

No. 14-6028

**UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

REACHING SOULS, INC., an Oklahoma non-profit corporation; TRUETT-McCONNELL COLLEGE, INC., a Georgia non-profit corporation, by themselves and on behalf of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas non-profit corporation,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma No. 5:13-cv-1092-D (DeGiusti, J.)

Amicus Curiae Brief of
Concerned Women for America
in support of *Appellees* and
urging Affirmance

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
Telephone: 757-463-6133
Facsimile: 757-463-6055
Email: nlf@nlf.net

CORPORATE DISCLOSURE STATEMENT

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

/s/Steven W. Fitschen

Steven W. Fitschen

The National Legal Foundation

2224 Virginia Beach Blvd., Suite 204

Virginia Beach, VA 23454

(757) 463-6133; nlf@nlf.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE*1

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c).....1

SUMMARY OF THE ARGUMENT2

ARGUMENT.....3

**I. WOMEN VALUE RELIGIOUS FREEDOM,
MINISTRY, AND SERVICE. 6**

**II. RELIGIOUS MINISTRY WORK, LIKE EDUCATION, IS
AN EXPRESSION OF FAITH PROTECTED
BY THE FIRST AMENDMENT..... 11**

**III. THE GOVERNMENT MANDATE VIOLATES RFRA AND THE
FIRST AMENDMENT BY PLACING A SUBSTANTIAL BURDEN
ON THE FREE EXERCISE OF RELIGION..... 13**

**IV. THE GOVERNMENT VIOLATES RELIGIOUS FREEDOM
FOR NO COMPELLING REASON. 15**

CONCLUSION.....18

TABLE OF AUTHORITIES

CASES

<i>Axson-Flynn v. Johnson</i> , 356 F.3d 1277 (10th Cir. 2004)	16
<i>Brown v. Entm't Merchs. Ass'n</i> , 131 S. Ct. 2729 (2011).....	16
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	15, 17
<i>Concerned Women for America Inc. v. Lafayette County</i> , 883 F.2d 32 (5th Cir. 1989).....	11
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990).....	15
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 132 S. Ct. 694 (2012).....	12
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	13
<i>Thomas v. Review Bd. of Indiana Employment Sec. Division</i> , 450 U.S. 707 (1981).....	13, 14
<i>Travis v. Owego-Apalachin School Dist.</i> , 927 F.2d 688 (2nd Cir. 1991).....	11
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	13, 16

FEDERAL LAW AND REGULATIONS

26 C.F.R. 1.6033-2(h)	11
-----------------------------	----

26 U.S.C. § 4980D.....	4
26 U.S.C. § 4980H.....	4
42 U.S.C. § 300gg-13(a).....	4, 18
45 C.F.R. 147.131(a).....	11
77 Fed.Reg. 8725 (Feb. 15, 2012).	4
78 Fed. Reg. at 39874	11
Pub. L. No. 111–148, 124 Stat. 119 (2010).....	2, 3
U.S. Const. amend I.....	7

OTHER SOURCES

Anne Hutchinson Memorial, <i>available at</i> http://www.dcmemorials.com/index_indiv0008064.htm	6
<i>Biography of Saint Elizabeth Ann Seton</i> , The National Shrine of Saint Elizabeth Ann Seton, <i>available at</i> http://www.setonheritage.org/learn-and-explore/resources/mother-seton-bio/	7
<i>Biography of St. Elizabeth Ann Seton</i> , The National Shrine of Saint Elizabeth Ann Seton, <i>available at</i> http://www.setonheritage.org/learn-and-explore/resources/mother-seton-bio/early-life/	7
<i>The Bylaws of Reaching Souls International, Inc.</i> , § 6, http://reaching-soulsinternational.org/sites/default/files/files/documents/ExecutedBylaws.pdf	5
Dorothy A. Mays, <i>Women in Early America: Struggle, Survival, and Freedom in a New World</i> , ABC-CLIO, Inc. (2004).....	8
Edward T. James, Janet Wilson James, Paul S. Boyer, eds.	

<i>Notable American Women, 1607-1950: A Biographical Dictionary</i> , Vol. 2, Harvard University Press (1971).....	8
Employee Benefit Security Administration, <i>Form 700</i> , http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf	4
<i>Enhancing the World of Christian Financial Services</i> , http://www.guidestone.org/AboutUs/Mission	4
<i>Fast Facts About American Religion</i> , Hartford Institute for Religion Research, http://hrr.hartsem.edu/research/fastfacts/fast_facts.html#largest	5
<i>GuideStone Global Health Plan</i> , http://www.guidestoneinsurance.org/~media/B34DFFF4DC744AD7A581C896F4713296.ashx	9
Julie Waters, <i>Elizabeth Ann Seton: Saint for a New Nation</i> , Paulist Press (2002)....	7
Luke 24:44-49	12
Mark 12:31	12
Mark 16:14-18.....	12
Matthew 22:39	12
Matthew 28:16-20.....	12
Melina Mangal, <i>Anne Hutchinson: Religious Reformer</i> , Capstone Press (2004)	6
<i>Mission</i> , Reaching Souls International, <i>available at</i> http://reachingsoulsinternational.org/mission	8
Public Option Deficit Reduction Act, H.R.261, 113th Cong. (2013).....	17
Richard Wheatle, <i>The Life and Letters of Mrs. Phoebe Palmer</i> , W.C. Palmer, Jr. (1876).....	8
Romans 13:1-7	14

Salvation Army International Statement on Faith, <i>available at</i> http://www.salvationarmy.org/ihq/faith	8
<i>Staff</i> , Reaching Souls, Inc., http://reachingsoulsinternational.org/staff	5
<i>Truett-McConnell College Student Handbook 4</i> , http://www.truett.edu/article-list/984	5
<i>Truett-McConnell Lives its Mission Statement</i> , http://www.truett.edu/article-list/984	9

STATEMENT OF INTEREST OF *AMICUS CURIAE*

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

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

The Brief is filed with the consent of all parties.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)

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

SUMMARY OF THE ARGUMENT

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

The choice the government presents between violating deeply held religious beliefs or facing crippling fines that would prevent the expression of religious faith through ministry services is no choice at all and presents a most basic violation of

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

the free exercise of religion. The government’s flimsy dismissal of the substantial burden it places on religious organizations in this case is not only unpersuasive but insulting to the thousand of religious women we represent. If the accommodation at issue in this case is immaterial, why has the government spent so much time and resources to impose it on religious groups? The government recognizes the religious liberty issues at play, as evinced by the exemption it grants to other religious institutions. If Appellees were to be exempted, the government’s interest would be no less advanced. Other less restrictive means are clearly available.

ARGUMENT

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

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

² *Id.*

42 U.S.C. § 300gg-13(a). Those guidelines have been interpreted to include all FDA-approved contraceptive and sterilization methods, including abortifacients such as Plan B and Ella,³ which millions of religious women consider an affront to the sanctity of human life. Noncompliance with these regulations is met with steep penalties.⁴ The government’s supposed “accommodation,” through the Employee Benefit Security Administration’s (EBSA) form 700,⁵ fails to address the religious freedom implications involved in this manner, but merely shifts them, while still burdening women of faith.

Though this Mandate has been promoted as benefiting women, it cannot escape this Court that many *women* are also represented by Appellees who merely seek to protect against this violation of our constitutional guarantee of the free exercise of religion. As explained by Appellees in their Brief, Appellee GuideStone was created by the Southern Baptist Convention. Appellee’s Br. 7.

³ 77 Fed.Reg. 8725 (Feb. 15, 2012).

⁴ *See* 26 U.S.C. § 4980D(a), (b)(1) and § 4980H(a), (c).

⁵ Employee Benefit Security Administration Form 700 is available, through the United States Department of Labor, at <http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf> (last visited May 26, 2014).

The Convention’s 16+ million members⁶—including, of course, its women members—vigorously oppose abortion. *Id.* at 7-8. As further explained by Appellees, Reaching Souls and Truett-McConnell College also oppose abortion. *Id.* at 8-9. Significantly, five out of thirteen of Reaching Souls’ current employees are women.⁷ This is particularly significant since Reaching Souls seeks to employ people with views on biblical mandates that match the ministry’s views.⁸ Similarly, as Appellees have explained, Truett-McConnell has adopted the Southern Baptists’ statement of faith as its own statement of faith. *Id.* at 9. This, in turn, is significant because its students—including its women students—are required to adhere to all college “moral and spiritual standards.”⁹ Thus, the religious exercise of Appellees is also the religious exercise of Appellees’ women members, staff, and students. *Amicus*, Concerned Women for America,

⁶ *Fast Facts About American Religion*, Hartford Institute for Religion Research, http://hrr.hartsem.edu/research/fastfacts/fast_facts.html#largest (figures as of 2012) (last visited May 26, 2014).

⁷ *See, Staff*, Reaching Souls, Inc., available at <http://reachingsoulsinternational.org/staff> (last visited May 27, 2014).

⁸ *See, The Bylaws of Reaching Souls International, Inc.*, § 6, available at <http://reachingsoulsinternational.org/sites/default/files/files/documents/ExecutedBylaws.pdf> (last visited May 27, 2014).

⁹ *Truett-McConnell College 2013-2014 Student Handbook*, available at http://www.truett.edu/images/TMC/student_life/2013-2014_Student_Handbook.pdf (last visited May 27, 2014).

representing 500,000 women around the country, stand boldly with them against this affront to one of our most cherished constitutional rights in the name of “women’s rights.”

I. WOMEN VALUE RELIGIOUS FREEDOM, MINISTRY, AND SERVICE.

Women have a long history of fighting for religious liberty. The Anne Hutchinson Memorial at the Massachusetts State House stands as a reminder of a time in our history when women could be marginalized because of their deeply held religious views. It is sad that the government’s actions in this case remind us of that history. Hutchinson was tried and banished from the Massachusetts Bay Colony in 1637 because of her religious views.¹⁰ The inscription in the marble foundation of her monument reads in part: “In Memory of Anne Marbury Hutchinson . . . Courageous Exponent of Civil Liberty and Religious Toleration.”¹¹ She was punished for her religious beliefs then, and ironically, today the government threatens a different punishment, but a punishment nonetheless, to women involved in ministry service if they faithfully adhere to their religious beliefs.

¹⁰ Melina Mangal, *Anne Hutchinson: Religious Reformer* 7, Capstone Press (2004).

¹¹ Pictures and description *available at* http://www.dcmemorials.com/index_indiv0008064.htm (last visited May 26, 2014).

St. Elizabeth Ann Seton, the first person born in the United States to become a canonized as a saint (September 14, 1975), also had to stand by her religious convictions in a less than free environment.¹² Biographer Julie Walters recounts a time when Anti-Catholic mobs would stand outside the doors of the church yelling things like, “We’re going to burn this unholy place to the ground.”¹³ But Seaton overcame all that and went on to found the Sisters of the Charity of St. Joseph’s, the first new community for religious women in the United States. She began the first free Catholic school for girls in the United States, St. Joseph’s Academy and Free School,¹⁴ and her lifetime commitment to charity is still celebrated today.

These stories are a reminder of that highest of principles enshrined in our great Constitution, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend I. This Court should not lose sight that it is religion—faith—that fueled these women’s passion for ministry service. It was faith that fueled Evangeline Booth (1865–

¹² *Biography of St. Elizabeth Ann Seton*, The National Shrine of Saint Elizabeth Ann Seton, available at <http://www.setonheritage.org/learn-and-explore/resources/mother-seton-bio/early-life/> (last visited May 26, 2014).

¹³ Julie Waters, *Elizabeth Ann Seton: Saint for a New Nation* 71, Paulist Press (2002).

¹⁴ *Biography of St. Elizabeth Ann Seton*, available at The National Shrine of Saint Elizabeth Ann Seton, <http://www.setonheritage.org/learn-and-explore/resources/mother-seton-bio/> (last visited May 26, 2014).

1950), daughter of Salvation Army founders William and Catherine Booth. She became commander of the Salvation Army in America and the first general of the International Salvation Army.¹⁵ All the incredible charitable work done by the Salvation Army throughout the years is “rooted in the faith of its members.”¹⁶

Those are just a few names, but many more exist. Women like Isabella Graham who established the Society for the Relief of Poor Widows With Small Children¹⁷ and Phoebe Palmer who founded the Five Point Mission to provide for the needy.¹⁸ That same spirit of faith and charity motivates Appellees to do what they do today.

Reaching Souls International’s mission says, “We are working to see as many people saved in the least amount of time by using the most efficient means available. The core driving force of all that we do is to reach people for Jesus.”¹⁹

¹⁵ Edward T. James, Janet Wilson James, Paul S. Boyer, eds. *Notable American Women, 1607-1950: A Biographical Dictionary*, Vol. 2, 206, Harvard University Press (1971).

¹⁶ Salvation Army International Statement on Faith, *available at* <http://www.salvationarmy.org/ihq/faith> (last visited May 26, 2014).

¹⁷ Dorothy A. Mays, *Women in Early America: Struggle, Survival, and Freedom in a New World* 165, ABC-CLIO, Inc. (2004).

¹⁸ Richard Wheatle, *The Life and Letters of Mrs. Phoebe Palmer* 224, W.C. Palmer, Jr. (1876).

¹⁹ *Mission*, Reaching Souls International, *available at* <http://reachingsoulsinternational.org/mission> (last visited May 26, 2014).

Truett-McConnell’s mission statement is similarly religious in nature: “Truett-McConnell College equips students to fulfill the Great Commission by fostering a Christian worldview through a biblically centered education.”²⁰ That commitment to their deeply held religious beliefs drives the great work these institutions do and also motivates them to honest and generous business practices that comport with the high standard required of them. That commitment also binds them to GuideStone, started by the Southern Baptist Convention (SBC) in 1918, with a focus on “integrity.”²¹ As an affiliate of the SBC, GuideStone believes in and promotes the sanctity of human life. For that reason, the GuideStone Plan does not pay or reimburse for expenses associated with “elective termination of pregnancy by any method,” including abortifacients.²²

The government’s actions in this case threaten to stifle the historical tradition of religious expression through ministry and charity by imposing a substantial and unnecessary burden on the Appellees’ ability to serve their

²⁰ *Truett-McConnell Lives its Mission Statement*, <http://www.truett.edu/article-list/984> (last visited May 26, 2014).

²¹ *Enhancing the World of Christian Financial Services*, <http://www.guidestone.org/AboutUs/Mission> (last visited May 23, 2014).

²² *GuideStone Global Health Plan 24*, available at http://www.guidestoneinsurance.org/~/_/media/B34DFFF4DC744AD7A581C896F4713296.ashx (last visited May 23, 2014).

neighbors. The government is prepared to force them to abandon their religious calling if they are not willing to do what their consciences prohibit them to do. If this Court does not guard freedom in this most intimate of areas, between a man or woman and his or her God, Americans could just as easily be at risk of losing their freedoms in any number of other areas that are perhaps cherished more by other groups.

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

Thirty-five years ago, Beverly LaHaye founded Concerned Women for America (CWA) precisely for this reason. She wanted to make sure women of faith had a voice in legal and public matters where she felt a particular view was being presented consistently as the views of all women. Today CWA enjoys wide support, having become a powerful voice on behalf of women of faith all over the nation. Throughout the years, CWA has stood in representation of women’s

religious liberties in the culture, legislatures and the courts.²³ In a similar way, *Amicus* comes before this Honorable Court today asking that the views of women of faith not be made subservient to the views of other groups of women who may not share our values.

II. RELIGIOUS MINISTRY WORK, LIKE EDUCATION, IS AN EXPRESSION OF FAITH PROTECTED BY THE FIRST AMENDMENT.

The government recognizes that there is a significant infringement upon religious liberties with the Mandate. The existence of a “true” exemption, without the burden of authorizing a third party through EBSA form 700, which the government has made available to churches and “integrated auxiliaries” proves that. *See* 78 Fed. Reg. 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). Why does the government insist on denying that same protection to other religious institutions? Its argument on this issue amounts to saying that Appellees are not “religious enough” to warrant a true religious exemption. But such an assertion is false. Appellees’ commitment to their faith is as great as that of any church. In fact, their close affiliation to the Southern Baptist Convention and their statements

²³ *See, e.g., Concerned Women for America Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) as an example, where the court held the use of public library by women’s religious group would not violate the establishment clause; *see also Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, (2nd 1991).

of faith are strong proof of that commitment in this case. All these ministries are united by the Great Commission²⁴ and contribute to it by adhering to the tenet of their faith to “love your neighbor as yourself”²⁵ in different ways.

But even beyond that, it is not the government’s role to second-guess religious organizations as to their religious practices. The government engages in an unconstitutional revisionism of what religious expression is supposed to look like. The government’s failure to comprehend the strong religious belief at issue here should not provide cover for its infringement on Appellees’ the free exercise or a ground to question the severity of its infringement. It views education and service to the next generations, which is crucial to the Christian faith, as a lesser form of religious work. As the Supreme Court opined recently in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), when the government insists it can speak to such issues, it “infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission”

For many Christians, service to their neighbors is perhaps the highest form of worship, and for the state to second-guess those beliefs is as big an offense to

²⁴ See Matthew 28:16-20, Mark 16:14-18, Luke 24:44-49.

²⁵ Matthew 22:39; see also, Mark 12:31.

the basic principles of the First Amendment as could ever occur. The Supreme Court has opined that “beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.” *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 713 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972)). The Court wrote that, “determination of what is a ‘religious’ belief or practice is . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas* 450 U.S. at 714. Yet that is exactly what the government is doing and asks this Court to do in this instance. The government substitutes its perception of the Appellees’ deeply held religious beliefs and makes demands it considers reasonable based on its own assumptions.

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

Women of faith should not be put in a position in which the government uses the law to force them to violate their deeply held religious beliefs. Yet, in this case, the government tells Appellees—and by extension, their women members, staff, and students—that they must violate their consciences or face crippling fines.

Furthermore, for these Christian women, government is forcing them to violate their deeply held religious beliefs no matter what because their faith also requires obedience to governmental authorities.²⁶

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

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

Thomas, 450 U.S. at 713. In this case, the government conditions the benefit of an exemption from a requirement that violates religious liberty upon a form that itself is in direct violation of the religious beliefs of the Appellees. Granting relief from religious liberty violation by requiring conduct that is in itself a violation of religious liberty is no relief at all.

The government's Mandate even fails under the guise of being neutral and generally applicable. Although the Supreme Court has recognized that neutral laws

²⁶ Romans 13:1-7.

of general applicability usually do not give rise to free exercise concerns,²⁷ the Mandate’s underinclusion by extending such a broad range of exemptions exposes the unconstitutionality of the law, as was the case in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This Brief has already mentioned that churches and their auxiliaries get an exemption without filing EBSA form 700. Employers who provide “grandfathered” plans are also exempt from the Mandate and do not have to file EBSA form 700. And small businesses with fewer than fifty employees also escape the government’s grasp, since they can avoid providing insurance in the first place. Having offered so many exemptions, it is inconsistent for the government to now come before this Court arguing that the violation of Appellees’ constitutional rights is necessary to accomplish its stated interest. Or to downplay the significance of the burden it places on them.

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

Failing the neutral and general applicability test puts the government in a precarious position. The state must show that it is using the least restrictive means of achieving a compelling state interest with this Mandate. “[I]f a law that burdens

²⁷ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

a religious practice or belief is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (internal quotation marks and citations omitted). On this, the Mandate fails plainly.

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

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

The government has many options at its disposal in order to increase access to free contraception without imposing this heavy burden on the free exercise of religion. In fact, a public option, for example, is preferred by many of the proponents of the ACA.²⁸ With half as much creativity as the government has shown through this regulatory scheme, it could come up with tax incentives to accomplish just as much, and perhaps more, of what it seeks today, since it could be including the millions it exempts through current regulation. There is simply no reasonable, let alone compelling, justification for the burden the government seeks

²⁸ See Public Option Deficit Reduction Act, H.R.261, 113th Cong. (2013), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:hr261>: (last visited May 26, 2014).

to levy on the shoulders of Appellees.

CONCLUSION

Appellees should qualify for a full religious exemption, as do churches and “integrated auxiliaries,” from the provisions imposed in 42 U.S.C. § 300gg-13(a). For the government to use the force of law to obligate Appellees to violate their consciences is a gross violation of the constitutional right to the Free Exercise of Religion guaranteed by the First Amendment. The government’s failure to grasp or its willingness to second guess the degree of which it burdens Appellees should provide no safeguard to its gross violation of constitutional rights. The consequences of such a burden on women of faith especially are of grave concern to *Amicus*, considering our country’s rich history of women of faith serving through ministry and charitable service. We respectfully ask this Court to affirm the preliminary injunction granted by the district court below.

Respectfully submitted,
this 27th day of May, 2014,

/s/Steven W. Fitschen
Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
463-6133; nlf@nlf.net

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

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

This brief contains 3,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word counting function of Microsoft Word 2007.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14 Times New Roman.

Dated: May 27, 2014

/s/Steven W. Fitschen
Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133; nlf@nlf.net

CERTIFICATION OF DIGITAL SUBMISSIONS

I, Steven W. Fitschen, hereby certify that:

(1) all required privacy redactions have been made,

(2) with the exception of those redactions, every document submitted in

Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (the virus scanning component of AVG Internet Security 2014, updated on May 27, 2014 2014)

and, according to the program, are free of viruses.

Dated: May 27, 2014

s/ Steven W. Fitschen

Steven W. Fitschen

The National Legal Foundation

2224 Virginia Beach Blvd., Suite 204

Virginia Beach, VA 23454

(757) 463-6133; nlf@nlf.net

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2014, I electronically filed the attached Brief *Amicus Curiae* of Concerned Women for America in the case of *Reaching Souls International, et al., v. Sebelius, et al.*, No. 14-6028, with the clerk of the court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served via that system.

Also, on May 27, 2014, seven paper copies of the Brief were deposited with Federal Express for delivery to the Court the next day.

/s/Steven W. Fitschen
Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133; nlf@nlf.net