No. 14-12696

In the United States Court of Appeals for the Eleventh Circuit

ETERNAL WORD TELEVISION NETWORK, INC.,
AN ALABAMA NON-PROFIT CORPORATION

Plaintiff-Appellant,

v.

ALEX AZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEXANDER ACOSTA, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, STEVEN MNUCHIN, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

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

APPELLANT'S UNOPPOSED MOTION TO REMAND AND VACATE

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October 19, 2018

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Eternal Word Television Network, Inc. represent that this entity does not have any parent entities and does not issue stock. Counsel further certifies, to the best of their 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)

Acosta, Alexander

Alabama Physicians for Life (amicus curiae)

Alliance Community for Retirement Living, Inc. (amicus curiae)

Alliance Home of Carlisle, Pennsylvania (amicus curiae)

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

American Bible Society (amicus curiae)

American Civil Liberties Union (amicus curiae)

American Civil Liberties Union of Alabama (amicus curiae)

Americans United for Separation of Church and State

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Association of Christian Schools International (amicus curiae)

Association of Gospel Rescue Missions (amicus curiae)

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Center for Law & Religious Freedom of the Christian Legal Society

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State of Georgia (amicus curiae)

The Most Reverend John Hartmayer

The Most Reverend Wilton D. Gregory

The Roman Catholic Archdiocese of Atlanta

The Roman Catholic Diocese of Savannah

United States Department of Health and Human Services

United States Department of Labor

United States Department of the Treasury

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

PROCEDURAL HISTORY 1

ARGUMENT 4

I. Remand and vacatur are appropriate because the Government can no longer defend its position on appeal. 4

II. Remand and vacatur are appropriate because the parties resolved their dispute at the direction of the courts. 9

CONCLUSION 10

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Page(s)

CASES

California v. HHS,
No. 4:17-cv-5783, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017), No. 18-15144 (9th Cir.) 3

Camreta v. Greene,
563 U.S. 692 (2011) 8

Catholic Benefits Ass'n LCA v. Sebelius,
No. 5:2014-cv-00240 (W.D. Okla.) 3

Colorado Christian Univ. v. U.S. Dep't of Health & Human Servs.,
No. 1:13-cv-02105 (D. Colo.) 3

Eternal Word Television Network v. Sec'y, U.S. Dep't of Health & Human Servs.,
756 F.3d 1339 (11th Cir. 2014) 2

Eternal Word Television Network v. Sec'y of U.S. Dep't of Health & Human Servs.,
818 F.3d 1122 (11th Cir. 2016) 2, 5, 6

Eternal Word Television Network v. Sec'y, U.S. Dep't of Health & Human Servs.,
No. 1:31-cv-521 (S.D. Ala. June 18, 2014) 2

Eternal World Television Network v. Burwell,
26 F. Supp. 3d 1228 (S.D. Ala. 2014) 4-5

Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.,
828 F.3d 1331 (11th Cir. 2016) 10

Pennsylvania v. Trump,
No. 2:17-cv-4540, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017), No. 17-3752, 18-1253 (3d Cir.) 3

Wheaton Coll. v. Burwell,
No. 1:13-cv-08910 (N.D. Ill.) 3

Zubik v. Burwell,
136 S. Ct. 1557 (2016) ..... *passim*

Other Authorities

82 Fed. Reg. 47,792 (Oct. 13, 2017) 2-3, 5, 6

INTRODUCTION

After six years of litigation and four years before this Court, the Government has abandoned and rejected the defenses it used to argue against EWTN's claims. As a result of the Government's 180-degree change of position, the parties have reached an agreement to resolve the remaining issues between them. Therefore, EWTN asks this Court to lift its stay, vacate the decision below, and remand the case so that EWTN may dismiss its remaining claims pursuant to settlement. The Government does not oppose the relief sought in this motion, but does not agree with all of the specific arguments raised by Appellants.

Remand and vacatur are appropriate here. The Government has made concessions, both in regulatory findings and before the Supreme Court in *Zubik v. Burwell*, which undermine the positions the Government previously advanced before the district court and this Court and which now render the Government unable to defend its case on appeal. As a result of that changed position and the Supreme Court's directive in *Zubik*, the parties have resolved the outstanding issues between them.

PROCEDURAL HISTORY

In 2014, the district court entered partial summary judgment in favor of the Government and certified the partial final judgment for appeal.

Eternal Word Television Network v. Sec'y, U.S. Dep't of Health & Human Servs., No. 1:31-cv-521 (S.D. Ala. June 18, 2014), ECF Nos. 65, 66. In light of impending massive fines, EWTN immediately appealed and sought an emergency stay pending appeal, which this Court granted. *Eternal Word Television Network v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014). This Court then heard the appeal and issued a decision affirming the district court. *Eternal Word Television Network v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122 (11th Cir. 2016). That decision was vacated after the Supreme Court's decision in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), and the case was stayed at the request of the parties, subject to monthly status reports. *See* May 31, 2016 Order; Aug. 10, 2016 Order.

During the *Zubik* litigation before the Supreme Court, the Government made admissions to the Supreme Court which contradicted the positions it had maintained before this Court and before the district court. Since that time, the Government has also issued a new Interim Final Rule relevant to the issues in this case. 82 Fed. Reg. 47,792

(Oct. 13, 2017).[1] In the process of issuing that IFR, the government made a number of regulatory findings which further contradict the position it had previously taken in this case. In light of these concessions, the parties continued to discuss an appropriate resolution of this case, and have now arrived at a settlement.

Based upon the Government's admissions and the new developments, EWTN now files this unopposed motion to lift the stay, vacate the partial final judgment below, and remand the case for resolution of its claims.

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[1] That IFR was enjoined by the Eastern District of Pennsylvania, and that injunction is currently on appeal. *See Pennsylvania v. Trump*, No. 2:17-cv-4540, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017), No. 17-3752, 18-1253 (3d Cir.) (pending). The Northern District of California issued a second nationwide injunction, also on APA grounds. *California v. HHS*, No. 4:17-cv-5783, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017), No. 18-15144 (9th Cir.) (pending). Both courts also suggested that their APA rulings should not impact pre-existing litigation such as this case. *Pennsylvania*, 2017 WL 6398465, at *21; *California*, 2017 WL 6524627, at *17. Several other federal courts have likewise disposed of pending HHS Mandate challenges notwithstanding the IFR injunctions. *See, e.g., Colorado Christian Univ. v. U.S. Dep't of Health & Human Servs.,* No. 1:13-cv-02105 (D. Colo.) (permanent injunction issued Jul. 11, 2018); *Wheaton Coll. v. Burwell*, No. 1:13-cv-08910 (N.D. Ill.) (permanent injunction issued Feb. 22, 2018); *Catholic Benefits Ass'n LCA v. Sebelius*, No. 5:2014-cv-00240 (W.D. Okla.) (permanent injunction issued Mar. 7, 2018).

ARGUMENT

Remand and vacatur are appropriate where, as here, the Government is no longer able to defend its case on appeal. This is particularly true given the unusual circumstances of this case, in which the Supreme Court directed the Government and the HHS Mandate challengers to consider alternative approaches.

I. Remand and vacatur are appropriate because the Government can no longer defend its position on appeal.

Since this Court rendered its opinion, the Government has made regulatory findings and factual concessions that undermine the district court's opinion and the Government's arguments to the district court and this Court.

The decision below found that the HHS Mandate did not violate the Religious Freedom Restoration Act because there was no substantial burden on EWTN's religious exercise. Specifically, it accepted the Government's argument that contraceptive coverage was separate and distinct from EWTN's actions, ruling that that "there is a world of difference between a law that compels EWTN to provide contraceptive coverage directly and one in which the government places that burden on someone else after EWTN opts out." *Eternal World Television Network v.*

Burwell, 26 F. Supp. 3d 1228, 1235 (S.D. Ala. 2014). Similarly, this Court likewise accepted the Government's representations, holding that EWTN was not burdened by the "the downstream, separate conduct of HHS and the TPAs to provide coverage." *Eternal Word Television Network*, 818 F.3d at 1150.

This Court likewise accepted the Government's assertions that, even if there was a substantial burden, the HHS Mandate's nonprofit accommodation scheme was justified by its furtherance of a compelling interest in ensuring that "women need not complete extra paperwork or sign up for an additional program." *Id.* at 1153. Finally, this Court accepted the Government's argument that "there are no less restrictive means available that serve the government's interests equally well." *Id.* at 1158.

The Government has since abandoned all three of these positions. In October 2017, the government issued Interim Final Rules (IFR) revising the accommodation at issue in this appeal. 82 Fed. Reg. at 47,792. Citing its prior concessions to the Supreme Court, the government concluded that requiring objecting religious organizations to comply with the mandate "constituted a substantial burden on the religious exercise" of

objecting religious organizations. *Id.* at 47,806, 47,809. Since requiring "compliance through the mandate or accommodation . . . did not serve a compelling interest and was not the least restrictive means of serving a compelling interest," the government concluded that "requiring such compliance led to the violation of RFRA in many instances." *Id.* at 47,806. In order to genuinely accommodate religious organizations' objections, the government expanded the "religious employer" exemption to include "all bona fide religious objectors." *Id.*[2]

These regulatory findings followed the Government's prior admissions before the Supreme Court in *Zubik*. There, after years of claiming the

[2] Although there would be no need to reach the claims because the government has conceded EWTN's arguments under RFRA, these same admissions leave the Government unable to defend its actions under the Free Exercise, Establishment, and Free Speech Clauses. The Government acknowledged in promulgating the IFR that it did so in part to avoid Free Exercise and Establishment Clause problems raised by the prior version of the Mandate. *See* 82 Fed. Reg. at 47,793 (new rules were justified in part by "protection of the free exercise of religion in the First Amendment"); *id.* at 47,801 (acknowledging that the Government could not "adequately explain some of the disparate results of the existing rules" differentiating between churches and other religious ministries, the crux of EWTN's Establishment Clause argument). And its concessions on strict scrutiny undermine its Free Speech defense. *See Eternal Word Television Network,* 818 F.3d at 1166 (resting Free Speech determination on earlier determination that the Government satisfied strict scrutiny).

opposite in the lower courts, the Government conceded in its merits brief to the Supreme Court that contraceptive coverage provided under the "accommodation" actually was "part of the same plan as the coverage provided by the employer." Br. for the Respondents at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (internal quotation marks omitted). In other words, it was neither "downstream" and "separate," as the Government had told this Court that it was.

Second, the Government acknowledged that its interests would be satisfied so long as women had access to a plan with some contraceptive coverage, which they could obtain from many sources, including "a family member's employer," "an Exchange," or "another government program." *Id.* at 65. As the Government put it to the Supreme Court, "*All* of [these] sources would include contraceptive coverage." *Id.* (italics in original). In other words, the Government's interest is satisfied in situations where women sign up for a different program to access contraception.

Third, after years of telling the lower courts that it was already using the least restrictive means possible, the Government told the Supreme Court that its accommodation system actually "could be modified" to avoid forcing religious organizations to execute documents that violate

their faith, while still getting women contraceptives. Suppl. Br. for the Respondents at 14–15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

Given these concessions and regulatory determinations, the Government can no longer defend its prior decisions before this Court and the district court. Thus the district court's decision here has in effect become unreviewable and must be vacated.

The Supreme Court has recognized that the very "point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (citation omitted). In particular, a "legally consequential decision" such as "a constitutional ruling" is "rightly 'strip[ped] . . . of its binding effect" when an appeal becomes moot. *Id.* (citation omitted). Because the Government unilaterally made admissions that undermined its arguments and has forfeited any ability to defend its actions on appeal, this Court will not be able to review the district court's ruling on important constitutional claims. This legal issue could harm EWTN's

interests if, in the future, it must deal with an unreviewable, legally consequential final judgment.

Even prior to the IFRs, this Court acknowledged the importance of the new developments in the case, vacating its own decision and directing additional briefing on how *Zubik* would apply to the self-insured plan at issue here. *See* May 31, 2016 Order at 4. For the same reasons, this Court should now vacate the decision below and remand the case to allow the parties to dispose of the remaining claims.

II. Remand and vacatur are appropriate because the parties resolved their dispute at the direction of the courts.

The Supreme Court in *Zubik v. Burwell* directed the parties to "arrive at an approach going forward" that would meet their concerns, and expressed its expectation "that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them." 136 S. Ct. at 1560. In response to that directive, EWTN and the Government have engaged in discussions and arrived at a settlement agreement which will resolve EWTN's claims.

Now that the parties have settled, vacatur is appropriate. This Court has found that, where settlement was pursuant to mediation ordered by the appellate court, vacatur of the decision below is appropriate after

settlement. *See Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1336 (11th Cir. 2016) (district court abused its decision by refusing to vacate decision after settlement pursuant to court-ordered mediation). Here, the discussions and eventual settlement occurred because the Supreme Court directed the Government and the mandate objectors to consider their significantly clarified views and arrive at an alternative approach. This Court has already acknowledged the unusual circumstances created by *Zubik* in vacating its own prior opinion in this case. *See* May 31, 2016 Order. Given this exceptional circumstance, vacatur of the opinion below is appropriate.

CONCLUSION

Since the Government has abandoned the positions upon which it obtained a judgment below, and upon which it relied in this Court, and because the parties have resolved this matter at the direction of the courts, the proper response is to vacate the decision below and remand the case so that the parties may dispose of the remaining claims.

Therefore EWTN respectfully requests that this Court lift the stay, vacate the decision below, and remand the case so that the parties may dismiss the remaining claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This motion complies with the length limitation of Fed.R.App.P. 27(d)(2) because it contains 2,053 words, excluding the parts of the motion exempted by Fed.R.App.P. 27(d)(2),

2. This motion complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because:

3. This motion has been prepared in a proportionally spaced typeface using "Word 2013" with Century Schoolbook, size 14 font.

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Dated: October 19, 2018

CERTIFICATE OF SERVICE

I certify that on October 19, 2018, I caused the foregoing Motion to be served electronically via the Court's electronic filing system, which then served it upon all counsel of record. All other case participants will be served via the Court's electronic filing system as well.

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