br. 63-67. The government protests that it need not create new programs, Opp. 59-60, but it has already done so here.

59.5(a)(8). HHS presented no evidence that the priority for low-income families would prohibit it from allocating some of the $300 million budget to providing services to an occasional EWTN employee. And if HHS's own regulations are an impediment, it has shown itself more than willing to amend regulations to route coverage to EWTN's employees.

The government also objects to these alternatives on the ground that employees would need to sign up for services. Opp. 60-61. But it points to no evidence that doing so would actually impede its public health goals.[14] When Congress passed RFRA, it stated that "'policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements,'" *Rich*, 716 F.3d at 533 (quoting S. Rep. No. 103–111, at 10, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900).[15]

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[14] The government also relies upon the IOM report for the proposition that women need "seamless[]" coverage. Opp. 59 (citing IOM report at 18-19). But that portion of the report says nothing about contraceptives and focuses entirely on cost, *not* on "seamless" coverage. *See* IOM Report 19. EWTN's suggested alternatives would provide contraceptives at no cost to employees.

[15] The *Hobby Lobby* decision nowhere states that less restrictive alternatives *must* have the features defendants describe, but rather uses the government's statements to illustrate the risks of imposing the penalties and prompting employers to drop coverage altogether. *See Hobby Lobby,* 134 S. Ct. at 2782-83.

The government presents no evidence that signing up for a separate program would deter women from using contraceptives. Even if it had such evidence, it could not explain why this method is insufficient for EWTN's employees, but perfectly fine for 34 million Americans employed by small businesses.[16] Indeed, the government proposed exactly this solution to this Court for EWTN's employees just a few months ago. Defs.' Opp'n to Inj. Pending Appeal 20 n.5 (stating EWTN can "choose to discontinue offering health coverage" and "its employees could purchase health insurance . . . on exchanges where many may qualify for subsidies."). Surely the government does not mean to suggest that purchasing health care on its own exchanges is an ineffective means of furthering its goals.

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

A. The Mandate violates the Free Exercise Clause.

The Supreme Court determined that the Mandate " 'does not apply to tens of millions of people.' " *Hobby Lobby*, 134 S. Ct. at 2764. It cannot be

[16] *See Tagore*, 735 F.3d at 330-31 ("particularly if, as here, the statute includes exceptions," then "the government must produce evidence justifying its specific conclusion.") (citation omitted).

generally applicable. The government has violated the Free Exercise Clause by burdening EWTN while exempting "a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree. . . ." Br. 68 (quoting *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.)).

In response, the government argues that laws are generally applicable if they exempt both religious and non-religious conduct. Opp. 63. But it makes no difference that a religious organization may sometimes take advantage of an exemption granted for secular purposes. Religious clubs like the Elks, Masons, or Boy Scouts could take advantage of the zoning exception for "private clubs and lodge halls" in *Midrash*, but that did not save the zoning ordinance. *See* 366 F.3d at 1220, 1232-33. A religious person with a skin condition might get an exemption from a shaving requirement, but that would not save the regulation in *Fraternal Order of Police v. City of Newark,* 170 F.3d 359, 364-66 (3d Cir. 1999). Religious people who ran a zoo or circus could obtain a permit to keep wild animals,

but that did not save the regulation in *Blackhawk*. *Blackhawk*, 381 F.3d at 205.[17]

Regulations are not generally applicable if the government makes an impermissible "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order*, 170 F.3d at 366. Here, the government has privileged "the interest of employers in avoiding the inconvenience of amending an existing plan," *Hobby Lobby*, 134 S. Ct. at 2780, over a religious employer's interest in religious exercise.[18]

The government also violates the neutrality requirement by facially discriminating among religious organizations. Br. 71-73. The Government repeats the district court's error, stating that the distinctions are presumptively neutral because they track the tax code.

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[17] The government claims *Blackhawk* was limited to regulations imposing "individualized, discretionary exemptions." But those regulations *also* failed general applicability because they created a categorical exemption. *Blackhawk*, 381 F.3d at 209, 211.

[18] The government assumes that its actions do not violate the Free Exercise Clause absent a substantial burden. Opp.50. But even laws imposing insubstantial burdens must be neutral or generally applicable. *See Midrash,* 366 F.3d at 1228, 1232-35 (applying Free Exercise principles after finding no substantial burden); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 849-50 (3d Cir. 1994) (courts should not "[a]pply[] such a burden test to non-neutral government actions . . . .").

D. Ct. Op. at 12. But whether a categorization is acceptable for recordkeeping purposes says nothing about whether the categorization is acceptable for determining who is religious enough to engage in a particular religious practice. *See infra* II.B. *Lukumi* teaches that "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533, 113 S. Ct. at 2227. The regulations have done exactly that, and done it by deeming some religious groups more religious than others.

Finally, the government also tries to distinguish *Lukumi* by citing the egregious circumstances there. Opp. 65. But the unanimous Supreme Court acknowledged that the *Lukumi* "ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543, 113 S. Ct. at 2232. Under *Lukumi* standard, the Mandate must face strict scrutiny.

B. The Mandate violates the Establishment Clause.

The Mandate facially discriminates among religious organizations based on government speculation about the religiosity of the organizations and their employees. Br. 73-74. The government seeks to excuse its discrimination via a theory that the Establishment Clause

bans *only* discrimination among religious denominations, not among religious institutions. Opp. 65-67. But both courts *and the government* reject that cramped view.

Larson v. Valente stated that "explicit and deliberate" governmental discrimination "between different *religious organizations*" was unconstitutional. 456 U.S. 228, 246 n.23, 102 S. Ct. 1673, 1684 n.23 (1982) (emphasis added). Applying *Larson*, the Tenth Circuit rejected the distinction the government makes here, calling it "puzzling and wholly artificial." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). *Weaver* concluded that, regardless of denomination, the law may not "discriminate[] among *religious institutions* on the basis of the pervasiveness or intensity of their belief." *Id.*; *accord Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[D]iscriminat[ion] between kinds of religious schools" based on their level of religious devotion "raise[s] First Amendment concerns."). The Mandate does exactly that.

The Ninth Circuit similarly applied *Larson* to find that Title VII's exception for "religious corporations" must include religious non-profits. *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011). Plaintiffs in

that case argued that the exception should include only churches, but the court rejected this as "potentially run[ning] afoul of the Establishment Clause" because it would "discriminate against religious institutions which 'are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship.'" *Id.* at 728.

The court relied on an amicus brief from the United States which directly contradicts the government's current position against EWTN. Citing *Larson*, the government successfully argued that to "allow houses of worship to engage in religious-based employment practices, but deny equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "create a serious Establishment Clause problem." Brief for *Amicus Curiae* the United States at 11, *Spencer v. World Vision, Inc.*, 2008 WL 5549423 (9th Cir. No. 08-35532); *cf. Hobby Lobby*, 134 S. Ct. at 2794-96 (Ginsburg, J., dissenting) (noting that the Religion Clauses give "special solicitude to the rights of" religious "nonprofit[s]" that "exist to foster the interests of persons subscribing to the same religious faith"). The government was right then and is wrong now.

The government tries to take refuge in its co-opting of 26 U.S.C. § 6033 to separate out the wheat from the tares. Opp. 66. But while § 6033 may be fine for tax reporting purposes, it is—as the government's briefing in *World Vision* indicates—an unfit tool for determining religious exemptions. *Cf. Larson*, 456 U.S. at 246 n.23, 102 S. Ct. at 1684 n.23 (rejecting harmful religious discrimination even when it "result[s] from application of secular criteria"). And the Mandate, unlike § 6033, is *explicitly* based *solely* on government speculation about the religious beliefs of a ministry's employees. *See*, *e.g.*, Dkt. 29-13 at 5. A law that "facially regulate[s] religious issues"—as the Mandate does—"must treat individual religions *and religious institutions* 'without discrimination or preference.'" *Weaver*, 534 F.3d at 1257 (internal quotation omitted) (emphasis added). The Mandate fails this test.

C. The Mandate violates the Free Speech Clause.

Compelled Speech. The government argues that EWTN's speech challenge is moot. But it is "well settled" that even voluntarily repealing a challenged law cannot automatically moot a case. *Ne. Fla. Chapter of the Assoc'd. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656, 662, 113 S. Ct. 2297, 2298 (1993). And the augmentation did not repeal

the speech mandate, but merely changed a few words. EWTN must still speak for a purpose that EWTN cannot: providing the "information necessary . . . to implement" the government's employer-based contraceptive distribution scheme. 79 Fed. Reg. at 51095; *see also* Br. 61-62; Dkt. 29-9 ¶¶ 51-53; Dkt. 29-14 ¶¶ 48-49. Since the augmentation is so "similar" to the original compelled speech that "the challenged conduct continues," *City of Jacksonville*, 508 U.S. at 662 n.3, 113 S. Ct. at 2301 n.3, and since EWTN's arguments are "substantially [un]alter[ed]," this issue is not moot. *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1314-15 (11th Cir. 2000).

As if admitting that fact, both the government's substantive arguments for compelling EWTN's speech mirror what it offered below. First, it argues that the compelled speech is really just about conduct. But the only case it cites, *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 61-63, 126 S. Ct. 1297, 1308-1309 (2006), concerned a regulation that determined what parties "must *do* . . . not what they may or may not *say*." 547 U.S. at 60, 126 S. Ct. at 1307. But here the forced speech is *the* essential act. Such "direct regulation of speech . . . plainly violate[s] the First

Amendment." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, Inc., 133 S. Ct. 2321, 2327 (2013).

Second, the government argues that EWTN can always tell Catholics worldwide that it opposes what the government made it say. But even in funding cases, where government has more latitude to control speech of its contractors, the First Amendment bans the government from forcing such "evident hypocrisy" on speakers. *Id.* at 2331.

Compelled Silence. The only argument the government offers here is mootness. And, indeed, the augmentation removes the regulatory gag rule. 79 Fed. Reg. at 51095. This is a beneficial change that at least partially resulted from this litigation, which means that EWTN has prevailed on its argument against the gag rule as such. *See*, *e.g.*, 10 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2667 (2014). But the augmentation states it is "unlawful" for EWTN to instruct its TPA not to provide contraceptives—without identifying any actual law that makes them so. 79 Fed. Reg. at 51095; *accord* Dkt. 50-3 at 15-16. Thus the new gag rule is worse, since it has no text to guide EWTN's speech or cabin the government's enforcement. *See Beckerman*

v. City of Tupelo, Miss., 664 F.2d 502, 510-11 (5th Cir. 1981) (striking down overbroad, vague laws that chill First Amendment rights).[19]

CONCLUSION

The district court's judgment should be vacated, and entry of partial summary judgment and a permanent injunction directed for EWTN.

Respectfully submitted,

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[19] The government offers no argument on the remaining injunction factors, and thus concedes EWTN is entitled to an injunction if it succeeds on the merits. *See* Br. 83-85.

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CERTIFICATE OF SERVICE

I certify that on October 20, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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