No. 13-1540

IN THE 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 non-profit corporation, by themselves and on behalf of all others similarly situated, CHRISTIAN BROTHERS SERVICES, an Illinois nonprofit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs- Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the 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,
Civil Action No. 1:13-cv-02611-WMJ-BNB
Judge William J. Martinez

BRIEF FOR LIBERTY, LIFE, AND LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

DEBORAH J. DEWART
Liberty, Life, and Law Foundation
620 E. Sabiston Drive
Swansboro, NC 28584-9674
Telephone: (910) 326-4554
Facsimile: (877) 326-4585
debcpalaw@earthlink.net

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae, Liberty, Life, and Law Foundation, is a nonprofit corporation that has no parent corporation and is not a publicly held corporation.

DATED: March 3, 2014

/s/Deborah J. Dewart
Deborah J. Dewart
Counsel for *Amicus Curiae*
Liberty, Life, and Law Foundation

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and related threats to liberty. The HHS Mandate at issue tramples the conscience of a multitude of Americans by requiring them to finance drugs and services contrary to their most cherished religious beliefs.

AUTHORITY TO FILE *AMICUS* BRIEF

Amicus curiae has obtained written consent from all parties to file this brief. Fed. R. App. P. 29(a).

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Counsel for *amicus* authored this brief in whole. No party of party's counsel authored this brief in any respect, and no person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees religious liberty to individuals and certainly to organizations

organized exclusively for religious purposes. Little Sisters is the epitome of a religious organization.

But now, the Affordable Care Act imposes crippling financial penalties unless Little Sisters executes a form (EBSA Form 700) that will trigger inclusion of *free access* to contraceptive drugs and related services in its employee health insurance (the "Mandate")—in direct conflict with the religious faith that motivates its mission. 42 U.S.C. § 300gg-13(a)(4). This Mandate is a frontal assault on liberties Americans have treasured for over 200 years—liberties no religious organization can be required to sacrifice as a condition for operation.

Some supporters of the Mandate reframe the issue by arguing that failure to comply constitutes "discrimination" against women.[1] This argument lacks coherence in light of the Government's assertion that signing the form would be a "meaningless exercise." App.Op.Br. 5. Little Sisters disagrees about the impact of the form—but supporters of the *Government's* position are making an argument that assumes the form would facilitate greater access to contraception. If the form is indeed meaningless, then signing it does nothing to achieve the government's alleged interest in gender equality—or any other purpose.

[1] The American Civil Liberties Union has made such arguments in amicus briefs in many of the HHS Mandate cases.

ARGUMENT

I. OPERATING A RELIGIOUS MINISTRY IN ACCORDANCE WITH RELIGIOUS DOCTRINE IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION THE CONSTITUTION PROHIBITS.

The heart of this case is liberty of conscience—not discrimination. The American legal system has traditionally respected conscience, as illustrated by exemptions granting relief from the moral dilemma created by mandatory military service. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to crush the conscience of its citizens. But that is exactly what the Mandate does, breeding a nation of persons who lack *conscience*. Even religious

organizations must set aside conscience. The sheer number of lawsuits testifies to the gravity of the matter.[2]

Many state constitutions protect liberty of conscience. "Deeply rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993) (ruling in favor of deli owner who refused delivery to abortion clinic). Freedom of conscience is even broader than the "free exercise of religion" the First Amendment explicitly protects. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990).

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: The Mandate requires even religious entities to violate their core faith by financing activities they believe

[2] Ninety-three (93) cases have been filed per "HHS Mandate Information Central." See http://www.becketfund.org/hhsinformationcentral/ (last visited 02/27/14).

are immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

A. Courts Have Long Respected The Conscience Rights Of Both Patients And Health Care Professionals.

There is a long history of respect for the conscience and moral autonomy of both patients and health care professionals. Women may have a legal right to contraception and abortion, but "to demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients." J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002).

After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that "[n]othing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 627-628 (2006). Almost every state has enacted conscience clause legislation. Courtney Miller, Note: *Reflections on Protecting Conscience for Health Care*

Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations, 15 S. Cal. Rev. L. & Social Justice 327, 331 (2006).

B. Like Many Successful Free Exercise Cases, This Case Involves *Conscientious Objectors*—Not Civil Disobedience.

Prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), many winning cases involve conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States*, 328 U.S. 61 (1946); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (education). Losing cases often involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith*, 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

Conscientious objector claims are "very close to the core of religious liberty." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 565, 611, 615-616. Religious ministries should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety.

This Court's decision has broad ramifications for the myriad of situations where legal mandates invade conscience. In light of the high value courts, legislatures, and constitutions have historically assigned to conscience, it is imperative to protect private employers who decline to finance morally objectionable medical services.

II. AN EMPLOYER'S REFUSAL TO FINANCE CONTRACEPTION IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION THE CONSTITUTION PROHIBITS.

Modern anti-discrimination principles have expanded over the years, increasing the potential to encroach on religious liberty:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Little Sisters challenges only a fraction of the required "comprehensive package." *Tyndale House Publ'rs, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 127 n. 17

(D.D.C. November 16, 2012). Most services unique to women are not morally objectionable—childbirth, prenatal care, mammograms, pap smears, breast or cervical cancer treatments.[3] Seen against the backdrop of common law principles and the First Amendment, Little Sisters is not engaged in unlawful discrimination.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Antidiscrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). But Massachusetts broadened the scope, adding more protected categories and places. *Id*. at 571-572. The same trend was apparent in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations—increasing the potential for collision with the First Amendment. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Protection also expanded, adding criteria such as criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656 n. 2.

[3] Although these services are not mandated, religious employers' willingness to provide them indicates they are not engaged in discrimination against women.

Similarly, the predecessor to California's Unruh Act (Cal. Civ. Code § 51), enacted in 1897 to codify common law doctrines, originally encompassed "inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement." Stats. 1897, ch. 108, p. 137, § 1, cited in *In re Cox*, 474 P.2d 992, 996 (Cal. 1970). The Act expanded over the years, adding public conveyances (Stats. 1919, ch. 210, p. 309, § 1) and places serving ice cream or soft drinks (Stats. 1923, ch. 235, p. 485, § 1). What the Act clearly forbids is the "irrational, arbitrary, or unreasonable discrimination" prohibited by the Equal Protection Clause. *In re Cox*, 474 P.2d at 999. Discrimination is "arbitrary" where an entire class of persons is excluded without justification. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982). But it is hardly "arbitrary" to avoid promoting a cause. *Hurley*, 515 U.S. 557 (parade organizers could not be compelled to grant access to an organization promoting a cause they did not support). When Unruh Act amendments were considered in 1974, the Legislative Counsel cautioned that "a construction of the act that would prohibit discrimination on any of the grounds enumerated therein *whether or not such action was arbitrary* would lead to *absurd results*." *Isbister v. Boys Club of Santa Cruz*, 707 P.2d 212, 222 (Cal. 1985) (emphasis added).

The Supreme Court has rightly upheld civil rights legislation intended to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v.*

United States, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Political power can be used to squeeze religious views out of public debate about controversial social issues. *Id*. at 188.

The clash between anti-discrimination principles and the First Amendment is particularly volatile when a morally controversial practice is protected and religious groups are swept within the ambit of the law. Government has no right to legislate a particular view of sexual morality and compel religious persons to facilitate it. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that shape the daily lives of individuals and religious organizations.

The clash between non-discrimination rights and religious liberty "places a complex legal question involving competing societal values squarely before the courts." *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 887. When the

D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Non-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty. *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and nondiscrimination principles emerges in many contexts. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 224-225. Employers may find themselves in a conundrum—protecting one group of employees while alienating another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But even if private sexual conduct is legally protected from government intrusion, that protection does not trump the First Amendment rights of those who cannot conscientiously endorse it—*let alone finance it.*

B. Many Decisions Necessitate Selection Criteria.

Discrimination may or may not be invidious, depending on the context and identity of the one who discriminates. Employers "discriminate" when they select

employees from a pool of applicants. Students experience "discrimination"—admissions, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Where selection criteria are truly irrelevant, protection is reasonable. But it is impossible to eradicate all discrimination.

C. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Action motivated by conscience and faith is not the invidious discrimination the Constitution prohibits. The law may proscribe the refusal to conduct business with an entire group based on personal animosity or stereotypes. But the First Amendment demands that courts seriously consider religious motivation. In the unemployment cases, the Supreme Court warned that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Similarly, this Court would exhibit hostility toward religion by equating Little Sisters' religious objections to the Mandate with unlawful "discrimination."

Motivation is a key factor. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet

refuses treatment based on religious convictions, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. But the same act—premeditated with malice aforethought—is first degree murder. Only the latter warrants legal consequences.

D. A Narrowly Crafted Exemption Would Not Constitute The Arbitrary, Unreasonable Discrimination The Constitution Rightly Prohibits.

This case involves no allegations that Little Sisters discriminates against women in hiring, compensation, or other policies. But they cannot comply with the Mandate without sacrificing allegiance to their core convictions. General anti-discrimination principles should not be applied so expansively as to eviscerate First Amendment rights. The Mandate extends far beyond the "meal at the inn" promised by common law and encroaches on a religious organization's right to conduct its mission according to its faith. When the Supreme Court rejected a 400-member dining club's challenge to a state anti-discrimination law, it recognized an expressive association's right to exclude members who disagree with the group's views. What the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). Plaintiffs use no

"shorthand" to discriminate against women—rather, they object to funding a narrow range of morally objectionable services.

E. Contraception Is A Gender-Neutral Term.

When the Eighth Circuit considered gender discrimination for purposes of Title VII, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C.S. §2000e(k), the Court concluded that contraception is gender-neutral. Title VII generally precludes employment decisions based on gender. *In re Union Pac. R.R. Emp't Practices Litig.*,479 F.3d 936, 944 (8th Cir. 2007). But where "an employer's action is not based on a sex classification, it is not a sex-based violation of Title VII. *See Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997)." *Id*. Moreover, contraception, like infertility, is "not a gender-specific term." *Id*. at 942; *see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers...[it] is gender-neutral"). Little Sisters' refusal to facilitate contraception is based solely on its religious doctrine—not the sex of any employee.

III. THE RIGHT TO ACCESS CONTRACEPTION DOES NOT JUSTIFY COERCED FUNDING BY UNWILLING PRIVATE EMPLOYERS.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. 624. The government has no power to force a *speaker* to support or oppose a

particular viewpoint. *Hurley*, 515 U.S. at 575. Religious liberty collapses when secular ideologies employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 186-188.

The Mandate grates against the Constitution, essentially banning religious believers—and even organizations—from full participation in society. It is tantamount to a statement that "no religious believers who refuse to [finance contraception] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. The Mandate's crippling financial penalties threaten to shut down organizations like Little Sisters.

Pregnant women may have a legal right to abortion, but they have no corollary right to draft their employers as unwilling accomplices who must pay for it. In the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court left intact Georgia's statutory protections for health care workers who object to participating in abortions. *Doe v. Bolton*, 410 U.S. 179, 205 (1973) (quoting Ga. Crim. Code § 26-1202(e) (1968)). The Mandate compels a private employer to become a "de facto accomplice" to a morally objectionable agenda. In this "clash of autonomies," private employers are entitled to equal protection of their "right to choose." *Reflections on Protecting Conscience for Health Care Providers*, 15 S. Cal. Rev. L. & Social Justice at 340-341, 344.

A. Abortion Is A Highly Controversial, Divisive Issue.

Americans on both sides of the abortion debate are equally entitled to constitutional protection for their respective positions. The government itself may adopt a position, but it departs from the Constitution when it compels private employers to finance morally objectionable services contrary to conscience. Reproductive rights do not trump the inalienable First Amendment rights of citizens who cannot in good conscience support—let alone finance—those rights. Abortion is too controversial to justify this severe intrusion on liberty of conscience.

Many deeply religious people view abortion as fundamentally wrong. Concerned citizens across the country have enacted regulations, including informed consent, parental notice, and waiting periods. The ensuing legal challenges are legion. But the very enactment of such restrictions is evidence that Americans are profoundly troubled and deeply divided.

Even if this case truly involved sex discrimination, the contentious nature of abortion distinguishes this case from *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (tax-exempt status denied to racially discriminatory school). Charitable activities must not be "contrary to settled public policy" (*id*. at 585)—and there is a "firm national policy to prohibit racial segregation and discrimination in public education" (*id*. at 593). That policy justified denial of charitable status to a racially

discriminatory institution. There is no comparable policy favoring abortion rights—but rather intense division and passion as the debate rages on.

B. Religious Freedom Is Our *First* Liberty—It Should Not Be Dismantled To Coerce Private Funding Of Abortion Rights.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. The Supreme Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden access to contraception. Religious organizations have not forfeited their right to pursue ministry in a manner consistent with their faith.

C. No Person Has A Constitutional Right To *Free* Contraception. Accommodation Of A Private Employer's Conscience Does Not Threaten Any Employee's Rights.

An employer does not impose its religion on employees merely by declining to finance contraceptives. The Mandate requires the employer to facilitate *free* access to morally objectionable services. No private party is obligated to facilitate or fund another party's rights. Employees are free to use contraception—what they cannot do is compel their *employers* to pay for it. An employer pays for an employee's time and services. It does not monitor—let alone endorse—every purchase the *employee* decides to make.

Even the government is not obligated to finance contraception/abortion. The state may prefer childbirth and allocate resources accordingly. *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). The government has "no affirmative duty to 'commit any resources to facilitating abortions.'" *Id.*, quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989); *see Bowen v. Kendrick*, 487 U.S. 589, 596-597 (1988) (the Adolescent Family Life Act restricts funding to "programs or projects which do not provide abortions or abortion counseling or referral"). The government's sole obligation is not to impose "undue interference." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). Accommodation of a private employer's conscience imposes

no burden on any employee's rights—but the Mandate does impose "undue interference" on the employer's rights.

Some advocates argue that courts must balance conflicting interests and not necessarily accommodate religion where the rights of third parties are detrimentally affected. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 525, 565 (2004); *Catholic Charities of Diocese of Albany v. Seri*, 7 N.Y.3d 510, 518 (N.Y. 2006) (same). Some earlier free exercise cases did not implicate third party rights, so it was unnecessary to balance rights. *Sherbert v. Verner*, 374 U.S. 398 (unemployment); *Wisconsin v. Yoder*, 406 U.S. 205 (parental rights to educate children). In other cases, courts have denied religious exemptions where accommodation would endanger minor children and/or community health. *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (child labor); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Walker v. Superior Court*, 47 Cal.3d 112 (1988) (parental failure to seek medical treatment for child). In these cases, the restriction on religious liberty was narrow and the religious conduct "invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403. In other cases, courts have balanced conflicting rights. Sometimes the nature and extent of infringement on the relevant rights is a key factor in the outcome. The Jaycees and Rotary lost free association claims because they could not show

that admitting female members would actually hinder their organizational expression. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

More recently, First Amendment rights to free association have trumped statutory anti-discrimination rights. *Hurley*, 515 U.S. 557; *Boy Scouts of Am. v. Dale*, 530 U.S. 640. This Court cannot brush aside Plaintiffs' conscientious objections to the Mandate without flouting these precedents. Protection of reproductive rights does not justify compelling a religious mission to disregard its core convictions when operating ministry—or risk financial ruin. That is particularly true in the absence of any employee's right to free contraception financed by her employer.

D. Other Cases Limiting Religious Freedom In The Commercial Sphere Left The Objector With A Viable Choice. The HHS Mandate Does Not.

Cases involving comparable legal mandates provide some avenue of escape:

- Religious charities required to include contraception in their prescription drug plan could discontinue drug coverage:
    - *Catholic Charities of Sacramento*, 32 Cal. 4th at 540 ("[T]he WCEA implicitly permits any employer to avoid covering contraceptives by not offering coverage for prescription drugs.);

- *Catholic Charities of Diocese of Albany*, 7 N.Y.3d at 527 ("WHWA does not literally *compel* them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. ")

- The Ninth Circuit suggested that a religious school could discontinue its employee health insurance program altogether in order to comply with its religious conviction that only male employees should be offered this benefit. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).
- A religious school offering supplemental pay to heads of household could discontinue the program and maintain lower salaries for all employees. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).
- A religious school could continue to operate, but without the benefits of tax-exempt status. *Bob Jones Univ. v. United States*, 461 U.S. at 603-604 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.")
- Students who objected to using mandatory registration fees for student health insurance covering abortion could presumably enroll in another

institution. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Erzinger v. Regents of Univ. of Cal.*, 137 Cal. App. 3d 389 (Cal. Ct. App. 1982).

These "solutions" are counter-productive and harmful, restricting access to goods and services. Elimination of medical insurances harms *all* employees, including the women who desired contraceptive coverage in the *Catholic Charities* cases and the female employees in *Fremont Christian School*. But these alternatives—undesirable as they are—pale in comparison to the draconian HHS Mandate, which leaves larger employers with virtually no escape hatch.

IV. THE GOVERNMENT DISCRIMINATES AGAINST EMPLOYERS WHO HOLD CONSCIENTIOUS OBJECTIONS TO CONTRACEPTION.

There *is* discrimination lurking in the shadows of this cases—not discrimination against *women*, but the government's blatant discrimination against religion. The Mandate's onerous financial penalties threaten the existence of employers who cannot in good conscience comply. But "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs...." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). A citizen may not be excluded from a profession by unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) (attorney); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor). ***This is itself a form of discrimination***. It is equally unconstitutional to jeopardize the continued existence of a religious organization.

This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

A. Even In The Commercial Sphere, Believers Do Not Forfeit Their Constitutional Rights.

The Mandate discriminates against people of faith by effectively squeezing them out of full participation in civic life. *Lessons From Pharaoh*, 39 Creighton L. Rev. at 561-563. Religion does not end where daily business begins. If religion is shoved to the private fringes of life, constitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Moreover, morality necessarily intersects the public realm. Religious organizations should be free to operate with the same level of honesty and integrity that customers expect when they transact business with for-profit entities.

B. Free Exercise Cases Commonly Arise In The Context Of Commercial Activity.

The state actively regulates commerce but has minimal control over the internal affairs of religious entities. Conflicts between religion and regulation typically occur in commercial settings:

- *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing);
- *Sherbert v. Verner*, 374 U.S. 398 (and other unemployment cases);
- *United States v. Lee*, 455 U.S. 252 (1982) (Amish business);

- *Roberts v. United States Jaycees*, 468 U.S. 609 (commercial association);
- *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985);
- *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (hiring);
- *Rasmussen v. Glass*, 498 N.W.2d 508 (food delivery);
- *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (housing);
- *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same);
- *Catholic Charities of Sacramento*, 85 P.3d at 93.

Some claimants succeeded (*Sherbert, Rasmussen, Desilets*), while others did not (*Braunfeld, Lee, Roberts, Alamo Found., McClure, Swanner, Catholic Charities*). The "commercial" factor does not dictate the outcome.

But with the advent of the draconian HHS Mandate to facilitate free access ro contraception and abortion-inducing drugs, even the church sanctuary provides no safe haven from the strong arm of the state.

United States v. Lee is often cited to oppose religious exemptions in the commercial sphere. *Catholic Charities of Sacramento*, 85 P.3d at 93. But *Lee* does not hold that believers forfeit their constitutional rights in the business world. Note the context of the often cited language:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm—but not abrogated altogether. And where religious organizations are involved, there ought to be a safe sanctuary for the free exercise of religion.

V. THE ARGUMENTS ARE EVEN MORE COMPELLING WHERE THE EMPLOYER IS A RELIGIOUS ORGANIZATION.

The First Amendment demands government neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Religious organizations have an affirmative constitutional right to oppose abortion and decline to facilitate it, free of government intrusion. The Constitution bars any public official from prescribing orthodoxy in religion. *Barnette*, 319 U.S. at 642. The Mandate guts the First Amendment, brazenly exhibiting the "callous indifference" to religion never intended by the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach*, 343 U.S. at 314. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id*.

Even if Little Sisters were a business corporation, the Mandate would present an unconstitutional burden. But it is a pervasively religious entity—and "the text of the First Amendment itself...gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012). Looking back over a century, the U.S. Supreme Court observed that:

> *Watson* "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116 (1952).

Id. at 704, referencing *Watson v. Jones*, 80 U.S. 679 (1872). Little Sisters has determined that it would violate core "faith and doctrine" to execute a form that will trigger free access to contraceptives for its employees.

Moreover, the Mandate does not fit the contours of *Smith*. As the *Hosanna* Court explained:

> *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.

Hosanna, 132 S. Ct. at 707, citing *Smith*, 494 U.S. at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma"). Although *Hosanna* involved the right of a religious organization to select ministerial

employees, it implies broad liberty to determine and apply religious doctrine in the operation of a ministry, including other aspects of the employment relationship. The Mandate encroaches on this liberty by requiring religious organizations to finance their employees' use of procedures and drugs that clash with the religious doctrine they were founded to uphold.

V. OTHER FACTORS ARE RESPONSIBLE FOR THE PROGRESS OF GENDER EQUALITY OVER THE PAST SEVERAL DECADES.

In *Hobby Lobby*, the government asserted vague interests in "gender equality" and "public health" that this Circuit did not find compelling, describing them as "broadly formulated interests justifying the general applicability of government mandates." *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013), citing *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

As one commentator observed two decades ago:

> [I]t is an offensive and sexist notion that women must deny what makes them unique as women (their ability to conceive and bear children), in order to be treated "equally" with (or by) men. Genuine equality between the sexes will be reached on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society.

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 46 (1993); *see also* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marquette L. Rev. 975, 1001-13 (Summer 1992).

Never before have women had a legal right to force their private employers to pay for contraceptives or incur financial penalties that threaten their very existence. Yet women have made extraordinary progress in their ability to participate fully in American society. That progress in "gender equality" is attributable to a variety of factors unrelated to the ability to access contraception or abortion:

> Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from Roe v. Wade.

Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion*, in Abortion, Medicine and the Law 154 (J. Butler & D. Walbert eds., 4th ed. 1992). Such progress began decades ago, before the controversial Mandate was on the horizon. Legislation protects women against unlawful discrimination in employment and other contexts:

- Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 et seq., as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, and the Pregnancy Discrimination in Employment Act amendments of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)) (discrimination in public and private employment);
- 5 U.S.C. § 201 (mandating anti-discrimination policy in federal employment);
- 5 U.S.C. § 2302(b)(1) (anti-discrimination in personnel policies);

- Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1988) (mandating equal pay);
- Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (forbidding discrimination on account of pregnancy in granting unemployment compensation benefits);
- 20 U.S.C. § 1221e(a) (mandating anti-discrimination policy in educational institutions receiving federal funds).

See Linton, *Planned Parenthood v. Casey: The Flight From Reason*, 13 St. Louis U. Pub. L. Rev. at 44 n. 130 (listing these and other statutes). Many states have constitutional and statutory provisions protecting women against discrimination. *Id*. at 45 n. 131. These protections facilitate access to higher education, better jobs, and a woman's choice to become pregnant and bear a child without sacrificing her career. It is disingenuous for the government to assert that easy access to employer-funded contraception is necessary—or even desirable—to combat discrimination against women.

VI. IRONICALLY, THE MANDATE WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING THOSE WHO ADVOCATE IMPOSING IT ON UNWILLING PRIVATE EMPLOYERS.

"Reproductive rights" are a relatively recent judicial development. Advocates accomplished this dramatic transformation through the political process,

exercising rights to free speech, press, and association. But no group can demand for itself what it would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, the Mandate directly attacks the freedom of employers who object to contraception and/or abortion. The rights of women to access reproductive services do not trump the rights of everyone else, particularly since no person has a right to coerced funding from either public or private sources. Americans who want to expand their own civil rights must grant equal respect to opponents—not crush them with debilitating legal penalties: "The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." *United States v. Ballard*, 322 U.S. 78, 95 (1944).

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin.... The current trend...is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination."

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245.

This principle cuts across all viewpoints and constitutional rights. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Boy Scouts of Am. v. Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas

we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). Justice Black said it well in a case about the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB*, 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972). *Healy* is about association rights—not reproductive rights. But the liberty of all Americans will suffer irreparable harm if a judicially manufactured right to coerced *funding* of reproductive rights is allowed to stifle rights of religion and conscience. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should reverse the District Court ruling.

Dated: March 3, 2014

Respectfully submitted,

/s/ Deborah J. Dewart
Deborah J. Dewart NC Bar No. 30602
620 E. Sabiston Drive
Swansboro, NC 28584-9674
Telephone: (910) 326-4554
Facsimile: (877) 326-4585
E-mail: debcpalaw@earthlink.net

Counsel for Amicus Curiae
Liberty, Life, and Law Foundation

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it brief contains **6,955** 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 Office 2010.

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 Office Word in 14-point Times New Roman.

DATED: March 3, 2014

/s/ Deborah J. Dewart
Deborah J. Dewart
Counsel for *Amicus Curiae*
Liberty, Life, and Law Foundation

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: March 3, 2014

/s/ Deborah J. Dewart
Deborah J. Dewart
Counsel for *Amicus Curiae*
Liberty, Life, and Law Foundation

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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/s/Deborah J. Dewart
Deborah J. Dewart
Counsel for *Amicus Curiae*
Liberty, Life, and Law Foundation