No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* CATHOLIC DEFENSE LEAGUE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The text of the Affordable Care Act (ACA) says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. The Department of Health and Human Services (HHS) has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either directly or via a regulatory mechanism through which they must execute documents that authorize and obligate third parties to use their healthcare plans to facilitate the provision of contraceptive coverage to their employees and that, in the government's view, put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already considered the direct method of compliance and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). It is undisputed, however, that nonexempt religious employers such as petitioners hold equally sincere religious objections to the regulatory method of compliance as well. It is further undisputed that they face draconian fines if they refuse to comply via one of those two avenues.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective - namely, the provision of no-cost contraceptives to the objector's employees?

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

Internet

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Catholic Defense League ("CDL") is a group of Catholic men and women who have come together to defend the Roman Catholic Church (the "Catholic Church," or simply the "Church"). As a non-profit Section 501(c)(3) organization based in St. Paul, Minnesota, CDL strives to protect the Catholic

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief with the blanket written consent by all parties, which they have filed with the Court.

Church, its bishops, priests and religious from unwarranted attacks or misleading information from many sources. This includes defending against misrepresentation of the positions or doctrine of the Church, rebutting ridicule of ministers of the Church, correcting erroneous statements about what the Church has done, and responding to subtle and even deliberate falsehoods concerning the Church.

In addition to defending against these specific attacks, *Amicus* CDL also works to protect freedom of religion against the barriers created by lawmakers, judges, anti-religious and anti-Catholic groups, and politically correct narratives of an increasingly secular humanist society, which tend to prevent Catholics from maintaining and expressing their Catholic identity. CDL also works to bring the voice of Catholics into the public square.

Amicus CDL has a direct and vital interest in this case by virtue of its goal to defend religious members of the Church against being forced to violate their consciences in a manner contrary to the doctrine of the Church. In addition, there is a Little Sisters of the Poor Home based in the same city as CDL's headquarters, Saint Paul, Minnesota, so CDL has a local interest too. Accordingly, CDL respectfully submits this amicus brief in support of Petitioners Little Sisters of the Poor Home for the Aged of Denver, Colorado, *et al.* ("Little Sisters of the Poor," or simply the "Sisters").

SUMMARY OF ARGUMENT

Government cannot lawfully compel the Little Sisters of the Poor to be complicit in activities that breach their faith. Centuries of Church doctrine teach that cooperating in sin can be as wrong as committing the sin itself. The Catholic Church automatically excommunicates not only those who directly participate in abortion, but also those who facilitate it. Moral culpability for facilitating sin is central to religious doctrine, and is not something for a court to second-guess. While some non-Catholics may view abortion and abortifacient contraceptives to be part of healthcare, the Catholic Church holds that they are gravely sinful. Millions of Catholics are duty-bound to abide by the Church or face eternal consequences, which no secular court can excuse. The Sisters should be allowed to comply fully with Church doctrine without being coerced into complicity with sin.

Fortunately, the Religious Freedom Restoration Act (RFRA) mandates full accommodation of religion by generally prohibiting the federal government from coercing people to transgress their faith. Under RFRA, an individual need not choose between draconian fines, on the one hand, and the risk of automatic excommunication on the other. But the court below erred in failing to apply RFRA to safeguard the Sisters against forced complicity in a contraceptive program condemned as sin by the Church.

In light of *Hobby Lobby*, which established full rights under RFRA for a closely held for-profit commercial enterprise, one might be dismayed to find the Sisters here at all. The Tenth Circuit was

mistaken in declaring that there is a significant difference between this case and *Hobby Lobby*. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir.), *cert. granted*, 136 S.Ct. 446 (2015). The Sisters are entitled to every bit of protection against dilution of their faith by government, just as the for-profit Hobby Lobby was. Whether the hoops imposed by government for the Sisters to jump through, to try to protect their souls, are an adequate accommodation is a decision for the Sisters to make, not the government. The Sisters are in a far better position than the Tenth Circuit to determine whether the regulatory scheme substantially burdens their religious exercise, and the court below erred in ruling otherwise.

The Catholic Church does not excuse sin based on opinion or pressure by secular authority. Excommunication is automatic under longstanding Church doctrine for certain offenses, including facilitation of abortifacients. The government has improperly pushed the Sisters toward complicity in activities that, in some situations, trigger automatic exclusion from God and the Church under their faith. RFRA does not allow this harmful overreaching by government.

More generally, respect for the dignity of others requires, at a minimum, respect for their rights of conscience. Prior to the Constitution, Quakers were not compelled to help the Continental Army during the Revolutionary War. The American tradition to respect the rights of conscience of others lies at the very heart of our traditions. General George Washington was hindered by how Quakers would not assist during the American Revolution, but he

respected their religious-based decision. The Court should do no less in honoring fully the rights of the Sisters based on their faith.

Sir Thomas More was put to death for refusing to violate Catholic doctrine by capitulating to the demands of his sovereign state. That was some 250 years before the U.S. Constitution, and 450 years before enactment of RFRA, but the issue at bar is not conceptually different. RFRA should be applied to ensure that no one in the United States is forced to abandon his or her faith in order to avoid draconian fines by government, and this law requires judgment in favor of the Sisters.

ARGUMENT

At issue is whether government can place the Sisters between the proverbial rock and a hard place, by requiring the Sisters either to arrange for a health plan that facilitates access to abortion-inducing drugs, at the Sisters' spiritual peril, or to decline and thereby endure harsh fines of $2000 annually per full-time employee, plus $100 daily for each individual who is affected. *See* 26 U.S.C. §§ 4980H(c)(1) and 4980D(b)(1).

The Tenth Circuit erred in attempting to downplay and marginalize the Sisters' moral objections to participating in this scheme. 794 F.3d at 1173-74. The court went even further, ruling that an administrative accommodation available to the Sisters actually "relieves them from complicity." *Id.* at 1174. RFRA does not allow the court to substitute its judgment about morality for the religious group.

RFRA protects the Sisters against government placing them in such a bind, making it impossible for them to comply with both their faith and the law.

I. The Court Below Erred in Ignoring the Severity of the Burden and Infringement on Catholic Faith, which Triggers Protection by *Hobby Lobby*.

Respondents' regulatory mandate at issue here requires that the Sisters arrange for and facilitate use of abortifacients for participants in their insurance plan, despite how facilitating use of these drugs causes abortion and thereby subjects the Sisters to automatic excommunication from the Church. This requirement by the government plainly violates RFRA, and the lower court should not have attempted to downplay the severity of the burden on the Sisters' faith. *See, e.g.*, *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 715 (1981) (holding, even before RFRA, that "courts should not undertake to dissect religious beliefs").

Specifically, the Sisters are being required to "sign off" on usage of treatments that include *ella,* which causes abortions as a selective progesterone receptor modulator. The prescribing information for *ella* on the FDA's own website warns physicians to "[e]xclude pregnancy before administering" and that "[e]mbryofetal loss was noted in all pregnant rats and in half of the pregnant rabbits," and in 40% of

pregnant monkeys.[2] Though misleadingly called a "contraceptive", *ella* (ulipristal acetate) actually operates like RU-486 (mifepristone), by inhibiting the progesterone that is essential to maintaining a healthy uterine wall.[3] *Ella* "thereby starves a developing baby of this needed protein," which causes an abortion.[4] Yet *ella* is one of the treatments that Respondents demand the Sisters arrange for, sign off on, and facilitate.

"The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2759 (2014). On that basis this Court held, less than two years ago, that a non-religious private company had an exemption under RFRA from being compelled to pay for contraceptives. Yet the Tenth Circuit denied the conceptual equivalent to the Sisters, whose religious vows plainly prohibit them from arranging the use of abortifacients.

The Little Sisters of the Poor are a pillar of the Catholic Church in their devotion to doctrine, their untiring service of the poor, and their missionary

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[2] http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf (pp. 1, 4) (viewed Jan. 6, 2016).

[3] "Mifepristone, also known as RU-486, is a prescription drug that terminates a pregnancy by detaching the gestational sac from the uterine wall. In the clinical trials, the woman returned two to four days later and took a second medication, misoprostol, which induced contractions to complete the medication abortion." *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 254 (Iowa 2015).

[4] http://www.frc.org/onepagers/the-truth-about-ella (viewed Dec. 29, 2015).

work. With roots that go back to shortly after the Civil War in the United States, and earlier in France, the Little Sisters of the Poor are a beacon of the Catholic faith in a sometimes-hostile secular world, on all six populated continents.[5] To many millions of the public, the Sisters are the face of the Catholic Church and comprise one of its most supportive arms.

Central to the Sisters' success is their faith and adherence to Catholic doctrine. Much of their daily routine is devoted to prayer, including a Marian devotion that consists of adoration of the Virgin Mary. The Sisters typically eat their meals in contemplative silence. They take four primary vows: chastity, poverty, obedience, and hospitality. Their garments include wearing a religious habit, typically black with a gray veil, "as a reminder to ourselves that we belong totally to God, as a sign and witness to others of our consecration and of God's presence in the world."[6]

The Sisters publicly strive to "be conformed to the mind and heart of Christ, so that [they] may do what is God's will, what is good, pleasing ***and perfect***."[7] The passage of the Bible that guides the Sisters includes this statement:

> And ***be not conformed to this world***: but be ye transformed by the renewing of your mind, that ye

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[5] http://www.littlesistersofthepoor.org/index.php/ourlife/worldwide-expansion (viewed Jan. 6, 2016)

[6] http://www.littlesistersofthepoor.org/index.php/ourlife/vowedlife (viewed Dec. 30, 2015).

[7] *Id.* (citing Romans 12:1–2, emphasis added).

> may prove what is that good, and acceptable, and perfect, will of God.

Romans 12:1-2 (King James Version, emphasis added). Put another way, the Sisters embody "religious consecration," which "means to make profession of having but one life, one heart, one soul and one will with Jesus."[8]

In denying the claim for a religious exemption below, the Tenth Circuit erred in failing to recognize the severity of the infringement on the religious devotion of the Little Sisters of the Poor. In its section entitled "No substantial burden from complicity," the lower court acknowledged that the Sisters "wish to play no part in" this scheme, but then ruled that "[w]e find this argument unconvincing for a number of reasons," and that "[o]pting out would eliminate their complicity with the Mandate and require only routine and minimal administrative paperwork." 794 F.3d at 1190, 1191, 1193. As explained below, each of the Tenth Circuit's bases for denying the Sisters' claim of unlawful infringement is without merit and should be reversed.

First, the Tenth Circuit held that "the purpose and design of the accommodation scheme is to ensure that Plaintiffs are *not* complicit—that they do not have to provide, pay for, or facilitate contraception." *Id.* at 1191 (emphasis in original). But the secular "purpose and design" are irrelevant to the religious question of whether the Sisters' signing off on the scheme constitutes a sinful facilitation of it. That question is one that only the Sisters can answer, and

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[8] *Id.*

they have confirmed that they cannot in good conscience complete the paperwork.

Second, the Tenth Circuit reasoned that because the Sisters "do not object to signing forms and paperwork generally," somehow they do not have a valid RFRA claim to object to signing the EBSA Form 700 for opting out of the contraceptive mandate. *Id.* at 1191. "RFRA does not require us to defer to [plaintiffs'] erroneous view about the operation of the ACA and its implementing regulations," the Tenth Circuit held. *Id.* Perhaps the latter statement is correct as to not deferring to a litigant's view of the law, but RFRA ***does*** require courts to defer to the Sisters on what degree of complicity in a scheme constitutes a violation of their faith. The Tenth Circuit failed to accord the Sisters that essential level of deference as to what is sinful, as can only be determined by the Sisters pursuant to their own beliefs.

Third, the lower court held that the act of opting out "does not involve them in providing, paying for, facilitating, or causing contraceptive coverage," and that this "*de minimis* administrative task" does not substantially burden the Sisters' religious beliefs. *Id.* at 1192. The court drew an analogy with conscientious objection procedures, which require completion of an exemption form in wartime. *See id.* at 1213-15. But that exemption form is not to authorize the war to which the person objects, while the form demanded of the Sisters here does help establish the program to which they object. The analogy to conscientious objectors does illustrate our Nation's rich tradition to respect people's religious beliefs and not force them to participate in something

against their faith, which is all that the Sisters seek here.

As George Washington explained to the Quakers, despite how they refused to help him during the American Revolution:

> In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

City of Boerne v. Flores, 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting) (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed. 1932).

It does not matter how "minimal" the administrative task is; after all, injecting a lethal dose for capital punishment does not require much time or effort either, but no one would compel a conscientious objector to administer the death penalty. What matters is not the time and effort entailed, but the moral line that is being crossed, and the government should not be allowed to push the Sisters across it.

RFRA exists to prevent precisely this type of overbearing interference by government with the private practice of one's faith. *See, e.g.*, *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) ("We conclude that a religious exercise is substantially burdened … when a government ... requires

participation in an activity prohibited by a sincerely held religious belief ….”), *cert. denied*, 562 U.S. 967 (2010).

As Professor Douglas Laycock observed:

> The Religious Freedom Restoration Act is the most important congressional action with respect to religion since the First Congress proposed the First Amendment. It resembles the great civil rights acts both in its sweep and in its restatement of fundamental principles. Apart from the various laws based on nondiscrimination models, there is no civil liberties statute of comparable importance.

Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 243 (1994). “RFRA is not a mere technical change from *Smith*. Rather, it restores a fundamentally different vision of human liberty.” *Id.* at 244 (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)).

Yet the Obama Administration violates RFRA here by substantially burdening the free exercise of religion without a compelling interest and without using the least restrictive means available. *See* 42 U.S.C. § 2000bb-1. The sincerity of the religious beliefs of the Little Sisters of the Poor can hardly be doubted, and the truth of their beliefs as reinforced by the Catholic Church should not be questioned by a court. The Sisters must “answer to no man for the verity of [their] religious views.” *United States v. Ballard*, 322 U.S. 78, 87 (1944). The decision by the Tenth Circuit below should be reversed.

II. Respect for Dignity Requires Respect for the Sisters' Faith-Based Refusal To Be Complicit in Activity Deemed Immoral.

Catholic doctrine, to which the Sisters have devoted their lives, is crystal clear about this: complicity in sin is itself sinful. Explained by the Catholic Catechism under the title "Respect for the Dignity of Persons," this doctrine compels the faithful to protect the souls of ***others*****,** not just of oneself. This doctrine, sometimes called the doctrine of "scandal", requires Catholics to refrain from supporting activities that lead others astray and towards sin.

As the D.C. Circuit explained in one of the cases among the *Hobby Lobby* line of decisions:

> "instructing or encouraging someone else to commit a wrongful act is itself a grave moral wrong—i.e., 'scandal'—under Catholic doctrine."

Gilardi v. United States HHS, 733 F.3d 1208, 1215 (D.C. Cir. 2013) (quoting Brief of Catholic Theologians at 3), *vacated*, 134 S.Ct. 2902 (2014). *See also Priests for Life v. United States HHS*, 2015 U.S. App. LEXIS 8326, at *26 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc) (noting the Catholic doctrine of scandal in determining whether conduct constitutes impermissible facilitation of wrongdoing according to one's faith), *cert. granted*, 136 S.Ct. 446 (2015); *Spacco v. Bridgewater Sch. Dep't*, 739 F. Supp. 30, 33 (D. Mass. 1990) (observing that "all leases of property by the Archbishop of Boston" include a termination clause to "prevent public scandal," which "would be

use of Church property … in a fashion contrary to basic Roman Catholic doctrines and values") (inner quotations omitted).

It is pursuant to this theology that Catholics are automatically excommunicated merely for arranging or facilitating abortions. Typically the Church does not issue an individualized order of excommunication; instead, its rules operate in an automatic manner for anyone who facilitates the occurrence of a sin as grave as abortion.[9] The Church recognizes that individuals do have culpability when they lead others astray, and Church members need to respect to the dignity of others with respect to their spiritual well-being. This doctrine thereby embodies the "respect for the dignity of persons" that has been emphasized by this Court even in secular contexts. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594-2608 (2015) (citing "dignity" nine times in interpreting the Constitution in favor of a right).

The Catechism of the Church explains that the sin:

> is an attitude or behavior which leads another to do evil. [T]he person who gives scandal becomes his neighbor's tempter. He damages virtue and integrity; he may even draw his brother into spiritual death. ***Scandal is a grave offense if by***

[9] "Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes … [to which] [t]he Church attaches the canonical penalty of excommunication." Catechism of the Catholic Church ¶¶ 2271-72, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm#I (viewed Jan. 6, 2016).

> ***deed or omission another is deliberately led into a grave offense***.

Catechism of the Catholic Church ¶ 2284 (emphasis added).[10]

Church doctrine even emphasizes that the sin is particularly grave for those who commit it in positions of authority, such as the Sisters:

> Scandal takes on a particular gravity by reason of the authority of those who cause it or the weakness of those who are scandalized. It prompted our Lord to utter this curse: "Whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened round his neck and to be drowned in the depth of the sea." Scandal is grave when given by those who by nature or office are obliged to teach and educate others. Jesus reproaches the scribes and Pharisees on this account ….

Id. ¶ 2285 (quoting Mt 18:6, and then citing, for the reference to the Pharisees, Mt 7:15). If the Sisters were to "sign off" on these abortifacients, then their position of authority would lend credibility to an act deemed gravely sinful by the Church, and such "signing off" is what Church doctrine prohibits.

Indeed, this "grave offense" of scandal "can be provoked by laws or institutions, by fashion or opinion," and those who establish laws or guidelines that lead to sin are likewise guilty of it:

> Therefore, they are guilty of scandal who establish laws or social structures leading to the decline of

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[10] *Id.*

> morals and the corruption of religious practice, or to "social conditions that, intentionally or not, make Christian conduct and obedience to the Commandments difficult and practically impossible."

Id. ¶ 2286 (quoting Pius XII, Discourse, June 1, 1941).

Catholic doctrine emphasizes further that those who wield power to lead others toward wrongdoing are fully and automatically responsible:

> Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged. "Temptations to sin are sure to come; but woe to him by whom they come!"

Id. ¶ 2287 (quoting Lk 17:1).

The Sisters seek to remain true to Church doctrine, and under RFRA they have a right to do so. The Tenth Circuit erred in downplaying the severity of the spiritual consequences for the Sisters if they were to "sign off" to facilitate the program of contraceptives, with its inclusion of abortifacients, as required by Respondents. To non-believers, the requirement that a religious group sign off on a program demanded by the Obama Administration (or by any Administration) may seem to be an inconsequential burden on religion. But under the foregoing Catholic doctrine, to which the Sisters (and many millions of others) unquestionably subscribe, it is a matter of spiritual and eternal life or death. RFRA protects Americans against this very predicament, as do pre-RFRA precedents of this

Court dating back more than a century. *See, e.g.*, *United States v. Ballard,* 322 U.S. at 86 ("'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'") (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872)).

The *Hobby Lobby* decision construed RFRA to require that "in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test." 134 S.Ct. at 2759. Here, as in *Hobby Lobby*, "[t]here are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives." *Id.* There are no legitimate goals of the government that justify compelling the Sisters to violate the foregoing Church doctrine against facilitating sin, by forcing the Sisters to "sign off" on the abortifacients. If a prisoner has a right "to wear a headband in his cell and during religious ceremonies …, and have a supply of venison for the Ghost Feast," then the Sisters cannot be lawfully compelled to file paperwork to facilitate abortifacients. *Schlemm v. Wall*, 784 F.3d 362, 366 (7th Cir. 2015) (Easterbrook, J.).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and judgment should be granted in favor of the Sisters.

Respectfully submitted,

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