Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,

Respondents.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Third, Fifth, Tenth & D.C. Circuits

BRIEF FOR CARMELITE SISTERS OF THE MOST SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY OF ALMA, MICHIGAN, AND SCHOOL SISTERS OF CHRIST THE KING OF LINCOLN, NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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[Caption continued]

PRIESTS FOR LIFE, ET AL.,
Petitioners,
v.
DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,
Petitioners,
v.
SYLVIA MATHEWS BURWELL, ET AL.,
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EAST TEXAS BAPTIST UNIVERSITY, ET AL.,
Petitioners,
v.
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SOUTHERN NAZARENE UNIVERSITY, ET AL.,
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I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae are Catholic institutes of religious sisters that, following the authoritative teaching of the Catholic Church (the "Church"), believe that use of artificial contraception and abortion are grave moral evils. *See* United States Catholic Conference, *Catechism of the Catholic Church* ¶ 2370 (1995).[2] As set forth below, these sisters express their love and devotion to God through physical acts of charity and compassion: They care for the sick and dying, educate children, feed and clothe the poor, and provide spaces for spiritual refreshment and

[1] No counsel for a party authored any portion of this brief, and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of the brief. All parties have granted consent to the filing of this *amicus* brief.

[2] Catholic teaching deems "'every action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible'" to be "intrinsically evil." *Catechism* ¶ 2370 (citation omitted). The Church also teaches that "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." *Id*. ¶ 2270.

renewal. They also employ lay people who work alongside them in these ministries.

Amici are all religious non-profit organizations that enjoy the same corporate and religious status as any Catholic diocese, yet they are not considered "religious employers" exempt from the contraception mandate promulgated by the Department of Health and Human Services (HHS) because the government does not consider their expressions of religious belief to be "*exclusively religious activit[y].*" 26 U.S.C. § 6033(a)(3)(A)(iii) (emphasis added); *see* 45 C.F.R. § 147.131(a) ("[A] 'religious employer' is an organization . . . referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code."). HHS's regulations thus require *amici* to implement the contraception mandate either by providing contraceptive coverage to their female employees (45 C.F.R. § 147.130(a)(1)(iv)), or by self-certifying that they are religious organizations that have religious objections to providing contraceptive coverage (*id.* § 147.131(c)(1)). Such self-certification, once completed, would obligate *amici*'s insurers to provide contraceptive coverage through *amici*'s own health plans (*id.* § 147.131(c)(2)(i)(B)).

Amici believe that implementing the mandate in either way would make them complicit with the provision of contraceptive coverage, in direct contravention of their religious beliefs. But if *amici* do not comply, they will be subjected to punitive fines that will cripple their ability to carry out the faith-based activities that are the fundamental expression of their religious beliefs. 26 U.S.C. §§ 4980D, 4980H.

Carmelite Sisters of the Most Sacred Heart of Los Angeles ("Carmelite Sisters"): The Carmelite Sisters manage and staff three health care facilities for the elderly, two child care centers, and a spiritual retreat center. The Carmelite Sisters' basic mission is to "promote a deeper spiritual life of God's people through healthcare, education and spiritual retreats," and these facilities and centers are the physical expression of their prayers and worship. To provide services to children and the elderly, the Carmelite Sisters operate several subsidiaries that together employ over 300 "co-workers" (people who work alongside the sisters). The Carmelite Sisters have established a single group health plan brokered by Arthur J. Gallagher that provides health insurance benefits for all of their employees.

Religious Sisters of Mercy of Alma, Michigan ("Religious Sisters"): The Religious Sisters is a Catholic religious institute dedicated to providing comprehensive health care, understood as the care of the entire person (spiritual, intellectual, physical, and emotional). The religious activity of providing care for others, through various activities, such as teaching and health care, is of the nature of and essential to the religious institute. To advance its mission, the Religious Sisters established Sacred Heart Mercy Health Care, which operates two health care clinics in the United States. The sisters work in these clinics and also teach and work for various dioceses around the country. Employees of Sacred Heart Mercy Health Care are insured through a Blue Cross Blue Shield health insurance plan.

School Sisters of Christ the King of Lincoln, Nebraska ("School Sisters"): The School Sisters

is a religious institute with the stated purpose of bringing about the reign of Christ through the apostolate of Catholic education. The sisters serve as administrators, teachers, and catechists in eight elementary schools in the Diocese of Lincoln. Employees of the School Sisters are insured through a Blue Cross Blue Shield of Nebraska plan established by the Catholic Diocese of Lincoln, Nebraska. The diocesan health insurance plan specifically excludes coverage for contraceptives, abortifacients, sterilization, and related services.

II. SUMMARY OF THE ARGUMENT

Petitioners have ably demonstrated that HHS's "accommodation" substantially burdens religious exercise in violation of the Religious Freedom Restoration Act ("RFRA") by imposing ruinous fines on religious non-profit organizations that refuse to implement the contraception mandate because of their religious convictions. *See* Br. for Petrs. in Nos. 15-35, 15-105, 15-119, & 15-191 at 41-56; Br. for Petrs. in Nos. 14-1418, 14-1453 & 14-1505 at 27-52. *Amici* agree that the "accommodation" burdens their religious exercise because it punishes them for remaining faithful to the teaching of the Catholic Church, which forbids them from being complicit in the provision of contraception and abortion.

Amici seek to highlight the additional constitutional and practical problems arising from HHS's arbitrary decision to facially discriminate among religious organizations. HHS's regulations categorically exempt "churches" and their "integrated auxiliaries" from the mandate, while requiring other religious non-profit organizations,

such as *amici* to implement the mandate. Under HHS's "accommodation," religious non-profit organizations like *amici* must either include contraceptive coverage in their health plans or file a form that results in having contraceptive coverage provided under their health plans. If they refuse to comply, they are subjected to crippling fines. As a result of this discriminatory scheme, a church is exempt from the mandate even if it operates a child care center or assisted living facility, but a religious order of nuns operating the same type of facilities is not. Similarly, a church that hires hundreds of individuals who do not share the church's religious objection to contraception would be exempt from the mandate, while a religious order that hires predominantly employees of the same faith who share its objection would not.

A. This Court has long held that when presented with two plausible interpretations of a statute, one of which "would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Here, the government's interpretation of RFRA, which countenances HHS's facially discriminatory regulations, creates significant Free Exercise and Establishment Clause problems. In the Free Exercise context, this Court applies strict scrutiny to laws burdening religious practices that are not "neutral and of general applicability[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The "minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. HHS's implementing regulations discriminate on their face between different types of

religious organizations and thus fail this fundamental requirement of neutrality.

The regulations also run afoul of the Establishment Clause, because they have the effect of conferring an advantage on those religious organizations that HHS perceives to be more intensely religious—i.e., organizations that engage primarily in worship and prayer and that predominantly hire people who share their religious convictions—while disadvantaging those organizations that engage in broader religious ministries. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (noting the Court's consistent rejection of laws "discriminating in the distribution of public benefits based upon religious status or sincerity") (citations omitted); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2010) (per curiam) (holding that Title VII's exemption for religious employers could not be limited to "churches").

Petitioners' interpretation of RFRA avoids these First Amendment problems and is fully consistent with Congress's explicit direction to "construe[] [RFRA] in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RFRA] and the Constitution." 42 U.S.C. § 2000cc-3(g)). Accordingly, the canon of constitutional avoidance militates strongly in petitioners' favor.

B. In addition to creating serious constitutional difficulties, HHS's decision to discriminate in favor of churches and against religious non-profits threatens to stifle Catholic religious expression. HHS's

regulations exempt Catholic dioceses from the contraception mandate but require Catholic religious institutes, such as *amici*, to implement the mandate through the "accommodation"—even when both entities are providing the same social services to the public. The regulations thus treat Catholic religious institutes as if they were disconnected from the Catholic Church and their local bishops. This arbitrary preference for dioceses over religious institutes represents an assault on the essential unity of the Catholic Church. Allowing the government to dissect unified ecclesiastical bodies such as the Catholic Church and to decide which aspects of that body may follow its religious tenets without penal sanctions and which may not would set a dangerous precedent.

Furthermore, punishing religious institutes for following the authoritative teaching of the Church will force religious institutes to close their ministries and retreat from the public sphere. Even if Catholic dioceses are able to step into the gap and maintain the various public services currently operated by religious institutes, squeezing religious institutes out of public life will greatly diminish the vibrant diversity of Catholic religious expression that presently exists within the unified Church. Diversity of religious expression is one of the defining features of the Catholic Church, but by limiting the types of public ministries that may operate in conformity with the Church's moral teaching, HHS's regulations will inevitably reshape and flatten Catholic religious expression. The government has no right to use its coercive power to modify the nature or form of religious expression,

and this Court should give effect to limits that Congress has established on such coercion in light of the First Amendment.

C. HHS's attack on Catholic religious expression is all the more unjustifiable because it serves no compelling government interest. Indeed, HHS has effectively conceded that it has no such interest, by exempting Catholic dioceses from the contraception mandate. HHS nevertheless asserts that the distinction between dioceses and religious institutes is justified because of alleged differences in their hiring practices. But HHS has not produced a scintilla of evidence supporting its theory that dioceses predominantly hire co-religionists while religious institutes do not. Nor could it, as the administrative record is devoid of empirical evidence and HHS undertook no such study. RFRA forbids the government from substantially burdening religious exercise on the basis of such confabulations.

More recently, HHS has attempted to bolster its discriminatory treatment of dioceses and religious institutes by pointing to the Tax Code's "longstanding" tradition of treating religious non-profits differently from churches. But that "tradition" dates back less than 50 years; in earlier years, dioceses and religious institutes were on equal footing. HHS also cannot hide behind an innocuous distinction in the Tax Code because the Tax Code does not embody a "longstanding" tradition of selectively imposing substantial religious burdens—neither the information filing requirement nor the exemption therefrom burdens religious exercise. The uncontroversial distinction in the Tax Code therefore cannot validate HHS's decision to burden the

religious expression of Catholic religious institutes and other religious non-profit organizations.

D. Even if HHS did have a compelling government interest in ensuring that employees of Catholic religious institutes receive cost-free contraceptive coverage (which it does not), it has failed to achieve that interest through the least restrictive means. As this Court and others have recognized, the government has other means of ensuring cost-free access to contraceptives. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) ("The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Serv's*, 801 F.3d 927, 945 (8th Cir. 2015) (government could provide "subsidies, reimbursements, tax credits, or tax deductions to employees," or "pay for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support."); *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) ("The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options."). HHS has not come close to explaining why these potential avenues are impracticable. That failure alone is sufficient to compel a ruling in favor of petitioners.

In sum, HHS's arbitrary discrimination among religious organizations and its assault on Catholic religious expression violate RFRA, and the "accommodation" and contraceptive mandate must be invalidated because they apply to religious institutes and other religious non-profit organizations that are religiously opposed to contraception.

III. ARGUMENT

Petitioners' briefs powerfully demonstrate that HHS's "accommodation" imposes a substantial burden on religious exercise by forcing religious non-profits to either violate their religious beliefs or pay crippling fines. Petitioners have also exposed the absence of any compelling government interest in requiring religious non-profits to implement the contraception mandate, and have shown that HHS failed to use the least restrictive means to further any such interest. For those reasons alone, the Court should hold that the "accommodation" violates RFRA and that religious non-profits with genuine religious objections to complying with the mandate must be exempted from the contraception mandate.

HHS's regulations do more than impose burdens on the religious exercise of those who oppose contraception; they facially discriminate among different types of religious organizations. Whereas "churches" and their "integrated auxiliaries" are categorically exempted from the mandate, other religious non-profit organizations—including Catholic religious institutes such as *amici*—are not. This blatant and wholly arbitrary favoritism for one type of religious organization over another presents

significant Free Exercise and Establishment Clause problems. It also poses an institutional threat to the Catholic Church (and perhaps to other religious institutions) both by disregarding its essential unity and by suppressing its rich diversity of religious expression. Moreover, the government has no compelling interest in discriminating among religious organizations, and it has utterly failed to demonstrate that the "accommodation" is the least restrictive means of furthering any such interest. Accordingly, this Court should strike down the "accommodation" and require HHS to confer the exemption equally to all religious non-profit organizations that have genuine religious objections to implementing the contraception mandate.

A. HHS's Discriminatory Regulations Raise Serious Constitutional Problems That Can Be Avoided Only By Adopting Petitioners' Construction of RFRA

It is well established that this Court is "'obligated to construe [a] statute to avoid [constitutional] problems' if it is 'fairly possible' to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)). Thus, where one of two statutory constructions "would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). The canon of constitutional avoidance "rest[s] on the reasonable presumption that Congress did not intend the alternative [interpretation] which raises serious constitutional doubts." *Id.* Here, because HHS's regulations discriminate among religious

organizations, an interpretation of RFRA upholding the regulations would raise serious constitutional problems.

Although some organizations ("churches" and their "integrated auxiliaries") are exempt from the mandate, other religious organizations that have the same religious objections to providing contraceptive coverage are not. Under HHS's "accommodation," religious non-profit organizations like *amici* are required to implement the mandate, either by including contraceptive coverage in their health plans or by submitting a form that triggers the provision of contraceptive coverage under their health plans. If they refuse to comply in one of these two ways, they are subjected to crippling fines that may force them to shut down altogether. As a result of this discriminatory scheme, a church is exempt from the mandate even if it operates a child-care center or assisted living facility, but a religious order of nuns operating the same type of facilities is not. Similarly, a church that hires hundreds of individuals who do not share the church's religious objection to contraception would be exempt from the mandate, while a religious order that hires predominantly employees of the same faith who share its objection would be forced to comply.

By drawing arbitrary distinctions between churches and other religious non-profit organizations that hold equally sincere religious objections to the contraception mandate, HHS's regulations raise serious Free Exercise Clause and Establishment Clause problems. This Court can avoid these thorny problems by adopting petitioners' interpretation of RFRA and holding that religious non-profit

organizations are equally entitled to the exemption. Not only would such a ruling avoid the First Amendment problems created by HHS's discriminatory regulations, but it is fully consistent with Congress's direction to "construe[] [RFRA] in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RFRA] and the Constitution." 42 U.S.C. § 2000cc-3(g)).

1. HHS's Interpretation Of RFRA Raises Fatal Free Exercise Problems

This Court has held that laws burdening religious practices that are not "neutral and of general applicability . . . must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The "minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. The contraceptive mandate scheme fails this fundamental requirement of neutrality because HHS's implementing regulations discriminate on their face between different types of religious organizations. *See Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982) (a law that makes "explicit and deliberate distinctions between different religious organizations" is "not . . . a facially neutral statute").

Specifically, "churches" and "their integrated auxiliaries" are exempt from the contraceptive mandate, while other religious organizations—some of which engage in the same activities (such as

healthcare and child care), share the same religious convictions, seek the same relief, and provide health benefits in the same ways—are not. *See* 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), (iii). As a result, only churches and their integrated auxiliaries are free to follow their religious convictions when providing health care to their employees. HHS thus explicitly privileges the religious exercise of some religious organizations over the religious exercise of organizations like *amici* that express their religious beliefs through activities the government does not consider "exclusively religious." 26 U.S.C. § 6033(a)(3)(A)(iii).

Indeed, HHS did not even pretend that the regulations are neutral. Rather, it explicitly declined to extend the exemption to organizations that it perceived to be ecumenical. *See* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (asserting that "Houses of worship . . . that object to contraceptive coverage on religious grounds are more likely . . . to employ people of the same faith who share the same objection"). Although HHS has never disputed that these organizations have sincere religious objections to providing artificial contraception to their employees, HHS deliberately crafted its regulations to compel them to implement the mandate. By withholding the exemption from religious non-profits on the basis of their perceived ecumenism, HHS violated the bedrock "governmental obligation of neutrality in the face of religious differences[.]" *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).[3]

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[3] Nor is it relevant that HHS may have thought it was "accommodating" religious exercise when it crafted its

Furthermore, "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason'" under the Free Exercise Clause. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990)); *see also Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion) ("If a state creates . . . a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."); *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (discriminatory application of city ordinance against one religious group violated First Amendment because other religious groups were exempt).

The government urges this Court to uphold regulations that are facially discriminatory and that selectively grant religious hardship exemptions to certain types of religious organizations but not others. Because petitioners' contrary interpretation of RFRA is at least equally plausible (indeed, it is compelled by the statute), this Court should avoid the severe Free Exercise problems inherent in the

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regulations. This Court made clear last Term in another First Amendment case that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) (citation omitted)). Whatever HHS's motive, the regulations discriminate between religious organizations on their face, suppressing the religious exercise of religious organizations like *amici*, and thus are not neutral.

government's position and hold that *all* religious organizations that hold sincere religious objections to the contraception mandate must be exempted.

2. HHS's Interpretation Of RFRA Raises Serious Establishment Clause Problems

The HHS regulations also violate the Establishment Clause because they have the effect of conferring an advantage on those religious organizations that HHS perceives to be more intensely religious—*i.e.*, organizations that engage primarily in worship and prayer and that predominantly hire people who share their religious convictions—while disadvantaging those organizations that engage in broader religious ministries.[4] Whereas "churches" and their "integrated auxiliaries" are allowed to practice their faith freely, other religious organizations are forced to choose between violating their faith and incurring

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[4] HHS's distinction fails to account for the fact that religious organizations like *amici* view educating children "with the heart and mind of Christ" and caring for the elderly as religious activities that flow directly from their expression of the love of God. *See*, *e.g.*, James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction . . . .") (NABRE translation). Nevertheless, because the government does not view these activities as "exclusively religious" (26 U.S.C. § 6033(a)(3)(A)(iii)), it has chosen to deny the exemption to religious nonprofits that perform them (45 C.F.R. § 147.131(a)). As this Court has recognized, "it is most bizarre" to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives[.]" *Mitchell v. Helms*, 530 U.S. 793, 827-28 (2000) (plurality opinion)

significant penalties. Thus, through its exemption and accommodation scheme, HHS grants the religious beliefs of churches greater dignity than the religious beliefs of other faith-based organizations, such as *amici*.

This Court has previously disavowed legal distinctions based on the government's perception of whether an organization is "pervasively sectarian." *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (warning that such distinctions are "not only unnecessary but also offensive"). The *Mitchell* plurality rightly observed that "application of the 'pervasively sectarian' factor collides with [the Court's] decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.* (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

Indeed, the government itself has argued in the past that such distinctions violate the Establishment Clause. *See* Br. for the United States as *Amicus Curiae* at 11, *Spencer v. World Vision, Inc.*, No. 08-35532, 2008 WL 5549423 (9th Cir. 2008) (arguing that limiting Title VII's religious-employer exemption to "churches" would "discriminat[e] among religious groups" and thus "create a serious Establishment Clause problem"). As the government explained, "[t]o allow houses of worship to engage in religious-based employment practices, but deny equal privileges to other, independent organizations that also have sincerely held religious tenets would unlawfully discriminate among religions, and give

the former group a competitive advantage in the religious marketplace." *Id*.

The government's argument prevailed, and the Ninth Circuit held that Title VII's exemption for religious employers was available to any entity "organized for a religious purpose [that] is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc*., 633 F.3d 723, 724 (9th Cir. 2010) (per curiam). The court explained that "interpreting the statute such that it requires an organization to be a 'church' to qualify for the exemption would discriminate against religious institutions which are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." *Id*. at 728 (O'Scannlain, J., concurring) (quotation marks and citation omitted); *see also id*. at 741 (Kleinfeld, J., concurring) ("I concur in Parts I and II of Judge O'Scannlain's concurrence."). Such discrimination "would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs." *Id.* at 729 (O'Scannlain, J., concurring) (internal citations omitted); *see also University of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools"); *Columbia Union College v. Clarke*, 159 F.3d 151, 172 (4th Cir. 1998) (Wilkinson,

J., dissenting) ("The denial of state aid to only certain types of religious institutions—namely, pervasively sectarian ones . . . directly violate[s] a . . . core principle of the Establishment Clause, the requirement of nondiscrimination among religions").

Here, the "pervasiveness or intensity" of religious belief—as manifested in an organization's hiring practices—is the *asserted basis* for the distinction between churches and other religious organizations. This distinction is entirely unnecessary, as HHS could instead have drawn a clear and constitutional boundary around the exemption by granting it only to organizations with sincere religious objections to providing contraceptive coverage. Faced with such an obviously constitutional alternative, this Court should avoid the constitutional problems that would flow from an interpretation of RFRA that countenances such arbitrary discrimination.

B. HHS's Discriminatory Regulations Are An Affront To The Catholic Church's Essential Unity And Diversity

In addition to raising serious constitutional problems, HHS's arbitrary discrimination among religious institutions has disastrous real-world consequences. For example, as applied to the Catholic Church, of which *amici* are a part, HHS's regulations exempt dioceses while requiring religious institutes to implement the contraception mandate. This arbitrary preference for dioceses over religious institutes represents a dangerous assault on the essential unity of the Church and threatens to stamp out the diversity of religious expression that is a hallmark of Catholicism in the United States. Thus,

in addition to the substantial burden imposed on each individual religious non-profit, the regulations' discriminatory treatment of differing religious organizations is itself a menace to religious exercise.

1. HHS's Regulations Are An Assault On The Church's Essential Unity

It is undisputed that a Catholic diocese is considered a "church" under the Internal Revenue Code ("IRC"), 26 U.S.C. § 6033(a)(3)(A)(i), and thus qualifies as a "religious employer" under HHS's regulations. 45 C.F.R. § 147.131(a). Accordingly, a Catholic diocese "is categorically exempt from the requirement to include coverage for contraceptive services for its employees[.]" *Priests for Life v. U.S. Dep't of Health and Human Serv's*, 772 F.3d 229, 239 (D.C. Cir. 2014). A diocese is entitled to this exemption even when its employees work in schools, hospitals, retreat centers, or any other facility owned and operated by the diocese, and regardless of whether they adhere to the religious tenets of the Catholic Church.

Catholic religious institutes, by contrast, have not historically been recognized as "churches" or "conventions or associations of churches." 26 U.S.C. § 6033(a)(3)(A)(i).[5] And although the Tax Code

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[5] Some religious institutes may qualify as "integrated auxiliaries" of a church, 26 U.S.C. § 6033(a)(3)(A)(i), and thus qualify for the exemption to the contraception mandate. However, religious institutes that operate schools, hospitals, retreat centers, elder care homes, etc. are unlikely to satisfy the IRS's "internally supported" test and thus are unlikely to be considered "integrated auxiliaries." 26 C.F.R. § 1.6033-2(h)(1) ("the term integrated auxiliary of a church means an organization that is—. . . (iii) Internally supported").

exempts the "exclusively religious activities of any religious order" from the filing requirement, *id*. § 6033(a)(3)(A)(iii), the government has taken a cramped view of "religious activity" that does not include the operation of schools and hospitals. *See* United States Conference of Catholic Bishops, *Annual Filing Requirements for Catholic Organizations* at 11 (Mar. 1, 2015) ("The filing exemption for the exclusively religious activities of any religious order is limited to the internal matters of the religious order to the exclusion of its charitable ministries.") *available at* http://goo.gl/3M7y0I. Consequently, religious institutes (i.e., "religious orders") are not considered "religious employers" when they hire individuals to work in schools, hospitals, and retreat centers that they own and operate, 45 C.F.R. § 147.131(a), and thus they do not qualify for the categorical exemption to the contraception mandate. In order to avoid crushing penalties, therefore, religious institutes must implement the contraception mandate and thereby participate in the provision of contraceptive coverage (including abortifacients) to their employees.

In short, although Catholic dioceses are entitled to the exemption with respect to employees working in diocesan schools and hospitals, Catholic religious institutes that operate schools and hospitals are not entitled to the exemption as to their employees. *See* 26 C.F.R. § 1.6033-2(g)(ii); 45 C.F.R. § 147.131(a). This anomalous treatment persists even when religious institutes arrange for health insurance coverage for their employees through plans sponsored by a local diocese. For example, in *Priests for Life*, certain religious non-profits affiliated with

the Roman Catholic Archdiocese of Washington provided health insurance to their employees by participating in the Archdiocese's self-insured church plan. 772 F.3d at 240. The court nevertheless found it "undisputed that, under the government's regulations, each [religious nonprofit] is eligible for the accommodation, but not the exemption extended to houses of worship." *Id.* Thus, even where a diocese and a religious institute insure their employees through the exact same plan—as is the case for *amici* School Sisters—the religious institute is required to implement the mandate by taking affirmative steps to ensure that employees working in its schools and hospitals are provided with contraceptive coverage, even though the diocese is exempt from that requirement and need not implement the mandate as to employees working in *its* schools and hospitals.

HHS's discriminatory preference for dioceses over religious institutes tramples on the ecclesiastical and spiritual unity of the Catholic Church. The *Catechism*, a compendium of Catholic doctrine, declares that "[u]nity is of the essence of the Church[.]" *Catechism* ¶ 813. The *Catechism* further provides that the visible sign of the Church's unity is the Pope (*id.* ¶ 882), while the "individual *bishops* are the visible source and foundation of unity in their own particular Churches" (*id.* ¶ 886) (emphasis in original). Catholic doctrine teaches that these "particular churches," called "diocese[s]," are communities "of the Christian faithful in

communion of faith and sacraments with their bishop ordained in apostolic succession." *Id*. ¶ 833.[6]

It is also bedrock Catholic doctrine that religious institutes are ecclesiastically and spiritually united with the bishops. *Id.* ¶ 927 ("All religious, whether exempt or not, take their place among the collaborators of the diocesan bishop in his pastoral duty."); *see also* Sacred Congregation for Bishops, *Directives for the Mutual Relations Between Bishops and Religious in the Church* (hereafter "*Directives*") ¶ 8, Vatican (May 14, 1978) (reflecting on the "ecclesial dimension," of the religious life—"namely the unquestionable bond of religious life with the life and holiness of the Church"), *available at* http://goo.gl/vRsjln. According to the Church, "[i]t would be a serious mistake to make the two realities—religious life and ecclesial structures—independent one of the other, or to oppose one to the other as if they could subsist as two distant entities, one charismatic, the other institutional." *Id.* ¶ 34. Religious institutes thus perform their various ministries—including education and health care—in communion with their local bishops. *See id.* ¶ 8.

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[6] There are nearly two hundred archdioceses/dioceses in the United States. *See* United States Conference of Catholic Bishops, *Bishops and Dioceses*, http://www.usccb.org/about/bishops-and-dioceses. An archdiocese is presided over by an archbishop, and a diocese is presided over by a bishop. There are currently 145 Latin Catholic Dioceses, 33 Latin Catholic archdioceses, 15 Eastern Catholic dioceses, and 2 Eastern Catholic archdioceses. *Id.* Within these dioceses are thousands of local parishes where individual Catholics worship and serve God together.

HHS's regulations ignore this essential unity and drive a wedge between dioceses and religious institutes. Under the "accommodation," religious institutes are treated as less Catholic than the dioceses—as if they were less bound by the teaching of the Church or somehow free from the authority of the bishops. The regulations are thus as religiously offensive as would be a regulation that exempted archdioceses but not ordinary dioceses, or a regulation that exempted Latin Catholic Dioceses but not Eastern Catholic Dioceses.[7] The government's artificial discrimination between two manifestations of a single religious organization imposes a heavy burden on religious exercise—a burden RFRA prohibits.

2. HHS's Regulations Threaten The Church's Inherent Diversity By Squeezing Religious Institutes Out Of Public Life

The regulations have the concrete effect of suppressing one of the Catholic Church's most unique features—the diverse expression of religious devotion and public service embodied in its many different religious institutes. Despite HHS's apparent disregard for religious institutes, the

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[7] The Church recognizes several different "liturgical traditions or rites" that have developed over the centuries. *Catechism* ¶ 1203. The most common rite in the United States is the Latin rite, but there are many Catholic dioceses that belong to various Eastern rites, including "the Byzantine, Alexandrian, or Coptic, Syriac, Armenian, Maronite, and Chaldean rites." *Id.* Although each rite expresses the Catholic faith in its own unique way, the "Church holds all lawfully recognized rites to be of equal right and dignity[.]" *Id.*

Catholic Church has, "[f]rom the beginning[,] . . . been marked by a great diversity," and the Church has long recognized many "different gifts, offices, conditions, and ways of life" as legitimate expressions of the Catholic faith. *Id.* ¶ 814 ("The great richness of such diversity is not opposed to the Church's unity."); *id.*¶ 873 ("[I]n the church there is diversity of ministry but unity of mission."). One aspect of this diversity can be seen in the many Catholics, including *amici*, that have consecrated themselves to what the Church teaches is a special form of Christian devotion called "religious life," which is "[l]ived within institutes canonically erected by the Church."[8] *Id.* ¶ 925. Catholic doctrine teaches that "[r]eligious life in its various forms is called to signify the very charity of God in the language of our time." *Id.* ¶ 926. *Amici*, for example, strive to show God's love by educating the young and caring for the sick and aging.

Catholic religious institutes pursue these public ministries in unique ways as they reflect the spirituality of their founders. The Church blesses these unique and authentic expressions of Catholic faith by giving religious institutes a special freedom—called an "exemption"—to manage their own ministries. *Directives*, ¶ 22 ("The Supreme Pontiff, in view of the good of the Church itself, grants exemption to a number of religious families, so that institutes can express their identity more

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[8] Those who have taken religious vows and joined a religious institute—such as nuns, sisters, brothers, etc.—are typically referred to simply as "religious" in Catholic literature. Similarly, the "religious life" in Catholic terminology refers to the unique vocation of the religious.

adequately and devote themselves to the common good with special generosity and on a wider scale."). This "exemption" "relates to the internal organization of their institutes[,]" and "ensure[s] that everything is suitably and harmoniously arranged within them, and the perfection of religious life promoted." *Id.* Religious institutes thus have the freedom to manage their own ministries under the supervision of the local bishops. For example, "Catholic schools conducted by religious are . . . subject to the local ordinaries as regards their general policy and supervision without prejudice, however, to the right of the religious to manage them." *Id.* ¶ 44.

Pursuant to this limited autonomy, religious institutes, including *amici*, have managed their own ministries for decades in unity with the local bishops. However, if they do not comply with HHS's contraception mandate, they will be confronted with substantial fines that significantly raise the cost of operating these ministries. Because a diocese is not similarly penalized for non-compliance, HHS's regulations make it less expensive for a diocese to manage the same types of ministries—schools, hospitals, retreat centers, etc.—that religious institutes also manage. The regulations thus place significant financial pressure on religious institutes such as *amici* to transfer control of their facilities to the local diocese. Putting all schools, hospitals, and other ministries under the direct control of the bishop, although perhaps allowing the ministries to survive for a time, would prevent the sisters from fully living out their unique calling. Ultimately, such an arrangement will squeeze Catholic religious

institutes out of the public square, relegating them to the narrow realm of "exclusively religious" activity as defined by the IRS.

By denying *amici* a full exemption from the morally objectionable contraception mandate, and thereby discriminating against religious institutes and their public ministries, HHS's regulations threaten the vibrant diversity of the Catholic Church in the United States. HHS's clumsy and needless assault on Catholic religious institutes—and thus on the Catholic Church itself—"would effectively exclude [them] from full participation in the economic life of the Nation." *Hobby Lobby*, 134 S. Ct. at 2783. "RFRA was enacted to prevent such an outcome." *Id.* Nor can HHS's arbitrary decision to devalue the religious commitments of *amici* and other religious institutes be reconciled with Congress's direction to "construe[] [RFRA] in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RFRA] and the Constitution." 42 U.S.C. § 2000cc-3(g)). Because petitioners have put forward a plausible interpretation of RFRA that would avoid all of these assaults on Catholic religious expression, the Court should reject the government's argument and strike down HHS's discriminatory regulations.

C. The Government Has No Compelling Interest In Forcing Catholic Religious Institutes To Implement The Mandate

HHS's attack on Catholic religious exercise—and on the religious exercise of countless other religious non-profits—is all the more indefensible because there is no compelling government interest in

requiring religious institutes to implement the contraception mandate. Indeed, by exempting dioceses from the contraception mandate, HHS has effectively conceded that it has no compelling interest in requiring those organizations to provide contraceptive coverage. 45 C.F.R. § 147.131(a).[9] Yet HHS purports to have such an interest in requiring Catholic religious institutes that hold precisely the same religious beliefs to implement the mandate via the so-called "accommodation." HHS initially offered only one justification for denying the exemption to these organizations:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39,874.

In other words, HHS believes that its interest in requiring churches to implement the mandate is not compelling because employees of churches with

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[9] As Petitioners have pointed out, there also gaping non-religious exemptions to the contraception mandate for grandfathered plans and small businesses. *See* Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 at 60-64. *Amici* agree that these exemptions for non-religious employers "conclusively demonstrate[] that the interests purportedly furthered by Congress' 'preventive services' mandate and HHS's regulatory contraceptive mandate are not the kind of interests that demand categorical and comprehensive treatment and cannot admit of exceptions." *Id.* at 63.

religious objections would not use artificial contraception even if it were provided. Conversely, HHS believes that its interest in requiring other religious non-profits, like *amici*, to implement the mandate is compelling because employees of those organizations would use artificial contraception if provided. HHS's reliance on this assumed difference in hiring practices is puzzling in light of its decision to remove the requirement that a "religious employer" must "primarily employ[] persons who share its religious tenets." Compare 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012), with 78 Fed. Reg. at 39,873-74. Indeed, only nine days before the Little Sisters filed their petition, HHS conceded that "[h]iring coreligionists is not itself a determinative factor as to whether an organization should be accommodated or exempted from the contraceptive requirements." 80 Fed. Reg. 41,318, 41,325 (July 14, 2015).

More problematically, HHS's rationale for denying the exemption to religious institutes and other religious non-profits is entirely contrived. To be sure, some of the public comments filed in HHS's rulemaking suggest that some non-exempt religious employers hire people outside their faith. *See, e.g.*, Comment on the Centers for Medicare Medicaid Services Proposed Rule: Coverage of Certain Preventive Services under Affordable Care Act, CMS-2012-0031-141017 (May 9, 2013) ("Catholic and other religious institutions such as hospitals, colleges and charities often . . . hire non-Catholic employees"). A review of the administrative record revealed no comments, however, suggesting that houses of worship or their auxiliaries hire only

employees of the same faith or even that they hire a greater proportion of such employees.

Not only is there zero empirical support for HHS's assumption that "houses of worship" hire only (or even mostly) people of the same religious beliefs, but there are myriad examples that refute the assumption. For example, the Archdiocese of Los Angeles employs thousands of people to work in its parishes and schools, but does not require those employees to be devout Catholics or to affirm the Church's moral teachings on contraception. Rather, the Archdiocese expects only that "Archdiocesan employees [will] conduct themselves according to the goals and mission of the Church in performing their work." *See* http://www.la-archdiocese.org/jobs/Pages/default.aspx. An individual does not need to be Catholic, much less agree with the Church's teaching on contraception, to conduct herself in accordance with the Church's goals and mission while at work. In fact, the general Employment Application Form for the Cathedral of Our Lady of the Angels, the seat of Archbishop of Los Angeles, states only that the Cathedral "can favor Catholic applicants and co-workers in all employment decisions," which necessarily implies the Cathedral's willingness to hire non-Catholics. http://www.olacathedral.org/jobs/Employment_Application.pdf. Indeed, the form does not even ask applicants to identify their religion or religious beliefs. *Id.*

But even if a diocese exercised its prerogative to hire only Catholic applicants, an applicant's simple profession of the Catholic faith does not prove that the applicant agrees with or follows the Church's moral teaching on contraception. Thus, even if a

diocese hired self-identified Catholics exclusively, if subjected to the contraception mandate it would have no assurance that its health plan was not being used to facilitate the distribution of contraceptives. Forcing Catholic dioceses, and other houses of worship, to comply with the contraception mandate would thus result in a substantial burden on their exercise of religion, which is precisely why HHS has exempted them from the mandate altogether. Catholic religious institutes, and other religious non-profit organizations that are morally opposed to providing contraception for religious reasons, are in precisely the same position. The distinction that HHS has drawn between "churches" and other religious organizations is thus entirely arbitrary.

Perhaps recognizing the flimsiness of its initial justification for denying the exemption to religious institutes, HHS now purports to rely on "the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship, such as the special treatment given to those organizations in the [Tax] Code." 80 Fed. Reg. at 41,325. HHS asserts that "[t]his exemption for churches and houses of worship is consistent with their special status under longstanding tradition in our society and under federal law, and is not a mere product of the likelihood that these institutions hire co-religionists." *Id*. But HHS's sudden respect for the Tax Code's supposedly "longstanding" tradition of treating churches differently from religious non-profits does not withstand scrutiny.

As an initial matter, the Tax Code's separate treatment of churches and religious institutes dates

only to the Tax Reform Act of 1969; the pre-1969 version of the Tax Code did not require "religious organizations and certain of their affiliates, schools and colleges" to file information returns. *See* Staff of the Joint Committee on Internal Revenue Taxation, *General Explanation of the Tax Reform Act of 1969* at 52 (Dec. 3, 1970). Thus, prior to 1969, schools operated by Catholic "religious organizations"—a category that indisputably included *amici*—were exempt from the information filing requirement.

The legislative history of the Tax Reform Act further undermines HHS's attempt to justify the religious burden imposed by the "accommodation" on the basis of the Tax Code. The "primary purpose" of the information filing requirement is to "provide the [IRS] with the information needed to enforce the tax laws[,]" and Congress concluded in 1969 that the requirement should be expanded to assist the IRS in performing this function. *Id*. at 52-53; *see also* Cong. Rec. 32148 (Senate Committee Report) (Oct. 29, 1969) (recognizing the "need for more current information, from more organizations, which could be made readily available to the public, including State officials").

In response to this need for more information, the House initially proposed a bill providing that "every [tax]-exempt organization . . . must file an annual information return[.]" Conf. Rep. No. 91-782, Statement of the Managers on the Part of the House, 1969 U.S.C.C.A.N. 2391, 2400 (Dec. 22, 1969). The Senate amendment included an exemption for "churches and their integrated auxiliary organizations and associations or conventions of churches[.]" *Id*. As the Senate Report explains, the

"Committee agreed to exempt churches from the requirement of filing annual information returns in view of the traditional separation of church and state." Cong. Rec. 32148. The "conference substitute follow[ed] the Senate amendment except that it also exempt[ed] from the filing requirement any religious order with respect to its exclusively religious activities (but not including any educational, charitable, or other exempt activities . . .)[.]" 1969 U.S.C.C.A.N. at 2401.

The Tax Reform Act thus narrowed the class of organizations that were exempt from the information filing requirement. Pub. L. 91-172, 83 Stat. 519, 520 (1969), codified at 26 U.S.C. § 6033. But nothing in the legislative history suggests that Congress viewed the religious beliefs of non-profit organizations as somehow less important or legitimate. Rather, Congress simply recognized that it would violate this country's longstanding tradition of respecting church autonomy to require churches to disclose sensitive financial information to the government. But there was no suggestion that information returns themselves might impose a burden on religious exercise. The 1969 amendment to the Tax Code thus does not support HHS's decision to impose differing religious burdens on dioceses than on religious institutes.

Moreover, even if the distinctions in the Tax Code were relevant (which they are not), the preservation of a regulatory "tradition" is not a compelling government interest that would justify requiring religious organizations to violate their faith. That is especially true here, where the Tax Code does not embody any "tradition" of imposing

substantial burdens on religious exercise. Accordingly, this Court should reject HHS's post-hoc attempt to concoct a compelling governmental interest by pointing at irrelevant distinctions in the Tax Code. HHS's shifting rationale for the "accommodation" reveals that it has no compelling interest in forcing religious institutes to implement the contraception mandate.

D. The "Accommodation" Is Not The Least Restrictive Means Of Furthering Any Compelling Governmental Interest

Even if the Government had some compelling interest in ensuring that employees of religious institutes have access to cost-free contraceptive coverage, which it does not, HHS must "demonstrate[] that application of the burden . . . is the least restrictive means of furthering [its] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). "The least-restrictive means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. "[I]f there are other, reasonable ways to achieve those [interests] with a lesser burden on . . . protected activity, [the government] may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

HHS has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). For example, this Court in *Hobby Lobby* noted that "[t]he most straightforward way" of serving the Government's interest" would be "for the

Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780. RFRA "may . . . require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 2781. In this case, that could mean providing "subsidies, reimbursements, tax credits, or tax deductions to employees," or "pay[ing] for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support." *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 801 F.3d 927, 945 (8th Cir. 2015).

Indeed, the Government "could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage" by "providing for subsidized—or in this case free—contraceptive coverage to be made available on health care exchanges." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 13 (D.C. Cir. 2015) (Brown, J., dissenting from denial of rehearing *en banc*). Employees of religious nonprofits, like others who use the exchanges, could then obtain contraceptives without cost sharing. This approach would serve the government's stated interest while minimizing the burden on religious non-profits. But HHS has eschewed this approach in favor of coercing religious institutes to implement the mandate via the "accommodation."

Because HHS has not shown why any of these less-restrictive alternatives are not viable options,

the "accommodation" violates RFRA and must be struck down.

IV. CONCLUSION

The Court should hold that HHS's so-called "accommodation" violates the Religious Freedom Restoration Act.

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