

ISSUE BRIEF

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Religious Liberty at the Supreme Court: Little Sisters of the Poor Take on Obamacare Mandate

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On March 23, the U.S. Supreme Court will hear oral arguments from the Little Sisters of the Poor in their challenge to the Obamacare “contraception mandate,” which threatens the sisters with crushing government fines unless—in direct violation of their religious beliefs—they facilitate coverage of abortion-inducing drugs and devices, contraception, and sterilization in their employer-provided health plan.

Dozens of religious nonprofits are challenging the Obamacare mandate, including charities, colleges and universities, religious high schools, missionary groups, and religious orders such as the Little Sisters of the Poor—an organization run by Catholic religious sisters dedicated to caring for the elderly poor. If religious nonprofit organizations fail to comply with the mandate, they face fines of up to \$100 per affected employee per day.¹ For the Little Sisters, that could mean up to \$70 million a year in federal fines, a devastating burden for a religious order with a long tradition of begging for food and donations to offset the costs of caring for the elderly poor.²

The mandate makes a serious assault on the fundamental freedom of individuals and organizations who form the backbone of civil society: those who care for the sick, feed the hungry, educate the next

generation, and provide shelter and counseling for the most vulnerable Americans. The government should not be permitted to coerce religious ministries like the Little Sisters of the Poor under threat of devastating fines. The Supreme Court should rule against the Obama Administration and protect the religious freedom of the Little Sisters and other challengers.

Mandated Coverage of Abortion-Inducing Drugs and Devices

The Department of Health and Human Services (HHS) has used the health care law to require employers to cover, among other things, “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women of reproductive age.”³

That list includes not only hormonal birth control and sterilization, but also “emergency contraceptives” like Plan B and *ella*, as well as intrauterine devices, which can sometimes prevent implantation of a living human embryo—effectively causing a very early abortion.⁴ The Little Sisters of the Poor, like many religious organizations that believe life begins at conception, do not wish to be involved in providing coverage that includes life-ending drugs and devices and contraceptive methods.

The Mandate’s Complicated Enforcement Mechanism

Only houses of worship and their “integrated auxiliaries” (like a church-run soup kitchen) are formally exempt from the mandate. For other clearly religious entities, like the Little Sisters of the Poor, the Obama Administration offers an alternative

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enforcement mechanism, which it concocted after nearly a dozen regulatory updates and hundreds of lawsuits over the rule.

Under the new rule, a religious nonprofit must either submit a “self-certification” form directly to its health insurer or third-party administrator (in the case of a self-insured plan) or send a notice letter directly to HHS with details and contact information about the organization’s insurer or administrator. The former situation obliges the insurer or third-party administrator to provide coverage for the objectionable drugs, devices, and services.⁵ In the latter situation, the government directs the insurer or third-party administrator to provide such coverage. In either case, the result is the same: After the nonprofit submits the form or letter, the employees enrolled in the health plan receive coverage that includes abortion-inducing drugs and devices, contraception, and sterilization at no cost to the insured.

Religious nonprofits challenging the mandate say that their participation in this scheme “authorizes, obligates, and incentivizes” their insurers to provide objectionable coverage and that this participation violates their sincerely held religious beliefs.⁶ Indeed, in the case of a self-insured plan, submitting the self-certification form to the plan administrator would be effectively consenting to changing the terms of the contract to provide coverage, which the plan administrator is required to follow. Legal scholars have equated the scheme to a “permission slip” signed by religious institutions for insurers or administrators to provide abortion-inducing drugs and contraception.⁷

Even the government admits in the last two pages of its brief that under the law it cannot take over the religious nonprofit’s health plans in this way *unless* the government receives identifying information about the organization’s insurer or administrator. This is not a matter of simply opting out of the mandate. The government is forcing the Little Sisters and others, under threat of heavy fines, to furnish information that will trigger the inclusion of objectionable drugs and devices in their health plan in violation of their deeply held beliefs.⁸

Religious Freedom Restoration Act

The Little Sisters of the Poor and others challenging the coercive mandate argue that it violates the federal Religious Freedom Restoration Act (RFRA), which protects Americans’ fundamental freedom from unnecessary government coercion. RFRA prohibits the government from doing anything that substantially burdens an adherent’s religious exercise unless the government can demonstrate that it has a compelling interest and that its proposed action is the least restrictive way possible of achieving that compelling interest.

That is a high legal standard, one the federal government failed to meet during a 2014 case over the same HHS mandate involving Hobby Lobby, a family-run business. In that case, the Court ruled against the coercive mandate, finding that it placed a substantial burden on individuals’ fundamental right to run their businesses in accordance with their faith.

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1. Sarah Torre, “Obamacare’s Fine on Faith: Trampling on Religious Liberty,” Heritage Foundation *Issue Brief* No. 3553, March 27, 2012, <http://www.heritage.org/research/reports/2012/03/obamacares-preventive-services-mandate-and-religious-liberty>.
 2. “Tradition of Begging,” The Little Sisters of the Poor, <http://www.littlesistersofthepoor.org/ourmission/tradition-of-begging> (accessed March 21, 2016).
 3. For more on the development of the HHS mandate, see Elizabeth Slattery and Sarah Torre, “Obamacare Anti-Conscience Mandate at the Supreme Court,” Heritage Foundation *Legal Memorandum* No. 115, February 13, 2014, <http://www.heritage.org/research/reports/2014/02/obamacare-anti-conscience-mandate-at-the-supreme-court>, and Sarah Torre, “Obama Administration’s Eighth Try on HHS Mandate and Religious Liberty Still Fails,” The Daily Signal, August 22, 2014, <http://dailysignal.com//2014/08/22/obama-adminstrations-eighth-try-hhs-mandate-religious-liberty-still-fails/>.
 4. Amici Curiae Brief of Association of American Physicians & Surgeons, et al. in *Zubik v. Burwell* (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).
 5. 45 CFR §147.131.
 6. Brief for Petitioners, p. 1, *Zubik v. Burwell* (Nos. 14-1418, 14-1453, 14-1505).
 7. Joel Gehrke, “DOJ Asks Supreme Court Not to Block HHS Mandate for Little Sisters of the Poor,” *Washington Examiner*, January 3, 2014, <http://www.washingtonexaminer.com/doj-asks-supreme-court-not-to-block-hhs-mandate-for-little-sisters-of-the-poor/article/2541541> (accessed March 21, 2016), and “New SCOTUS Term: Win for Nuns on HHS Mandate?” *CBN News*, October 5, 2015, <http://www1.cbn.com/cbnnews/us/2015/October/New-SCOTUS-Term-Win-for-Nuns-on-HHS-Mandate> (accessed March 21, 2016).
 8. Brief for Respondents, pp. 87-88 in *Zubik v. Burwell*.
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The Little Sisters' Fight for Religious Freedom

The complicated alternative enforcement scheme created by HHS bureaucrats amounts to nothing more than a smoke screen. The government is still forcing some religious organizations to be involved in providing abortion-inducing drugs and devices, contraception, and sterilization while completely exempting other religious organizations. This does not meet RFRA's high standard.

The Mandate Imposes a Substantial Burden.

The federal government's lawyers argue that the opportunity to submit the self-certification form or notice letter to HHS offers the equivalent of an "opt out" from the contraceptive mandate, and that there is therefore no substantial burden.⁹

But the religious organizations rightly counter that the rules simply provide "a mechanism for [the Little Sisters of the Poor] to *comply with*, not avoid, the mandate to which they object."¹⁰ As explained above, by signing the form or sending a letter to HHS, the Little Sisters set in motion a process by which the government takes over their health plan infrastructure to provide coverage that includes abortion-inducing drugs and devices, contraception, and sterilization. The Little Sisters believe this makes them morally complicit in the provision of such drugs and devices.

Again, if religious nonprofits do not comply, they face serious and devastating fines. Being forced to choose between violating one's faith or facing government penalties is, the Little Sisters argue, "a quintessential substantial burden on religious exercise."¹¹

The Government Has Not Shown a Compelling Justification for Burdening These Organizations in This Way. The government claims it has a compelling interest in ensuring that all women enrolled in a health plan have cost-free access to

contraceptive drugs and devices because doing so would ensure "full and equal health coverage" for women and reduce rates of unintended pregnancy—a claim that is itself disputed.¹²

But the government's interest cannot be so important. It has exempted the health plans of tens of millions of employees from the contraceptive and abortion-inducing drug mandate for reasons ranging from the political to those of logistical convenience. Many large corporations—such as Visa, Pepsi Bottling, and Exxon—are exempt from the contraceptive mandate under the ACA's grandfather provision and the U.S. military health plan is not required to cover the mandated drugs and services. Moreover, employers with fewer than 50 employees are not required to provide employee health coverage at all. In total, the health plans of about one in three Americans are effectively exempt from this mandate.¹³

More important, HHS has formally exempted houses of worship from the mandate because the government recognized that the mandated coverage could create conflicts of conscience for many religious institutions. Instead of broadly exempting religious organizations with objections to the mandate, HHS looked to an arcane IRS reporting provision that applies only to formal houses of worship in order to exempt the narrowest segment of religious institutions. Houses of worship do not have to fill out forms or even notify the government of their objection to providing coverage that includes some of these drugs and devices; they are automatically excluded—even if they do not actually object to any of the mandated coverage.

Hijacking Nuns' Health Plans Is Not Least Restrictive Means. Even if the government could show a compelling interest in ensuring cost-free access to contraception and sterilization, forcing the Little Sisters of the Poor to facilitate coverage that

9. *Ibid.*, p. 13.

10. Brief for Petitioners, p. 42 in *Zubik v. Burwell* (Nos. 15-35, 15-105, 15-119, 15-191).

11. *Ibid.*

12. Brief for Respondents at 54 in *Zubik v. Burwell*; Michael J. New details counter-evidence to the government's claim that contraceptive coverage mandates will reduce unintended pregnancy rates in an amicus brief in *Zubik*, Brief for Amicus Curiae Michael J. New, Association Scholar, Charlotte Lozier Institute, in Support of Petitioners, *Zubik v. Burwell* (Nos. 14-1418).

13. "Understanding Who Is Exempted from the HHS Mandate," Little Sisters of the Poor.com, <http://www.scotusblog.com/wp-content/uploads/2016/01/Little-Sisters-Merits-Brief.pdf> (accessed March 21, 2016).

14. The government even admits in its brief that women without compliant health plans "will ordinarily obtain coverage through a family member's employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, or through Medicaid or another government program." Brief for Respondents at 65 in *Zubik v. Burwell*.

includes potentially life-ending drugs and devices is not the least restrictive means of achieving that goal.

As the Supreme Court noted in *Hobby Lobby*, and as the Little Sisters argue, there are other ways for the government to provide abortion-inducing drugs and devices and contraception to those who want them without hijacking employers' health plans and curtailing religious freedom.¹⁴

Writing for the majority in *Hobby Lobby*, Justice Samuel Alito wrote that the government could find a way to provide these services directly to women without entangling religious objectors:

If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.¹⁵

HHS Mandate's Assault on Religious Freedom

The cases before the Supreme Court are not about whether the Little Sisters or other religious nonprofits are correct in their religious beliefs. The Supreme Court has long recognized that judges are not competent to determine which beliefs are "good enough" for protection. After all, the right to the free exercise

of religion includes the right to disagree with prevailing opinions.¹⁶

One need not agree with the Little Sisters' expression of their faith or share their opposition to abortion and contraception to recognize that the government should not force any American to violate his or her conscience in order to serve others, educate students, care for the sick, or comfort the dying.

All women, including those working for religious nonprofits, remain free to make their own decisions about the drugs and devices at issue in this mandate and to purchase or find coverage for them. A small number of charities, schools, and others are simply asking for the freedom not to be coerced into actively participating in a government-imposed scheme that their consciences do not allow.

Religious liberty can only be meaningful if it applies to everyone—not just those the government deems worthy.

The Supreme Court should rule against the Obama Administration's narrow view of faith and provide relief to the Little Sisters and other religious organizations from this coercive and unnecessary mandate.

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15. *Hobby Lobby v. Burwell*, 573 U.S. 41 (2014).

16. Ryan T. Anderson, "The Right to Be Wrong," *The Public Discourse*, July 7, 2014, <http://www.thepublicdiscourse.com/2014/07/13432/> (accessed March 21, 2016).