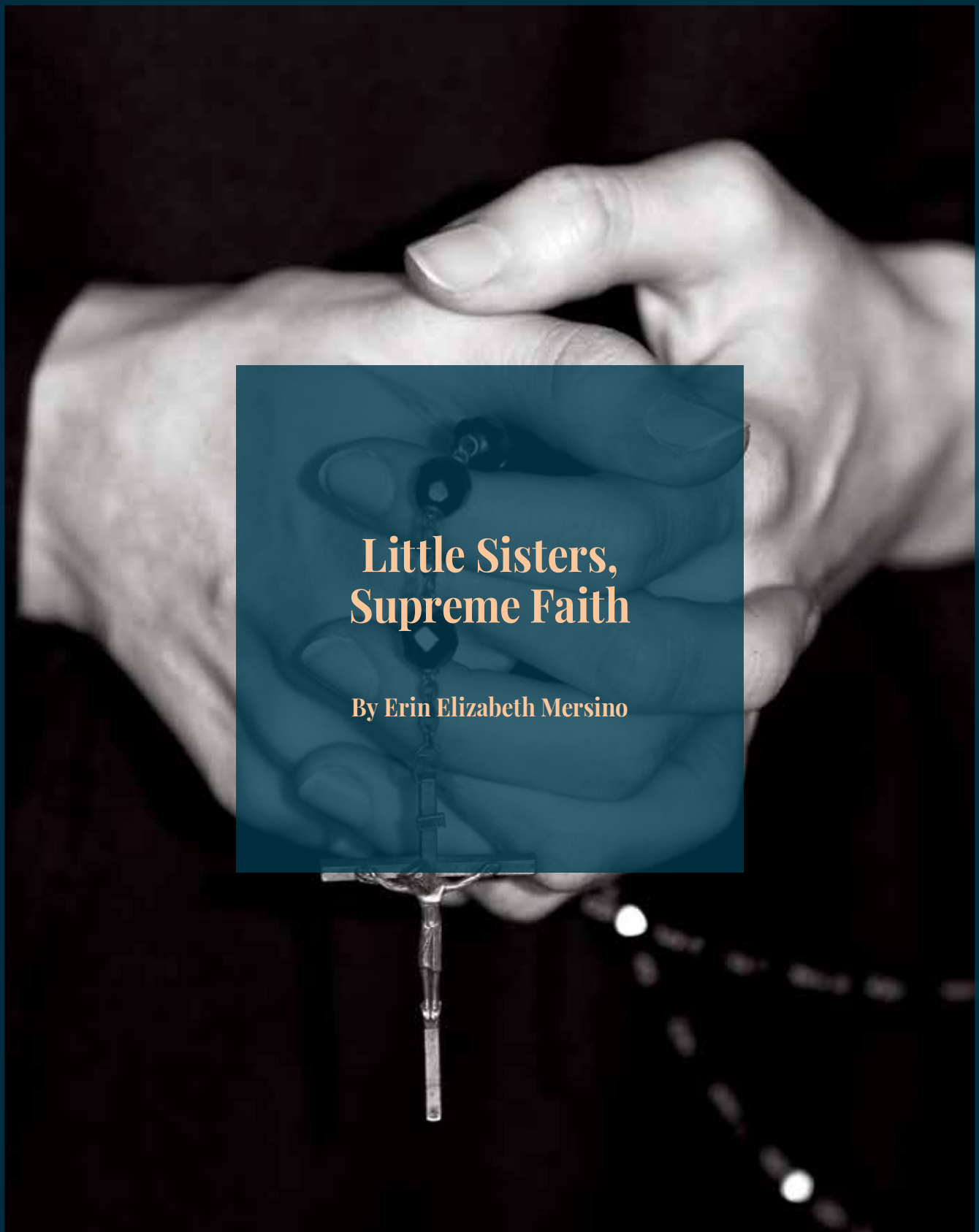


Little Sisters, Supreme Faith

By Erin Elizabeth Mersino

The Little Sisters of the Poor, an order of nuns devoted to ministering to the neediest poor and elderly of all races and religions, live as a portrait composed of a million brushstrokes of humble, hidden tasks.[1] The Little Sisters wear religious habits as a reminder of their complete devotion to God, complete with a crucifix inscribed with the words, "I am gentle and humble of heart."[2] This peaceful, quiet order of women who pour themselves into the people they serve were nearly anonymous in the United States for 150 years — until the federal government mandated them to provide health coverage that violated their vows as Catholic sisters. For the greater part of the last decade, the Little Sisters have accepted a new and unlikely role: litigant before the Supreme Court. To better understand their journey, we need to examine the past.

In 1786, a decade had passed since Thomas Jefferson principally drafted the Declaration of Independence, George Washington would not be elected as our nation's first president for another three years, and the Church of England was threatening the young country's newly proclaimed freedom from nationalized religion. Feeling the pressure and responsibility to protect religious pluralism, the General Assembly of Virginia decided to dust off legislation written by Jefferson when he was the state's governor. The legislation states, in part:

> *We the General Assembly of Virginia do enact* [Be it enacted by the General Assembly] that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[3]

The act, passed by the assembly in 1789 and considered a predominant influence for the First Amendment of the Bill of Rights, was one of three accomplishments requested by Jefferson for enumeration on his headstone.[4] Indeed, just eight months later, the U.S. Congress approved James Madison's proposed draft of the First Amendment and by the end of 1791, the requisite number of states had ratified the Bill of Rights. Despite years of litigation regarding its meaning and importance, Madison's text is quite simple as it pertains to religious liberty: No government may enact a law "respecting an establishment of religion or prohibiting the free exercise thereof."[5]

These simple words stand as a sentinel for individuals whose beliefs do not conform to those of the government and, at times, the great weight of most of the population or sometimes to the *argumentum ad populum*. These words paved the bedrock of jurisprudence protecting the uniquely American notion that freedom does not require homogeneous agreement between its citizens, especially in personal matters such as religious faith. This "live and let live" mentality is displayed in *West Virginia v. Barnette*, where the U.S. Supreme Court famously opined:

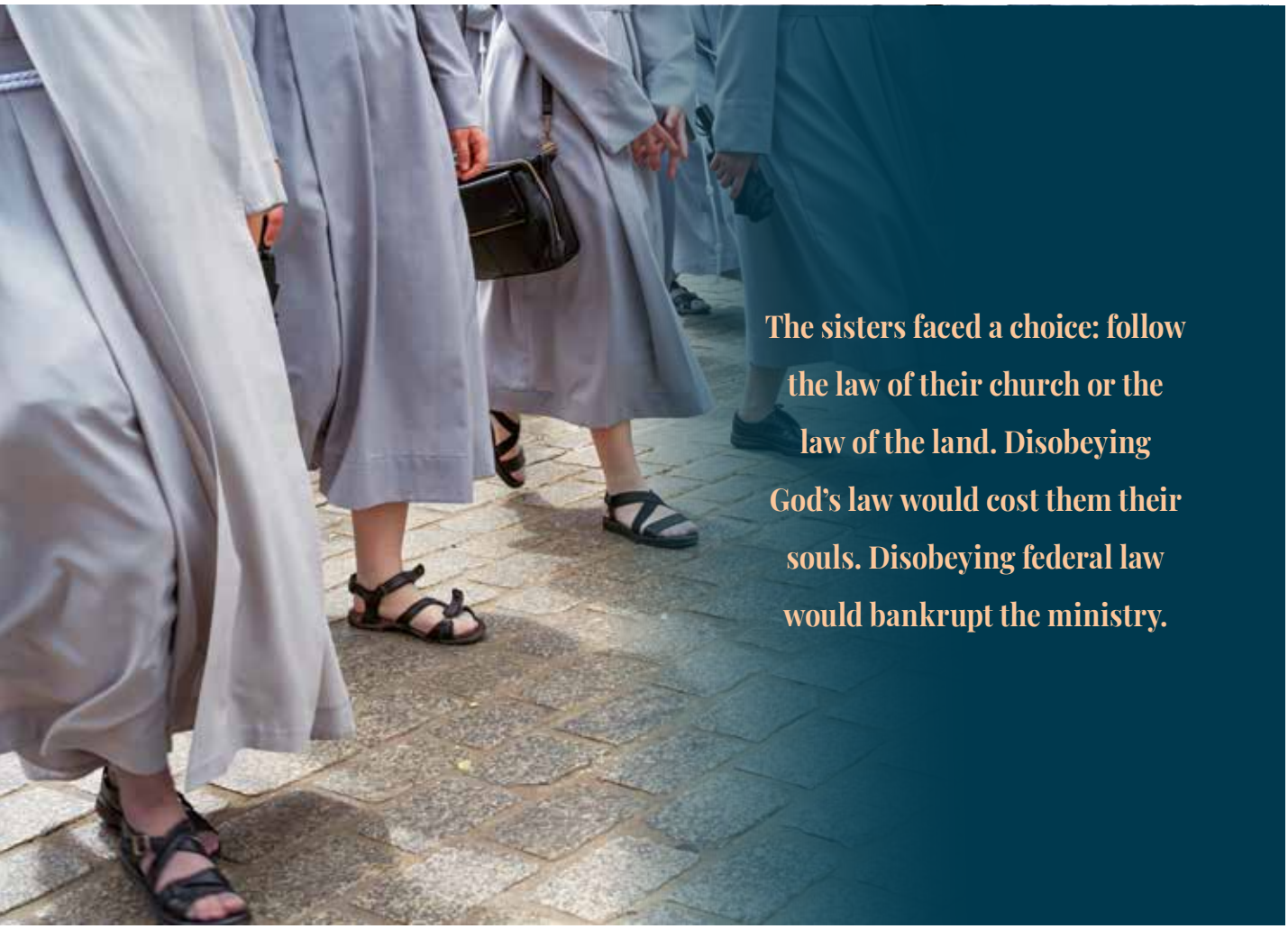
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[6]

In 1990, the Supreme Court published the much-lamented opinion written by Justice Antonin Scalia, *Employment Division, Department of Human Resources of Oregon v. Smith*.[7] Scholars widely panned the decision as inappropriately curtailing religious freedom because *Smith* applied a general applicability test which greenlighted many governmentally imposed burdens to religious exercise to be upheld under mere rational basis review.[8] Three years later, Congress passed the Religious Freedom Restoration Act to "ensure that the interests in religious freedom are protected" and codified strict scrutiny when federal legislation substantially burdens religious exercise.[9]

The post-*Smith* Supreme Court has seen increasing challenges brought by people of faith both under RFRA and the First Amendment and, over the course of the last few years, has seemingly opened the door for the return to the philosophy of *Barnette*'s pluralism that expressly seeks tolerance for individuals motivated by sincere religious convictions. In *American Legion v. American Humanist Association*, for example, the Supreme Court analyzed whether a cross honoring fallen veterans should be allowed to remain standing on public property.[10] Displaying a sentiment of inclusivity and pluralism, the Court held that "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many" leads to its decision to allow the cross to stand.[11] Justice Elena Kagan concurred with the majority, noting that the Court's decision "shows sensitivity to and respect for this Nation's pluralism, and the values of

At a Glance

In 2011, the federal government mandated that employers provide birth control through their employee health insurance plans. For the Little Sisters of the Poor, a group of Catholic nuns, this required them to violate their sincerely held religious beliefs and started them on a journey that ended at the U.S. Supreme Court.



The sisters faced a choice: follow the law of their church or the law of the land. Disobeying God's law would cost them their souls. Disobeying federal law would bankrupt the ministry.

neutrality and inclusion that the First Amendment demands."[12] This relates to the Little Sisters of the Poor because their religious convictions might not correspond with yours, but nonetheless require not your agreement, but your tolerance.

The Little Sisters' journey as litigants began in 2011. Congress passed the Affordable Care Act and delegated to the U.S. Department of Health and Human Services (DHHS) the decision of what employers must include as preventive services for women. DHHS mandated that employers must provide all federally approved forms of birth control.[13] Birth control had been around for decades, but the idea of requiring an employer to provide it under the penalty of law was new; the idea of requiring nuns to provide it seemed absurd.

Beyond the absurdity of the situation was a graver issue, however. For the Little Sisters, the mandate conflicted with the catechism of the Catholic Church.[14] The sisters faced a choice: follow the law of their church or the law of the land. In their view, disobeying God's law would have cost them their souls. Disobeying federal law would lead to IRS fines for non-compliance, which would have bankrupted the ministry and forced it to close its doors. The sisters found themselves in a place they never imagined: fighting with the federal government in court for the right to live consistently with their faith.[15]

The Little Sisters filed their first lawsuit in September 2013 and lost at both the district and appellate court levels.[16] On New Year's Eve 2013, right before the law penalizing them was about to take effect, Justice Sonia Sotomayor granted the sisters an emergency injunction from the enforcement of the mandate.[17] It was the only time she ruled in favor of the Little Sisters.

In March 2014, the Supreme Court heard oral arguments in *Hobby Lobby v. Sebelius*, a related case that affected the sisters' fate.[18] The arguments took place on the Feast of the Annunciation, a holy day when the sisters celebrate Mary agreeing to be the mother of Christ. The Court released its opinion at the end

of the term, a narrow 5–4 decision in favor of Hobby Lobby, which struck down the mandate as applied to closely held, for-profit corporations under the Religious Freedom Restoration Act[19] and concluded that the mandate failed to pass strict scrutiny because less restrictive alternatives were available.

However, the sisters' case continued because the mandate applied differently to their non-profit ministry; they lost in the U.S. Tenth Circuit Court of Appeals.[20] In November 2015, the Supreme Court granted certiorari to the Little Sisters.[21] A month prior to hearing oral arguments for their case, Scalia died. If the justices ruled as they did in *Hobby Lobby v. Sebelius*, the decision would be 4–4 and the Little Sisters would lose their case. But in May 2016, the Court issued a *per curium* order protecting the Little Sisters from being fined and ordering the federal government and the sisters to reach a resolution.[22]

In 2017, DHHS issued a new mandate allowing the Little Sisters of the Poor to claim an exemption that satisfied their religious objections.[23] This relief was short lived, however, as California, Pennsylvania, and other states challenged the exemption as unconstitutional. Last July, the Supreme Court in a 7–2 opinion ruled in the Little Sisters' favor, upholding the exemption as lawfully protecting their sincerely held religious beliefs and their ability to carry out those beliefs.[24]

While this victory was sweet, it may be impermanent; a new presidential administration could revert to the mandate that barred the ministry from an exemption. Although the Supreme Court has seemingly embraced "a society in which people with all beliefs can live harmoniously,"[25] the divide in the country has grown larger. ■

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ENDNOTES

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4. *See* https://www.monticello.org/site/research-and-collections/jeffersons-gravestone.
5. US Const, Am I.
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7. *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872; 110 S Ct 1595, 108 L Ed 2d 876 (1990).
8. *Id.* at 878
9. 42 USC 2000bb *et seq.*
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11. *Id.* at 2089.
12. *Id.* at 2094.
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23. Dep't of the Treasury, Dep't of Health and Human Svcs, and Dep't of Labor, *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed Reg 47792 (October 13, 2017).
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