No. 14-12696-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

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

AMICUS BRIEF OF ALABAMA, FLORIDA, AND GEORGIA, AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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IDENTITY OF *AMICI* CURIAE

The *amici* states of Alabama, Florida, and Georgia have an interest in protecting the religious liberty of their citizens. All three states have strong constitutional and statutory protections for religious freedom. *See, e.g.*, Ala. Const. art. I, § 3; Fla. Const art. 1, § 3; Ga. Const. art. 1, § 1, ¶¶ III–IV. These protections reflect the *amici* states' recognition that religious freedom is a fundamental part of our society. The *amici* states have an interest in creating a climate where diverse businesses and nonprofits, helmed by people of various faiths, can thrive and create jobs without compromising their deeply held beliefs.

STATEMENT OF THE ISSUE

Whether the HHS Mandate violates the Religious Freedom Restoration Act (RFRA) to the extent it requires the Eternal Word Television Network ("EWTN") to violate its religious beliefs on threat of millions of dollars in fines?

SUMMARY OF ARGUMENT

The Panel's decision in this case conflicts with the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, ___, 134 S. Ct. 2751, 2767–75 (2014), and similar precedents. The Panel wrongly accepted the government's evaluation of what constitutes a substantial burden instead of relying on EWTN's expressed beliefs. The touchstone for a RFRA claim is the genuineness of religious belief, not its objective reasonableness. Under a proper formulation of the test, the

HHS Mandate substantially burdens EWTN's exercise of religion. The HHS Mandate is also not narrowly tailored to achieve a compelling government interest. There is no need for the government to hijack EWTN's health insurance plan to facilitate access to contraception and sterilization.

ARGUMENT

The Panel misapplied both prongs of RFRA's strict scrutiny test. Under RFRA, the federal government, as a general matter, "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). It may justify such a burden only if the burden "(1) is in furtherance of a compelling governmental interest" and "(2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). At RFRA's first step, the Panel erroneously applied an "objective" test to evaluate the reasonableness of EWTN's belief as part of its inquiry into whether the HHS Mandate imposed a substantial burden. And, at the second step, the Panel applied a watered-down form of review that did not meaningfully hold the government to strict scrutiny.

I. The Panel's substantial burden analysis is inconsistent with *Hobby Lobby*.

The Panel's decision is at odds with binding precedent. Both this Court's precedent and Supreme Court precedent have long dictated that courts should avoid evaluating the reasonableness of religious beliefs. The Panel wrongly relied on

unpersuasive out-of-circuit precedent to disregard EWTN's characterization of its religious beliefs, particularly about moral complicity. Slip Op. at 31.

The Panel's objective evaluation of EWTN's religious beliefs is contrary to the Supreme Court's decision in *Hobby Lobby*. In *Hobby Lobby*, the Supreme Court explained that "exercise of religion" includes "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Hobby Lobby*, 573 U.S. at ___, 134 S. Ct. at 2762 (quoting 42 U.S.C. § 2000cc-5(7)(A)). The Supreme Court did not evaluate the religious plaintiffs' objections for reasonableness. Instead, it recounted the plaintiffs' objections, as explained by the plaintiffs, noting that these beliefs were sincere. *Id.* at ___, 134 S. Ct. at 2775–76. The Court also rejected the argument that dropping health care coverage would solve the plaintiffs' problem, "doubt[ing] that the Congress that enacted RFRA—or, for that matter, [the Affordable Care Act]—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans." *Id.* at ___, 134 S. Ct. at 2777. This reasoning surely applies to a nonprofit ministry like EWTN, established by a cloistered nun to proclaim Catholic teachings, with a professed moral imperative to provide health care to its employees. Doc. 29-9 ¶¶ 6, 63 (Warsaw Declaration).

The Court also rejected the government's argument that the burden was insubstantial because the connection between the religious plaintiffs' conduct and the provision of contraceptive services was "too attenuated." *Hobby Lobby*, 573 U.S. at ___, 134 S. Ct. at 2777. This argument, in the Court's view, "dodges the question that RFRA presents . . . and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at ___, 134 S. Ct. at 2778. The morality of the religious plaintiffs' mandatory involvement in the provision of certain contraceptive services was "a difficult and important question of religion and moral philosophy" that the Court refused to evaluate. *Id.* Because the plaintiffs would be forced to "pay an enormous sum of money" if they refused to comply, the Court concluded that "the mandate clearly imposes a substantial burden on [the plaintiffs'] beliefs." *Id.* at ___, 134 S. Ct. at 2779.

The Court's reasoning in *Hobby Lobby* is consistent with its reasoning in other contexts when a plaintiff alleged that a particular law burdened his or her exercise of religion. For example, in *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051 (1982), the Supreme Court "accept[ed the plaintiff's] contention that both payment and receipt of social security benefits is forbidden by the Amish faith." 455 U.S. at 257, 102 S. Ct. at 1055. The only question was whether the law nonetheless satisfied strict scrutiny—whether the burden was "essential to accomplish an overriding

governmental interest." 455 U.S. at 257, 102 S. Ct. at 1055. Similarly, in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963), the Court concluded that "it is clear" that a plaintiff's disqualification for unemployment benefits as a result of her belief that working on Saturday was immoral "impose[d] a burden on the free exercise of [her] religion," "even though the burden may be characterized as being only indirect." 374 U.S. at 403–04, 83 S. Ct. at 1793–94 (internal quotation marks omitted). Finally, in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 101 S. Ct. 1425 (1981), a steel worker declined employment positions where he would have to fabricate steel turrets for military tanks. 450 U.S. at 710, 101 S. Ct. at 1428. Noting that the worker did not object to producing materials that might later be used in weapons, the Court observed that the worker "drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 711, 715, 101 S. Ct. at 1428, 1430. Relying on *Sherbert*, the Court concluded that the state "put[] substantial pressure" on the worker "to modify his behavior and to violate his beliefs," then proceeded in short order to consider whether the State's interest was compelling and whether its "inroad on religious liberty" was the least restrictive means of furthering that interest. *Id.* at 717–19, 101 S. Ct. at 1431–32. In each of these cases, the Court avoided "tell[ing] the plaintiffs that their beliefs are flawed" and instead accepted the plaintiffs' own view of

religious exercise and morality as a given. *Hobby Lobby*, 573 U.S. at ___, 134 S. Ct. at 2778.

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

Similarly, this Court characterized a burden as incidental, rather than substantial, when two synagogues challenged a zoning ordinance that required them to apply for a conditional use permit. *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1219, 1227–28 (11th Cir. 2004). The synagogues did not allege that their preferred location had religious significance or that requiring congregants to "walk

farther" specifically prevented religious exercise, especially because congregants tended to move closer to synagogues instead of expecting synagogues "to move closer to them." *Id.* at 1228. As a result, the synagogues did not show that compliance with the ordinance violated their religious beliefs.

In light of this body of law, the Panel was wrong to follow the reasoning of other circuits that have held that the mandate does not impose a substantial burden. See Slip Op. at 31. This line of reasoning misses the point of *Hobby Lobby*: courts should not be weighing the merits of a religious belief. As Judge Tjoflat explains in dissent, the Panel's reasoning presages a "Bizarro World" in which "secular courts" must "mak[e] ex cathedra pronouncements" on religious tenets. Slip Op. at 125. The limit of moral complicity is a religious and moral question upon which the federal courts cannot take a position. "[I]t is not for [courts] to say that the line [EWTN] drew was an unreasonable one." *Hobby Lobby*, 573 U.S. at ___, 134 S. Ct. at 2778 (internal quotation marks omitted).

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

Correctly applying *Hobby Lobby* and other binding precedent reveals that the HHS Mandate is a substantial burden. Because completing Form 700 and delivering it to EWTN's third party administrator would violate EWTN's religious beliefs and

because EWTN faces millions of dollars in fines for noncompliance, the government's regulations impose a substantial burden on EWTN.

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

EWTN also believes that executing Form 700 would render it morally complicit in the provision of sterilization and contraception services. Doc. 29-10 ¶ 58–68 (Haas Declaration). In addition to a certification that the signing entity has a religious objection to providing contraceptive coverage, Form 700 states that "[t]he organization or its plan must provide a copy of this certification to the plan's . . . third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement." Doc. 29-11 (Form 700). It also indicates that the "certification is an instrument under which the plan is operated." *Id.* EWTN believes that completing this certification would

be "an immoral act" because "notification [is] provided to the insurance companies that they have to cover the cost of the immoral practices" and "the certificate that is submitted is what brings about these actions and therefore serves as an essential circumstance to the provision of the evil itself to which the employer is objecting[.]" Doc. 29-10 ¶ 65 (Haas Declaration); *see also* Doc. 29-9 ¶¶ 24–65 (Warsaw Declaration).

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

III. The HHS Mandate is not the least restrictive means of furthering the government's interest in facilitating sterilization and contraceptive care.

Finally, the Panel erroneously concluded that the government met its burden to show that the HHS Mandate is the least restrictive means of increasing access to contraception and sterilization. Assuming for the purposes of argument that the government has a compelling interest in providing free contraception and sterilization, *see Hobby Lobby*, 573 U.S. at ___, 134 S. Ct. at 2779–80, it is clear that the government failed to use the least restrictive means to accomplish these ends.

The government could facilitate access to contraception in many ways without substantially burdening EWTN's religious exercise. Congress did not pass a law that required religious employers to provide contraception coverage to their employees. Instead, the decision to require sterilization and contraception coverage came through the regulatory process. *See* 42 U.S.C. § 300gg-13(a)(4). The government also created Form 700 and its attendant requirements through the regulatory process. *See* 78 Fed. Reg. 39870-01. If the government had the authority to establish this scheme by regulation, then it can fix this scheme through the regulatory process as well. This problem is one of the executive branch's own making.

In fact, the government has since admitted in court filings that the HHS Mandate could be modified to provide "contraception coverage seamlessly" and has proposed ways to do precisely that. *See Zubik v. Burwell*, No. 14-1418, Resp'ts

Suppl. Br. at 14–15. The government already exempts churches and their auxiliaries from any requirement to provide sterilization or contraception coverage or to fill out Form 700. 45 C.F.R. § 147.131(a), 26 U.S.C. § 6033(a)(3)(A)(i) & (iii). The government could simply require other "[e]ligible organizations" like EWTN, described in 45 C.F.R. § 147.131(b), to complete a form containing only the certification that appears on the first page of Form 700 and mail that form to the government. Or EWTN could "inform[] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014); *Hobby Lobby*, 573 U.S. at ___, 134 S. Ct. at 2763 n.9; *see also Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, No. 14-12696-CC, 2014 WL 2931940 at *10 (11th Cir. June 30, 2014) (Pryor, J., concurring). The government could also provide tax credits to employees who purchase these services. *See* Doc. 30 at 26 (EWTN Mem. in Supp. of Summary Judgment).

None of these methods, or others suggested by EWTN, ensnare EWTN in what it considers to be immoral conduct. And they are all less restrictive than HHS's more complicated regime for providing free sterilization and contraception. There was no need for the government to hijack EWTN's health insurance plan to increase access to contraception and sterilization.

CONCLUSION

This Court should **GRANT** the petition for rehearing.

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