Nos. 19-431, 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME,
Petitioner,

v.

PENNSYLVANIA, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,
Petitioners,

v.

PENNSYLVANIA, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of Inner Life Fund and Institute for Faith and Family as *Amici Curiae* in Support of Petitioners

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Counsel for Amici Curiae

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Inner Life Fund and Institute for Faith and Family, as *amici curiae*, respectfully submit that the decision of the Third Circuit should be reversed.

Inner Life Fund is a North Carolina non-profit, tax-exempt corporation formed on June 22, 2006 to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. ILF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to life. See https://iffnc.com.

---

[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

ILF and IFF provide a voice for the residents of North Carolina who strongly disagree with the arguments presented in the Third Circuit brief filed by Massachusetts, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, as *amici curiae* in support of Pennsylvania and New Jersey. Nos. 17-3752, 18-1253, 19-1129, and 19-1189 (filed 03/25/19).

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 liberty of religion and conscience to individual citizens and entities, particularly organizations established for religious purposes.

But since the enactment and implementation of the Patient Protection and Affordable Care Act, 42 U.S.C. 18001 *et seq.*, the Contraceptive Mandate (the "Mandate") imposes crippling financial penalties unless Petitioner[2] complies with a legal directive that guarantees *free access* to contraceptive drugs and related services through their employee health insurance plans—in direct conflict with the religious faith that motivates their lives and missions. 42 U.S.C. § 300gg-13(a)(4). This Mandate attacks liberties

[2] When used in the body of this brief, "Petitioner" refers to Little Sisters of the Poor Saints Peter and Paul Home.

Americans have treasured for over 200 years—liberties no one can be required to sacrifice as a condition for participating in the public square. The Mandate is as great an assault on conscience as the constitutional evil of compelling citizens to support religious beliefs they do not hold. It is anathema to the basic First Amendment principle that the government may not coerce its citizens to endorse or support a cause. The so-called "accommodation" at issue in these cases is a thinly veiled method of compliance. As the Government's own rules explain, a group health plan *complies* with the Mandate through the "accommodation" process. 26 C.F.R. § 54.9815-2713A(b)-(c); 29 C.F.R. § 2590.715-2713A(b)-(c); 45 C.F.R. § 147.131(c).[3] Through this process the Government compels employers—including *religious* organizations—to assist their employees in obtaining contraceptives and abortifacents.

The Ninth Circuit recently held that "providing free contraceptive services was a core purpose of the Women's Health Amendment." *California v. U.S. HHS*, 941 F.3d 410, 426 (9th Cir. 2019). This is tantamount to saying "[t]hat the absolute maximum availability of birth control, sterilization, and drugs that can in some circumstances act to destroy a human embryo are somewhere near the heart of women's equality and freedom." Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379 (2013). This argument exalts "reproductive rights" above all other liberties.

---

[3] See Brief for Petitioners, 14-1418, et al., pp. 9-14.

In *Hobby Lobby*, this Court assumed for the sake of argument that the government had a compelling interest and then tackled the least restrictive means analysis. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). "The least-restrictive-means standard is exceptionally demanding . . . and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Id*. Here, low income women in Pennsylvania and elsewhere have access to contraception through Medicaid, Title X, community health centers, and other programs. *See* Pet. (19-431) at 23. If the Mandate is unnecessary to ensure access to contraception, it appears to be solely aimed at undermining the beliefs of religious individuals and groups.

In one of the early challenges to the Mandate, the prior administration asserted that signing a simple notice or form—"a single sheet of paper"—was "a de minimis requirement" that would remove eligible organizations from delivery of the contraceptives. *Priests for Life v. United States HHS*, 772 F.3d 229, 249 (D.C. Cir. 2014). Similarly, that administration characterized the notice as a "meaningless exercise." App.Op.Br.5, *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015). But as the Ninth Circuit tacitly admits, the objecting organization "sends a copy of the form to its insurance issuer or third-party administrator (TPA), *which must then provide contraceptive care for the organization's employees* without any *further* involvement by the organization." *California v. U.S. HHS*, 941 F.3d at 419

(emphasis added). The notice is a legal prerequisite for the Government to commandeer the employer's insurance program. The impact is hardly "meaningless" and merely eliminates "further" involvement. If the notice were truly meaningless, there would be no reason to aggressively coerce compliance or object to the newly formulated exemptions. "After all, if the form were meaningless why would the government require it?" *Priests for Life v. United States HHS*, 808 F.3d 1, 20 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of Petition for Rehearing En Banc). Moreover, if the self-notification is truly independent of *any* action required of Petitioner, there is logically no compelling interest in forcing them to submit it.

ARGUMENT

I. THE THIRD CIRCUIT HAS DEPARTED FROM THIS NATION'S LONG HISTORY OF RESPECT FOR RELIGIOUS LIBERTY AND CONSCIENCE.

"Conscience is the essence of a moral person's identity. . . . Liberty of conscience was the foundation for Madison's and Jefferson's and other Framers' views underlying the First Amendment's religion clauses." *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of Petition for Rehearing En Banc). In spite of the pervasive "gender equality" rhetoric in many of the arguments, the heart of this case is liberty of conscience—not gender equality or sex discrimination.

America's traditional respect for conscience is illustrated by exemptions granting relief from the moral dilemma created by mandatory military service. This Court, acknowledging man's "duty to a moral power higher than the State," once quoted the profound statement of Harlan Fiske Stone (later Chief Justice) that "both morals and sound policy require that the state should not violate the conscience of the individual." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Indeed, "nothing short of the self-preservation of the state should warrant its violation," and even then it is questionable "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." *Id*. It is hazardous for any government to crush the conscience of its citizens. But the Mandate breeds a nation of persons who lack *conscience*, forcing religious citizens and even organizations to set aside conscience or face ruinous fines. The tsunami of lawsuits over the years testifies to the gravity of the matter.[4]

A. Federal law has 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. Regardless of the rights of women, demanding that a physician act in a "morally

---

[4] https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/ (last visited 02/18/2020).

unpalatable manner . . . compromises the physician's ethical integrity" and likely has "a corrosive effect upon [his or her] dedication and zeal" in treating patients. J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002).

After abortion became legal nationwide, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in the procedure. 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).

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 facilitating activities they believe are immoral, contrary to our nation's history. The Founders' recent experience with religious persecution produced "a fierce commitment to each individual's natural and inalienable right to believe according to his conviction and conscience and to exercise his religion as these may dictate." *Priests for Life*, 808 F.3d at 5 (Brown, J., dissenting from denial of Petition for Rehearing En Banc), citing James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901) (internal quotation marks omitted).

The Mandate is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold. Some courts, including the Third Circuit, have missed this simple truth by highlighting the action required of objectors—signing a single sheet of paper—instead of the draconian penalties they face for non-compliance. *Pennsylvania v. President United States*, 930 F.3d 543, 575 (3d Cir. 2019) ("the current Accommodation does not substantially burden employers' religious exercise"). But even more modest penalties are constitutionally forbidden: "Thomas More went to the scaffold rather than sign a little paper for the King." *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d at 635 (Jones, J., dissenting from denial of Petition for Rehearing En Banc). Quoting James Madison, "the leading architect of the religion clauses of the First Amendment," this Court once cautioned that "the same authority which can force a citizen to contribute three

pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Flast v. Cohen*, 392 U.S. at 103, quoting 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed., 1901).

B. States provide broad constitutional and statutory protection for liberty of conscience.

All states offer constitutional and/or statutory protection for liberty of conscience. 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).[5] The vast majority of state constitutions expressly define religious liberty in terms of conscience.[6] A few states,

---

[5] When this article was published, forty-nine states had some form of conscience clause legislation, with variations as to which providers, institutions, procedures and payors were covered. Current detailed state-by-state information can be found at: https://www.consciencelaws.org/law/laws/usa.aspx#state (last visited 02/21/2020).

[6] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III-IV; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I,

while not using the term "conscience," provide similar rights by protecting their citizens against state compulsion. Alabama Const. Art. I, Sec. 4; Iowa Const. Art. I, § 3; Md. Dec. of R. art. 36; W. Va. Const. Art. III, § 15. Some state constitutions contain a broad description of religious liberty, limited only by licentiousness or acts that would threaten public morals, peace and/or safety. Conn. Const. Art. I., Sec. 3; Fla. Const. Art. I, § 3; Md. Dec. of R. art. 36; Miss. Const. Ann. Art. 3, § 18. Several states essentially duplicate the language of the U.S. Constitution. Alaska Const. Art. I, § 4; HRS Const. Art. I, § 4; La. Const. Art. I, § 8; Mont. Const., Art. II § 5; S.C. Const. Ann. Art. I, § 2. Oklahoma's unique language provides for "perfect toleration of religious sentiment" and mode of worship and prohibits any religious test for the exercise of civil rights. Okl. Const. Art. I, § 2.

State courts also acknowledge rights of conscience, but typically weigh those rights against compelling state interests. Conscience has been defined as "that moral sense which dictates . . . right and wrong." *Harden v. State*, 216 S.W.2d 708, 711 (Tenn. 1948) (handling of poisonous snakes could be regulated to protect public health and safety). "Freedom of conscience" is a "fundamental right of every citizen . . . [d]eeply rooted in the constitutional law of Minnesota." *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993) (ruling in favor of deli owner who refused

---

§ 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

delivery to abortion clinic). *See also In re Williams*, 152 S.E.2d 317, 326 (N.C. 1967) (free exercise includes protection against government compulsion to do what one's religious beliefs forbid, but it is not absolute); *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979) (because of the high value assigned to religious belief and its close relationship to conduct, religiously compelled actions can be forbidden only where they substantially threaten public safety, peace or order); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992) (city's interest in preservation of aesthetic and historic structures was not compelling enough to burden church's rights to religion and free speech); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (ruling in favor of corrections officer whose Native American religion required him to maintain long hair); *Guaranteed Auto Fin., Inc. v. Dir., ESD*, 92 Ark. App. 295, 299-300 (2005) (conditioning availability of unemployment benefits upon willingness to violate "cardinal principles" of religious faith effectively penalized free exercise); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 886 (Wis. 2009) (declining to review first grade teacher's employment discrimination claim against Catholic school employer, because her position was closely linked to the school's religious mission—noting the "extremely strong language" of the state constitution, "providing expansive protections for religious liberty")

C. Like many successful Free Exercise cases, this case involves *conscientious objectors*—not civil disobedience.

Many winning cases decided prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) involved conscientious objectors seeking freedom from state compulsion to commit an act against conscience. *See, e.g., 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 plaintiffs, including *Smith*, are often "civil disobedience" claimants seeking to actively 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.

The Petitions in these cases implicate the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*., rather than the *Smith* decision. But unlike the civil disobedience claim in *Smith*, they involve conscientious objections to active participation in a legal scheme that will guarantee their employees free access to contraceptive drugs. Conscientious objector claims like this are "very close to the core of religious liberty." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 565, 611, 615-616. Religious citizens and 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 other situations where legal mandates invade conscience and an exemption poses no threat to public peace or safety. In light of the high value courts, legislatures, and constitutions have historically assigned to conscience, it is imperative to protect persons and organizations who decline to facilitate morally objectionable medical services.

II. THE LEGALITY OF CONTRACEPTION DOES NOT JUSTIFY COERCED FACILITATION BY UNWILLING PRIVATE EMPLOYERS.

At one time the states were free to outlaw contraception or limit it to married couples. That changed in two key decisions of this Court that preceded *Roe v. Wade*, 410 U.S. 113 (1973). *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing right of married couples to use contraception due to the "zone of privacy" in that relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending right of privacy to single persons). But in spite of these rulings, there is no corollary right to draft employers as unwilling accomplices who must ensure cost-free access. In the companion case to *Roe v. Wade*, this 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)). But now, the Mandate compels a private employer to become a de facto accomplice to a morally

objectionable agenda. The Mandate grates against the Constitution, essentially banning people of faith, and even organizations, from full participation in society. Its crippling financial penalties threaten to shut down organizations or deprive their personnel of *any* health care insurance. This is tantamount to a statement that "no religious believers who refuse to [facilitate contraception] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573.

A. Abortion is a highly controversial, divisive issue.

Many deeply religious people view abortion and/or contraception as grave moral wrongs. Concerned citizens across the country have enacted regulations, including informed consent, parental notice, waiting periods, and laws regulating medical personnel and facilities. The ensuing legal challenges are legion. But the very enactment of such restrictions is evidence that Americans are profoundly troubled and deeply divided.

Americans on both sides of the debate are equally entitled to constitutional protection for their respective positions. The government itself may adopt a position, but it violates the Constitution to compel private employers to facilitate and/or 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 facilitate—those rights. The issues surrounding abortion and contraception are too controversial to justify this severe intrusion on liberty of conscience.

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 v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). Religious liberty collapses under the weight of secular ideologies that employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 186-188.

B. Religious freedom should not be dismantled to coerce private entities to facilitate reproductive 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. This Court agrees: "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. . . in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. at 68. "[T]he product of that struggle" was the First Amendment's protection for religious liberty. *Id*. We dare not sacrifice priceless

American freedoms through misguided—or even well-intentioned—efforts to broaden access to contraception. Religious citizens and organizations have not forfeited their right to live and pursue their missions in a manner consistent with their faith and conscience.

C. No person has a constitutional right to *free* contraception.

No private party is obligated to facilitate or fund another party's rights. Employees have no constitutional right to compel their employers to provide them with cost-free contraception, and an employer does not impose its own religion on employees by refusing to do so. An employer pays for an employee's time and services, and that employee is then free to purchase contraception (or anything else) with his or her own money. The employer is not complicit in purchases the employee initiates. But the Mandate compels employers—regardless of religious faith or conscience—to facilitate *free* access to services the employer believes are morally objectionable.

Even the government is not obligated to finance contraception/abortion or ensure the most convenient access. 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) (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 an "undue burden." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992). Accommodation of the employer's conscience imposes no burden on any employee's right to access contraception independently. Nor does an employer impose its religion on employees merely by declining to facilitate seamless, cost-free contraceptives. It is the Mandate that imposes an "undue burden"—on the employer's rights.

D. Accommodation of a private employer's conscience does not threaten any employee's fundamental rights.

The Third Circuit, citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005), argues that the challenged accommodation fulfills this Court's directive to consider the collateral consequences an exemption imposes on third parties—here, "the female employees who will lose coverage for contraceptive care." *Penn.*, 930 F.3d at 574. In *Cutter*, this Court found that the requested accommodation "alleviate[d] exceptional government-created burdens on private religious exercise" and therefore was "compatible with the Establishment Clause." *Id.* at 720 (inmates requested accommodations for their nontraditional religious ceremonies, dress, and literature). Here, Petitioner seeks an exemption from an "exceptional government-created burden" that would render them complicit in a procedure they believe is tantamount to infanticide. The right to free contraception was created by an executive agency defining the details of "preventative" services mandated by recent legislation. This pales in

comparison to the religious liberty explicitly protected by the First Amendment.

Concern for third party rights is not new. Some earlier free exercise cases did not implicate such rights, e.g., *Sherbert v. Verner*, 374 U.S. 398 (unemployment). In other cases religious exemptions were denied where an 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,* 763 P.2d 852 (Cal. 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.

The exemptions at issue pose no threat to public peace or safety. Reproductive rights do not warrant compelling a religious organization to disregard its core convictions or risk financial ruin. That is particularly true in the absence of any employee's *constitutional* right to access *free* contraception through her employer's health plan.

E. The Mandate does not leave conscientious objectors with a viable alternative to provide health benefits to their employees.

Cases involving comparable legal mandates suggest "solutions" that are counter-productive and harmful, restricting access to goods and services. One "solution"

is for the employer to discontinue some or all of its employee health benefits. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 76 (Cal. 2004) (employer could avoid covering contraceptives by not offering prescription drug coverage); *Catholic Charities of Diocese of Albany v. Seri*, 859 N.E.2d 459, 468 (N.Y. 2006) (same). This alternative would harm *all* employees, including women who desire contraceptive coverage. Similarly, 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). *See also Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (religious school offering supplemental pay to heads of household could discontinue the program and maintain lower salaries for all employees); *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996) (students objecting to using mandatory registration fees for student health insurance covering abortion could presumably enroll in another institution). Such a broad elimination of benefits is counter-productive and may not be available for larger employers, who are left with virtually no escape hatch. Their choice is either to violate conscience or face draconian penalties that would cause them to shut down operations.

At the agency level, a similar "solution" would be to eliminate contraception from the comprehensive list of preventative services. That would track the Third Circuit's reasoning that the agencies were only granted authority to determine "the type of services that are to

be provided" (contraception)—and not "who must provide coverage for these services." *Penn.*, 930 F.3d at 570. That would solve the problem for conscientious objectors, but not for female employees whose employers might decline to provide the coverage for other reasons, e.g., the cost of premiums.

III. THE THIRD CIRCUIT'S APPROACH DEMONSTRATES HOSTILITY TO RELIGIOUS LIBERTY AND CONSCIENCE.

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). The Mandate's onerous penalties threaten 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).

A. Even in the commercial sphere, believers do not forfeit their constitutional rights.

The Mandate is hostile to people of faith, 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 life begins. When 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.

Morality necessarily intersects the public realm. All organizations—religious and secular—should be free to operate with a high level of honesty and integrity in dealing with the persons they serve.

Conflicts between religion and regulation typically occur in settings beyond the walls of a church. These conflicts may involve either religious citizens who own a business or non-church organizations established for religious purposes:

- *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)
- *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (employment laws)
- *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 (charitable work).

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

But with the advent of the draconian Mandate to facilitate free access to contraception and abortifacent drugs, even pervasively religious organizations had no safe haven from the strong arm of the state—that is, until the current administration crafted the exemptions that are now being challenged. The government surely must be allowed to exempt believers under such circumstances.

United States v. Lee is often cited to oppose religious exemptions in the commercial sphere. *See, e.g., Catholic Charities of Sacramento,* 85 P.3d at 93. But *Lee* does not hold that believers forfeit their constitutional rights when they step beyond the borders of a church. The frequently cited language, in context, notes that "*every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs." *United States v. Lee*, 455 U.S. at 261 (emphasis added). Religious freedom is not abrogated in the public square—and where religious organizations are serving the community, they are surely entitled to a safe sanctuary to provide services in a manner consistent with their faith.

B. 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. Many—including Little Sisters of the Poor and others—provide services and ministry to the community in accordance with the tenets of their faith. 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*.

The Mandate presents an unconstitutional burden even to for-profit businesses such as Hobby Lobby. But Little Sisters of the Poor is religious to the core—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*, 565 U.S. 171, 189 (2012). Over a century ago this Court recognized "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), citing *Watson v. Jones*, 80 U.S. 679 (1872). In *Hosanna-Tabor*, this Court reiterated that theme. *Hosanna-Tabor*, 565 U.S. at 186. Petitioner has determined that it would violate core "faith and doctrine" to comply with the Mandate in the manner prescribed by the government.

Moreover, the Mandate does not fit the contours of *Smith*. As this Court explained in *Hosanna*: "*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*, 565 U.S. at 190, citing *Smith*, 494 U.S. at 877 (distinguishing the government's regulation of "physical acts" from "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 allowing the government to hijack the health insurance plans of religious organizations and other conscientious objectors to provide their employees with free access to drugs and services that clash with the employer's core convictions.

IV. IT WILL NOT BE POSSIBLE TO SATISFY THE DEMANDING "COMPELLING INTEREST" OR "LEAST RESTRICTIVE MEANS" PRONGS OF RFRA.

The Petitions before this Court raise important issues about an agency's authority to craft religious exemptions. But in the most recent pronouncement about the Mandate, "[t]h[is] Court d[id] not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current

regulations are the least restrictive means of serving that interest." *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016). In *Hobby Lobby*, this Court assumed a compelling interest—*solely for the sake of argument*—but went on to find the Mandate would fail the "least restrictive means" prong. *Hobby Lobby*, 573 U.S. at 728.[7] Although the current administration has acknowledged and attempted to alleviate the burden on Petitioner's religious liberty, the future of the Mandate remains unknown.

Eventually the underlying RFRA issues must be resolved. The Third Circuit not only dismisses the substantial burden on Petitioner but also turns RFRA upside down. Instead of requiring the *government* to demonstrate a compelling interest to impose the burden, the circuit court would require the *religious objector* to show the exemption is "necessary to protect a legally cognizable interest." *Penn.*, 930 F.3d at 575.

The correct approach is to require *the government* to show a compelling state interest. In the *Hobby Lobby* briefing, the prior administration asserted a "compelling" interest in "gender equality." *Hobby Lobby*, 573 U.S. at 726. This Court found that interest

---

[7] The Third Circuit incorrectly states that "*Hobby Lobby* ruled that closely-held corporations are entitled to take advantage of the Accommodation process . . . a less restrictive alternative . . . ." *Penn.*, 930 F.3d at 573-574. There was no such ruling. This Court did not reach a definitive conclusion that closely-held corporations were entitled to use the accommodation crafted for religious nonprofits, but only that the accommodation *would be* less restrictive *if* it were offered to for-profit corporations. *Hobby Lobby*, 573 U.S. at 728.

was too broadly formulated. *Id*. Instead, the government must "specifically identify an 'actual problem' in need of solving" and show that the burden on Petitioner's rights is "actually necessary" for the solution. "Predictive judgment[s]" and "ambiguous proof" are insufficient. Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 432, quoting *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738-2739 (2011). Here, it would be necessary to demonstrate that cost-free, "seamless" access to contraceptive drugs is "actually necessary" to achieve a compelling interest. Doing so would require turning a blind eye to decades of progress attributable to other factors and degrading women with a "predictive judgment" that they are unable to take even minimal alternative steps to obtain free contraception offered outside their employers' health plans.

A. The Mandate is premised on a condescending rationale that demeans women.

As one commentator observed, "it 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 achieve equality with men. Men and women will be truly equal "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).

In earlier challenges to the Mandate, government briefs argued that, if women were required to take even minimal steps to learn about and sign up for a separate government funded program, those requirements would constitute a substantial barrier to equal health care coverage. *See, e.g.*, Opp. Pet. 14-1418 at 27; Opp. Pet. 15-35 at 23. Some courts bought this argument: "Providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest." *Priests for Life*, 772 F.3d at 265. But ironically, this approach quickly backfires. If religious employers were "effectively compel[led]" to "drop health-insurance coverage altogether," employees would be left to search for insurance independently. *Hobby Lobby*, 573 U.S. at 732.

B. Other factors are responsible for the progress of gender equality over the past several decades.

Never before have women had a legal right to force unwilling employers to facilitate (let alone finance) free access to contraception. Yet women have made extraordinary progress in their ability to participate fully in American society. That progress is attributable to a variety of factors unrelated to the easy availability of 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, long before the controversial Mandate was on the horizon. Legislation now 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 (federal employment);
- 5 U.S.C. § 2302(b)(1) (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) (equal pay);
- Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (unemployment benefits);
- 20 U.S.C. § 1221e(a) (educational institutions).

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. The same courts that find the Mandate necessary simultaneously acknowledge that significant progress in gender equality occurred long before the advent of the Mandate. *See, e.g.*, *Priests for Life*, 772 F.3d at 263, citing earlier sources:

> "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856.
>
> "[A]ccess to contraception improves the social and economic status of women." 78 Fed. Reg. at 39,873.
>
> Congress noted "pervasive discrimination in the workplace" when enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e *et seq*.), and the Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601 *et seq*.).

In light of less onerous alternatives the government has already used to provide women with equal opportunities, it is disingenuous to assert that easy, cost-free access to contraception—coerced through employer participation—is necessary or even desirable

to combat discrimination against women. *It is certainly not compelling.*

C. Other factors render it impossible to establish the required causal link between the Mandate and gender equality.

Not all women of childbearing age desire contraception. "[W]omen have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it free." Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 380. The prior administration presumed that contraception was not only desirable for women but also that cost-free access to it was necessary for their health and equality. As several of the certiorari level briefs in earlier cases observed, many women employed by religious organizations share their employers' moral objections. *See, e.g.*, Pet. 15-35 (E. Tx. Baptist Univ.), at 36; Reply 15-119 (So. Nazarene Univ.), at 10 ("The Universities' employees and students share their religious belief that use of the four FDA-approved contraceptives in question is sinful because they may have an abortifacient effect. Pet. App. 167a-68a."). The Mandate is based on unsupported assumptions and fails to consider the actual needs and desires of the women involved.

Another factor is the employment status of the women who allegedly require free contraception. The Mandate only addresses women who are employees or dependents of an employee, but "studies on the incidence of unintended pregnancy univocally report

that unintended pregnancy is highly concentrated among low income women – who are already amply provided free or very lost cost contraception by federal and state governments." Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 399.

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

"Reproductive rights" is a relatively recent judicial development. Advocates accomplished this dramatic transformation by exercising their rights to free expression and association. But no group can demand for itself what it would deny to others—otherwise, constitutional foundation will crumble and all Americans will suffer. Overly aggressive advocacy erodes protection for other liberties. Here, the Mandate directly attacks the freedom of employers who object to contraception and/or abortion. "Reproductive rights" do not trump the rights of everyone else, particularly since no person has a right to coerce public or private entities to provide seamless, cost-free access. Americans who want to expand their own civil rights must grant equal respect to opponents—not crush them with debilitating legal penalties. This is just as true here as it is in other contexts: "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).

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. 640, 660 (2000). 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), quoted by *Healy v. James*, 408 U.S. 169, 187-188 (1972). These cases were about association rights—not reproductive rights. But the liberty of all Americans will suffer irreparable harm if an agency-created right to coerced facilitation of contraception is allowed to stifle rights of religion and conscience.

CONCLUSION

This Court should reverse the Third Circuit decision.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive, Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Counsel for Amici Curiae