No. 13-1540

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland nonprofit corporation, by themselves and on behalf of all others similarly situated, CHRISTIAN BROTHERS SERVICES, an Illinois non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, 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,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
(No. 1:13-cv-02611-WJM-BNB, Hon. William J. Martinez)

Amicus Curiae Brief of
Concerned Women for America
in Support of Appellants and
Urging Reversal

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Concerned Women for America have no parent corporations or stock which a publicly held corporation can hold.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States with 500,000 members from all 50 states. Through our grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise their religious freedoms protected by the First Amendment.

The Brief is filed with the consent of all parties.

STATEMENT OF COMPLIANCEWITH FED. R. APP. P. 29(c)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

Women have a long history of recognizing the deep value of religious freedom and charitable service. The contribution of so many women of faith to the poor and needy in our country cannot be overestimated. Those contributions are a direct expression of faith that is protected by the Free Exercise Clause of the First Amendment to the United States Constitution. The federal government infringes on that freedom today through a regulatory scheme under the Patient Protection and Affordable Care Act (ACA)[1] that requires that all employees providing private insurance plans to "provide coverage for and … not impos[ing] any cost sharing requirements for . . . preventive care and screenings" for women that includes medicines and procedures that come in direct violation of deeply held religious beliefs of many women. Even when the government recognizes the religious freedom implications, it fails to provide adequate accommodation.

The choice the government presents between violating deeply held religious beliefs or facing crippling fines that would prevent the expression of religious faith through charitable services is no choice at all and presents a most basic violation of the free exercise of religion. The government purports to enforce such violation by alleging compelling reasons that fall short of the clear standard set out by the

[1] Pub. L. No. 111–148, 124 Stat. 119 (2010).

Supreme Court. The numerous exemptions it already allows exposes how unnecessary the government's Mandate really is to the interests it seeks to promote. Indeed the government's interest would be no less advanced if Appellants were to be exempted, as other religious institutions are, than if the government sought other means to advance its goals. Other less restrictive means are clearly available.

ARGUMENT

As an organization representing the interest of a significant group of women, *Amicus* finds it offensive that some requirements in the Patient Protection and Affordable Care Act (ACA)[2] are being used to infringe on the religious liberties of women, while purporting to act for the benefit of women. In relevant parts, the ACA requires the following:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for … with respect to women, such additional preventive care and screenings … as provided for in comprehensive guidelines supported by the Health Resources and Services Administration…

42 U.S.C. § 300gg-13(a). Those guidelines have been interpreted to include all FDA-approved contraceptive and sterilization methods, including abortifacients

[2] *Id.*

such as Plan B and Ella,[3] which millions of religious women consider an affront to the sanctity of human life. Noncompliance with these regulations is met with steep penalties.[4] The government's supposed "accommodation," through the Employee Benefit Security Administration's (EBSA) form 700,[5] fails to address the religious freedom implications involved in this manner, but merely shifts them, while still burdening women of faith.

Though this Mandate has been promoted as benefiting women, it cannot escape this Court that the *women* of the Little Sisters of the Poor lead the charge against this violation of our constitutional guarantee of the free exercise of religion. And *Amicus*, Concerned Women for America, representing thousands of women around the country, stand boldly with them against this affront to one of our most cherished constitutional rights in the name of "women's rights."

I. WOMEN VALUE RELIGIOUS FREEDOM AND CHARITABLE SERVICE.

Women have a long history of fighting for religious liberty. The Anne Hutchinson Memorial at the Massachusetts State House stands as a reminder of a time in our history when women could be marginalized because of their deeply

[3] 77 Fed. Reg. 8725 (Feb. 15, 2012).
[4] *See* 26 U.S.C. § 4980D(a), (b)(1) and § 4980H(a), (c).
[5] Employee Benefit Security Administration Form 700 is available, through the United States Department of Labor, at http://www.dol.gov/ebsa/pdf/preventiveserviceseligible organizationcertificationform.pdf (last visited March 2, 2014).

held religious views. It is sad that the government's actions in this case remind us of that history. Hutchinson was tried and banished from the Massachusetts Bay Colony in 1637 because of her religious views.[6] The inscription in the marble foundation of her monument reads in part: "In Memory of Anne Marbury Hutchinson … Courageous Exponent of Civil Liberty and Religious Toleration."[7] She was punished for her religious beliefs then, and ironically, today the government threatens a different punishment, but a punishment nonetheless, to the women of the Little Sisters of the Poor if they faithfully adhere to their religious beliefs.

St. Elizabeth Ann Seton, the first person born in the United States to become a canonized as a saint (September 14, 1975), also had to stand by her religious convictions in a less than free environment.[8] Biographer Julie Walters recounts a time when Anti-Catholic mobs would stand outside the doors of the church yelling things like, "We're going to burn this unholy place to the ground."[9] But Seaton overcame all that and went on to found the Sisters of the Charity of St. Joseph's, the first new community for religious women in the US. She began the first free

[6] Melina Mangal, *Anne Hutchinson: Religious Reformer*, 7, Capstone Press (2004).
[7] Pictures and description *available at* http://www.dcmemorials.com/index_indiv0008064.htm (last visited March 2, 2014).
[8] *See* The National Shrine of Saint Elizabeth Ann Seton, *available at* http://www.setonshrine.org (last visited March 2, 2014).
[9] Julie Waters, *Elizabeth Ann Seton: Saint for a New Nation*, 71, Paulist Press (2002).

Catholic school for girls in the United States, St. Joseph's Academy and Free School, and her life-time commitment to charity is still celebrated today.[10]

These stories are a reminder of that highest of principles enshrined in our great Constitution, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. This Court should not lose sight that it is religion—faith—which fueled these women's passion for charity. It was faith that fueled Evangeline Booth (1865–1950), daughter of Salvation Army founders William and Catherine Booth. She became commander of the Salvation Army in America and the first general of the International Salvation Army.[11] All the incredible charitable work done by the Salvation Army throughout the years is "rooted in the faith of its members."[12]

Those are just a few names, but many more exist. Women like Isabella Graham who established the Society for the Relief of Poor Widows With Small Children[13] and Phoebe Palmer who founded the Five Point Mission to provide for

[10] *See* Biography of St. Elizabeth Ann Seton *available at* http://www.setonheritage.org/learn-and-explore/resources/mother-seton-bio/ (last visited March 2, 2014).
[11] Edward T. James, Janet Wilson James, Paul S. Boyer, eds. *Notable American Women, 1607-1950: A Biographical Dictionary,* Vol. 2, 206, Harvard University Press (1971).
[12] Salvation Army International Statement on Faith, *available at* http://www.salvationarmy.org/ihq/faith (last visited Feb. 28, 2014).
[13] Dorothy A. Mays, *Women in Early America: Struggle, Survival, and Freedom in a New World*, p. 165, ABC-CLIO, Inc. (2004).

the needy.[14] That same spirit of faith and charity is the reason the Little Sisters of the Poor do what they do today. The government's actions in this case threaten to stifle that historical tradition of religious expression through charity by imposing a substantial and unnecessary burden on their ability to serve the needy. The government is prepared to force them to abandon their religious calling if they are not willing to do what their conscience prohibits them to do. If this Court does not guard women's freedom in this most intimate of areas, between a woman and her God, American women shall be at risk of losing their freedoms in any number of other areas that are perhaps cherished more by other women groups.

Women are not a monolithic group of people placing similar values in all areas of life, including faith or reproductive rights. But they should all be treated equally and with respect and dignity. The government distorts the facts when it argues that it is acting on behalf of "women" by imposing this Mandate. *Amicus* urges this Court to reject any urgency to simplify the values of women by taking the singular view of a few and imposing it by force of law on all.

Thirty five years ago, Beverly LaHaye founded Concerned Women for America (CWA) precisely for this reason. She wanted to make sure women of faith had a voice in legal and public matters where she felt a particular view was

[14] Richard Wheatle, *The Life and Letters of Mrs. Phoebe Palmer*, 224, W.C. Palmer, Jr. (1876).

being presented consistently as the views of all women. Today CWA enjoys wide support, becoming a powerful voice on behalf of women of faith all over the nation. Throughout the years, CWA has stood in representation of women's religious liberties in the culture, legislatures and the courts.[15] In a similar way, *Amicus* comes before this Honorable Court today asking that the views of women of faith not be made subservient to the views of other groups of women who may not share our values.

II. RELIGIOUS CHARITY IS AN EXPRESSION OF FAITH PROTECTED BY THE FIRST AMENDMENT.

The government recognizes that there is a significant infringement upon religious liberties with the Mandate. The existence of a "true" exemption, without the burden of authorizing a third party through EBSA form 700, which the government has made available to churches and "integrated auxiliaries" proves that. *See* 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). Why does the government insist on denying that same protection to the Little Sisters of the Poor? Its argument on this issue amounts to saying that the Little Sisters of the Poor are not "religious enough" to warrant a true religious exemption. But such an assertion is demonstrably false. The Little Sisters of the

[15] *See Concerned Women for America Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) as an example, where the court held the use of public library by women's religious group would not violate the establishment clause; also *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, (2nd 1991), among others.

Poor's commitment to their faith is as great as that of any church. Their vision is "to contribute to the Culture of Life by nurturing communities where each person is valued, the solidarity of the human family and the wisdom of age are celebrated, and the compassionate love of Christ is shared with all."[16] Sharing the love of Christ can summarize the mission of any number of churches. But the sisters' commitment goes further. They disregarded worldly comforts, taking vows of poverty, chastity, obedience and hospitality, in order to serve their Lord and their neighbors.[17] Any reasonable observer can see that these sisters are as worthy as any church of being respected in their religious beliefs.

But even beyond that, it is not the government's role to second-guess religious organizations as to their religious practices. The government engages in an unconstitutional revisionism of what religious expression is supposed to look like. It views charity work and service to the elderly poor in this case, which is central to the Christian faith,[18] as a lesser form of religious work. As the Supreme Court said recently in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 707 (2012), "the state infringes the Free Exercise Clause,

[16] *See* Little Sisters of the Poor Mission, Vision and Values 2012, *available at* http://www.littlesistersofthepoor.org/ourmission/misison-statement (last visited on Feb. 28, 2014).
[17] *See* Vowed life—one heart, one soul with Jesus, *available at* http://www.littlesistersofthepoor.org/ourlife/vowedlife (last visited on Feb. 28, 2014).
[18] *See* James 1:27, Luke 14:12-14; Isaiah 58:10; Leviticus 19:32, among many others.

which protects a religious group's right to shape its own faith and mission…."

For many Christians, service to our neighbors is perhaps the highest form of worship and for the state to second guess those beliefs is as big an offense to the basic principles of the First Amendment as could ever occur. The Supreme Court has said that "beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 713 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972)). The Court said that, "determination of what is a 'religious' belief or practice … is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. Yet that is exactly what the government is doing and asks this Court to do in this instance. The government substitutes its perception of the Little Sisters of the Poor's deeply held religious beliefs and makes demands it considers reasonable based on its own assumptions.

III. THE GOVERNMENT MANDATE VIOLATES THE FIRST AMENDMENT AND RFRA BY PLACING A SUBSTANTIAL BURDEN ON THE FREE EXERCISE OF RELIGION.

Women of faith should not be put in a position in which the government

uses the law to force them to violate their deeply held religious beliefs. Both the First Amendment to the United States Constitution and the Religious Freedom Restoration Act (RFRA)[19] were enacted to guard against such an infringement. In this case, however, the government tells the Little Sisters of the Poor they must violate their conscience or face crippling fines. For some religious people, government is forcing them to violate their deeply held religious beliefs no matter what because the Christian faith also requires us to obey our governmental authorities.[20]

Either way, the choice is no choice at all. The Supreme Court clarifies the false choice:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S at 713. In this case, the government conditions the benefit of an exemption from a requirement that violates religious liberty upon a form that itself is in direct violation of the religious beliefs of the Appellants. Granting relief from religious liberty violation by requiring conduct that is in itself a violation of

[19] 42 U.S.C. § 2000bb - 42 U.S.C. § 2000bb-4.
[20] *See* Romans 13:1-7.

religious liberty is no relief at all.

The government's Mandate even fails to take refuge under the guise of being neutral and generally applicable. Although the Supreme Court has recognized that neutral laws of general applicability usually do not give raise to free exercise concerns,[21] the government's underinclusion by extending such a broad range of exemptions exposes the unconstitutionality of the law, as was the case in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). We have already mentioned that churches and their auxiliaries get an exemption without filing EBSA form 700. Employers who provide "grandfathered" plans are also exempt from the Mandate and do not have to file EBSA form 700. And small businesses with fewer than fifty employees also escape the government's grasp, since they can avoid providing insurance in the first place. Having offered so many exemptions, it is inconsistent for the government to now come before this Court arguing that the violation of the Little Sisters of the Poor's constitutional rights is necessary to accomplish its stated interest.

IV. THE GOVERNMENT VIOLATES RELIGIOUS FREEDOM FOR NO COMPELLING REASON.

Failing the neutral and general applicability test puts the government in a

[21] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

precarious position. The state must show that it is using the least restrictive means of achieving a compelling state interest with this Mandate. "[I]f a law that burdens a religious practice or belief is not neutral or generally applicable, it is subject to strict scrutiny, and 'the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.'" *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (citing *Lukumi*, 508 U.S. at 531). On this, it fails plainly.

A compelling government interest requires a "high degree of necessity." *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2741 (2011). "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215. But no such evidence has been presented in this case, aside from the government's assertion of the general public welfare. Its "gender equality" language is so loose that, if this Court were to accept it, the government could justify almost anything it believes will help some women in some way, regardless of its infringement on the free exercise of religion. Precedent, on the other hand, demands the government "identify an 'actual problem' in need of solving, and the curtailment of [the right infringed] must be actually necessary to the solution." *Brown*, 131 S.Ct. at 2738 (citations omitted). There is no evidence in this case that infringing the religious

freedoms of the Little Sisters of the Poor and similarly situated organizations is necessary to advance "gender equality" and "public health."

Again, "a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted). And as *Amicus* argues, the government's stated interests in this case are so broad they fit almost any action in the name of general public health. To put it another way, Appellants could be exempted as churches are and the government's interest would be no less advanced than it would be if the Little Sisters of the Poor are compelled to violate their religious beliefs through this Mandate.

The government has many options at its disposal in order to increase access to free contraception without imposing this heavy burden on the free exercise of religion. In fact, a public option, for example, is preferred by many of the proponents of the ACA.[22] With half as much creativity as the government has shown through this regulatory scheme, it could come up with tax incentives to accomplish just as much, and perhaps more, of what it seeks today, since it could be including the millions it exempts through current regulation. There is simply no reasonable, let alone compelling, justification for the burden the government seeks

[22] *See* Public Option Deficit Reduction Act, H.R.261, 113th Cong. (2013), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d113:hr261: (last visited March 2, 2014).

to levy on the shoulders of the Little Sisters of the Poor and other Appellants.

CONCLUSION

Appellants should qualify for a full religious exemption, as do churches and "integrated auxiliaries," from the provisions imposed in 42 U.S.C. § 300gg-13(a). For the government to use the force of law to obligate the Little Sisters of the Poor to violate their consciences is a gross violation of the constitutional right to the Free Exercise of Religion guaranteed by the First Amendment. The consequences of such a burden on women of faith especially are of grave concern to *Amicus*, considering our country's rich history of women of faith serving the poor and needy through charitable service. This Court should grant an injunction against Appellees preventing enforcement or assessment of penalties and fines against Appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 3,105 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word counting function of Microsoft Word 2007.

2. This brief 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 this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14 Times New Roman.

Dated: March 3, 2014

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CERTIFICATION OF DIGITAL SUBMISSIONS

I, Steven W. Fitschen, hereby certify that:

(1) all required privacy redactions have been made,

(2) with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (the virus scanning component of AVG Internet Security 2014, updated on March 3, 2014) and, according to the program, are free of viruses.

Dated: March 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I electronically filed the attached Brief *Amicus Curiae* of Concerned Women for America in the case of *Little Sisters of the Poor, Denver, Colorado, et al., v. Sebelius, et al*, No. 13-1540, with the clerk of the court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served via that system.

On March 4, 2014, seven paper copies of the Brief will be deposited with Federal Express for delivery to the Court the next day.

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