No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*
Respondents.

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

BRIEF FOR *AMICI CURIAE* DOMINICAN SISTERS OF MARY, MOTHER OF THE EUCHARIST; SISTERS OF LIFE; AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF THE PETITION FOR CERTIORARI

Eileen J. O'Connor
Counsel of Record
Robert S. Logan
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 663-8380
eileen.oconnor@pillsburylaw.com

Carrie Severino
Jonathan Keim
Judicial Education Project
722 Twelfth Street, N.W.
Fourth Floor
Washington, D.C. 20005

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICI CURIAE[1]

The Dominican Sisters of Mary, Mother of the Eucharist is a Roman Catholic community of women religious based in Ann Arbor, Michigan. The community was founded in the Dominican tradition to spread the witness of religious life in accord with Saint John Paul II's vision for a New Evangelization. The Dominican Sisters profess the vows of poverty, chastity and obedience, along with a contemplative emphasis on Eucharistic adoration and Marian devotion, for the salvation of souls and the building of the Church throughout the world. Women religious have been an integral part of the history of Catholic education in the United States. The Dominican Sisters seek to continue the tradition of educating generations of young people in their Faith and most of all, to bring youth into deeper relationship with Christ through a faith formation that includes liturgical, doctrinal, spiritual and moral dimensions.

The Sisters of Life is a Roman Catholic community of contemplative and active women religious. John Cardinal O'Connor founded The Sisters of Life in 1991 for the protection and enhancement of the sacredness of every human life. In addition to the traditional vows of poverty, chastity, and obedience, The Sisters of Life are consecrated under a special fourth vow to protect

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Counsel for all parties have submitted blanket consent to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

and enhance the sacredness of human life. The Sisters of Life community includes 80 Sisters from around the world, who minister to pregnant women through hospitality, practical assistance, spiritual retreats, and healing. In addition, The Sisters of Life promote Roman Catholic teaching about the value of life in churches and communities through pro-life activities and a wide variety of educational programs.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. In pursuit of these constitutional principles, JEP has filed *amicus curiae* briefs in numerous cases before the federal courts of appeals and the Supreme Court, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

SUMMARY OF ARGUMENT

The Affordable Care Act (ACA) is one of the most comprehensive and far-reaching legislative enactments in history, and its effects will be felt by almost every person and organization in the country for decades to come. This case squarely presents issues regarding the intersection of vast and intrusive government mandates with profound issues of religious freedom and government coercion that warrants the prompt intervention of the highest court in the land. The stakes could hardly be higher; the issues are ripe for decision. The Tenth Circuit's opinion is not only wrong for all of the many reasons the petitioners have demonstrated, but also represents a misreading and misapplication of the Court's most recent religious precedent on nearly the same issue in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76, 2779 (2014). The result can only be to confuse and undermine the clear principles set out in that case for the resolution of religious challenges to government dictates.

Amici wish to highlight the arbitrary nature of the decision by the Department of Health and Human Services (HHS) to base the availability of religious exemptions to the HHS contraceptive mandate ("HHS Mandate" or "Mandate") not on factors that go to an employer's religious character, but on the way it is treated in tax law. The HHS Mandate relies on several categories set forth in Internal Revenue Code[2] § 6033

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[2] Unless otherwise specified, any reference to "Code" in this brief refers to the Internal Revenue Code, which is found at Title 26 of the United States Code.

to distinguish between its treatment of different religious organizations. But the history and application of § 6033 show that the classification was solely intended to facilitate administration of the tax laws, not to draw a line between religious institutions whose free exercise was fully protected and those who received less consideration. In short, the availability of an exemption to the Mandate should turn on an organization's claim to religious exercise rights, not its tax filing obligations.

In fact, employment law has long managed to reconcile its own demanding requirements with religious exercise. Title VII of the Civil Rights Act of 1964 defines religious organizations who are exempt from other employment law much more broadly than does § 6033, and in a way that captures both the Little Sisters and *amici*. That definition has served as the model for other religious exemptions in employment law and regulations, and gives evidence of a readily-available alternative to the burdensome rule of the HHS Mandate.

ARGUMENT

The Government Wrongly Relies on § 6033's Return Filing Requirements to Govern Application of the Contraceptive Mandate

When HHS proposed its Mandate, the regulation triggered thousands of comments pointing out the serious risks to religious freedom if the government were to force employers opposed to contraception or abortion to provide contraceptive or abortifacient drugs or services. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

The initial version of the rule included no exemptions for religious groups. After serious First Amendment and Religious Freedom Restoration Act (RFRA) concerns were raised, however, the government settled on a tripartite division in which only houses of worship and affiliated entities would be entirely exempted from the mandate, while, in sharp contrast, other religious organizations would receive a mere "accommodation" to the rule, and all other employers would be required to follow the rule regardless of religious objection.[3]

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[3] This Court held in *Burwell v. Hobby Lobby Stores, Inc.* that even for-profit religious employers that do not fit within the not-for-profit categories of § 6033 enjoy religious freedom protection under RFRA and therefore must be granted accommodation for their religious beliefs. 134 S. Ct. 2751, 2768-69 (2014).

A. The HHS Mandate Wrongly Conditions the Religious Accommodation on Return Filing Status Under § 6033 of the Internal Revenue Code

The arbitrary division of religious institutions into more- and less-protected castes is at the heart of this case. Had HHS chosen to group the Little Sisters of the Poor with churches and integrated auxiliaries that have similar religious objections, the Sisters would have received a full exemption from the HHS Mandate and would not now be faced with choosing between violating a fundamental tenet of their religious faith or facing crushing fines. Ultimately, however, HHS officials made a momentous decision to distinguish between groups of religious organizations, even those with similar or identical religious beliefs and employment practices, giving some a full exemption from the rule but only allowing others a mere "accommodation" that would force these other groups to play an important role in imposing the HHS Mandate. Moreover, the regulators distinguished between the two classes by importing a distinction from tax law that has no relation to the religious freedom concerns that it purports to "accommodate."

Exempted organizations include only "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," as those terms are used in clauses (i) and (iii) of § 6033(a)(3)(A) of the Code, and organized and operated as nonprofit entities. 45 C.F.R. § 147.131(a) (citing I.R.C. § 6033(a)(3)(A)(i) & (iii)). Merely because they fall into a different category for tax filing purposes, other

religious organizations, including the Little Sisters, are offered an "accommodation" which does not address their religious objections to cooperating in providing contraceptives and abortifacients to their employees. While that distinction between different categories of religious organization may make sense in the tax context, it is neither designed nor appropriate for allocating free exercise burdens on religious employers.

B. Section 6033 Provides No Guidance Regarding the Treatment of Religious Organizations; It Merely Prescribes Return Filing Requirements for Tax-Exempt Organizations

Throughout the long history of taxation in the United States, the tax-writing committees of Congress have generally tried to avoid entangling the Internal Revenue Service in First Amendment religious considerations.

With the HHS contraceptive mandate, by contrast, an administrative agency of the government has chosen to demand that the Little Sisters provide their female employees and dependents (including minor dependents) contraceptives and abortifacients or authorize someone else to do so, while entirely exempting other religious organizations. It bases this crucial distinction on an entirely irrelevant fact: Section 6033 requires the Little Sisters to file with the Internal Revenue Service an annual return of income and expenses and other information relevant to its tax exemption but does not require churches and their affiliates to do so. As the following history makes clear, however, § 6033 provides no logical or legally defensible basis for distinguishing among religious institutions to

determine the degree of protection their religious freedom merits. The history shows, rather, that the provision is aimed solely at collecting information to enable the Internal Revenue Service to confirm that tax-exempt organizations are operating in accordance with the terms of their tax-exempt status.

Generally speaking, every exempt organization is required by § 6033(a)(1) of the Code to file an annual return of income and expenses and other information the Internal Revenue Service needs to determine whether the organization continues to qualify for the tax exemption and meets other tax-related requirements. Section 6033(a)(3)(A) specifies which organizations are statutorily exempt from that general rule.

When Congress first imposed an income tax on corporate entities, it specifically exempted from all taxation – and filing requirements – all "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes[.]" Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on rehearing,* 158 U.S. 601 (1895)); *see also* Revenue Act of 1909, ch. 6, § 38, 36 Stat. 11, 113 (1909). After the Sixteenth Amendment was ratified, the Revenue Act of 1913 preserved the exemption. Revenue Act of 1913, ch. 16, 38 Stat. 114, 172 (1913).

It was not until the 1943 Revenue Act that tax-exempt organizations were required to file any sort of information returns, and even then the requirement did not apply to "religious organization[s]" and "organization[s] . . . operated, supervised, or controlled

by or in connection with a religious organization." Revenue Act of 1943, ch. 63, § 117, 58 Stat. 21, 37 (1944).

Over time, it became clear that some tax-exempt organizations were engaging in income-producing activity unrelated to their exempt purpose, and thus competing at an unfair advantage against taxable entities. So in 1950, Congress added the unrelated business income tax (UBIT) provisions to the Code, requiring otherwise tax-exempt organizations, including religious institutions, to file income tax returns and pay taxes on their unrelated business taxable income. Revenue Act of 1950, ch. 994, 64 Stat. 906, 948 (1950). These UBIT returns were entirely separate from the information returns filed to report on nontaxable exempt operations. "Churches" were excluded from the UBIT return requirement, but the statute did not define "church." Thus, although non-church religious organizations now had to file UBIT returns, the broad category of religious organizations as a whole remained exempt from filing information returns.

In 1969, in response to the increasing complexity and sophistication of tax-exempt entities and actual or perceived abuses of their tax status, the Tax Reform Act of 1969 (the "1969 Act") made major changes to the taxation of otherwise tax-exempt organizations. Tax Reform Act of 1969, tit. I, § 101, 83 Stat. 487, 494-96 (1969). Among them was a narrowing of the information return filing exemption for religious organizations. Now it applied only to "churches, their integrated auxiliaries, and conventions or associations

of churches" and "the exclusively religious activities of any religious order."[4] *See id.* at 520.

At the same time, though, Congress tried to avoid giving the Internal Revenue Service power to interfere with the free exercise of religion. As the Supreme Court stated the following year,

> For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. . . . Few concepts are more deeply embedded in the fabric of our national life beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 676 (1970).

The General Explanation of the Tax Reform Act of 1969 (also known as the 1969 Blue Book) noted the new legislation's narrow information return exemption for church-related organizations, observing that "[i]n addition to these three categories, the Treasury Department may exempt other type of organizations from the filing requirements if it concludes that the information is not of significant value." Staff of the Joint Committee on Internal Revenue Taxation, 91st

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[4] These statutory criteria remain today in clauses (i) and (ii) of § 6033(a)(3)(A) and constitute the sole basis for exemption from the HHS Mandate.

Cong., General Explanation of the Tax Reform Act of 1969 53 (Comm. print 1970) ("1969 Blue Book"), *available at* https://www.jct.gov/publications.html?func=startdown&id=2406. This discretionary authority of the Treasury was codified in § 6033(a)(3)(B), which continues to provide that the Treasury Secretary may relieve any organization from filing an information return "where he determines that such filing is not necessary to the efficient administration of the internal revenue laws."

In fact, pursuant to this discretionary authority, the Treasury has exempted certain other non-church religious organizations from information return filing because it determined the information was not necessary for administration of the tax laws.[5] In just one of the anomalies created by HHS's restrictive criteria for the HHS Mandate exemption, these religious organizations are just as legally exempt from information return filing as church-related organizations, but yet are not eligible for an exemption from the HHS Mandate solely because their filing

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[5] These organizations include, in general terms, (i) mission societies sponsored by or affiliated with a church and primarily acting in or towards foreign countries, (ii) below-college-level educational institutions affiliated with a church or operated by a religious order, and (iii) organizations operated, supervised, or controlled by church-related organizations and that are engaged exclusively in financing, funding, or managing funds for such organizations, or that maintain retirement insurance plans primarily for such organizations where more than half of the covered individuals are directly employed by those organizations, or more than 50 percent of the assets are contributed by, or held for the benefit of, employees of those organizations. *See* Treas. Reg. § 1.6033-6(b)(2)(iii), (iv); Rev. Proc. 96-10, 1996-1 C.B. 577.

exemption is discretionary under § 6033(a)(3)(B) rather than statutory under § 6033(a)(3)(A)(i) and (iii) as required by the HHS Mandate exemption.

Even the extensive 1969 Act statutory changes, however, were not uniform in their treatment of church-related organizations and other religious organizations, as they varied based upon Congressional views on sound tax policy and the Department of Treasury's requirements for information. Accordingly, although church-related organizations remained exempt from filing information returns under the narrower exemptions in § 6033(a), Congress revoked the general religious organization exemption from filing UBIT returns for *all* religious organizations, even church-related organizations. Congress took this step because it believed that it was inappropriate even for church-related organizations to be exempt from UBIT when

> . . . exempt organizations not subject to the unrelated business income tax—such as churches, social clubs, fraternal beneficiary societies, etc.—began to engage in substantial commercial activity. For example, numerous business activities of churches were brought to the attention of the Congress. Some churches are engaged in operating publishing houses, hotels, factories, radio and TV stations, parking lots, newspapers, bakeries, restaurants, etc.

1969 Blue Book 66-67. The development of § 6033(a)(3)'s exemptions from otherwise applicable information filing requirements, especially in context with the imposition of UBIT filing requirements regardless of the type of religious organization, makes

clear that the sole purpose of return filing is to provide the Internal Revenue Service with the information it needs to administer and enforce the tax laws, nothing more.

C. Section 6033 Is Not a Classification of Religious Rights

The government uses the distinctions drawn in § 6033(a)(3)(A) to distinguish between religious groups who are entirely exempt from the HHS mandate and those whom it will only "accommodate." But those provisions in no way address the religious freedoms at the heart of which groups should not be subject to the HHS Mandate.

Section 6033(a)(3)(A) provides exceptions to the general rule of § 6033(a)(1), which requires tax-exempt organizations to file an annual information return. The filing of this return has nothing to do with religious exercise and everything to do with administration of the tax laws.

The general rule for the tax filing requirements of tax-exempt organizations makes that purpose explicit:

> . . . every organization exempt from taxation under § 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information *for the purpose of carrying out the internal revenue laws* as the Secretary may by forms or regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and

> comply with such rules and regulations as the Secretary may from time to time prescribe . . . .

I.R.C. § 6033(a)(1) (emphasis added).

The 1969 Blue Book emphasized the information reporting purpose of § 6033:

> The primary purpose of these requirements was to provide the Internal Revenue Service with the information needed to enforce the tax laws. The Congress concluded that experience of the past two decades indicated that more information is needed on a more current basis from more organizations and that this information should be made more readily available to the public, including State officials.

1969 Blue Book 52, 53. Nothing in the Committee Report suggests that a religious organization's obligation to file an annual information return with the Internal Revenue Service has any purpose other than facilitating administration of the tax laws.

In crafting the Mandate, HHS identified religious considerations in its own explanation for the HHS Mandate exemption. It noted that forcing religious employers to cover contraceptive services implicated religious freedoms, but then made the unsupported assertion that the relationship of a religious employer with its employees is unique for houses of worship and their affiliates as defined under the tax code.

But whether an organization is a "church" for purposes of § 6033 and other areas of the tax code, or a religious organization like Little Sisters and *amici*, has only to do with its structure and its religious activities,

not the relative religiousness of the organization or its rank-and-file employees.[6] Furthermore, after a 10-year fight and losses in litigation, the Treasury finally abandoned the position that the activities of an "integrated auxiliary" of a church, one of the entities exempted under the HHS Mandate, must be "exclusively religious." *See, e.g.*, *Lutheran Social Service of Minn. v. United States*, 758 F.2d 1283 (8th Cir. 1985) (striking down "exclusively religious" requirement). Indeed, such church auxiliaries often have no purpose relating to religious teaching or ceremonies, and may be engaged in the same types of community service activities and have the same types of religiously-motivated members as the Little Sisters, yet such auxiliaries qualify under § 6033(a)(3)(A)(i) and the Little Sisters do not. In the face of these similarities, and despite the fact that religious considerations were the reason for the HHS Mandate exemption in the first place, HHS has stubbornly continued to base availability of the exemption solely on an organization's tax filing obligations.

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[6] *See, e.g.*, *American Guidance Foundation, Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (requiring "associational" activities that mean "[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship.").

D. HHS Ignored the More Suitable Definition of Religious Organizations Already Codified in Title VII

The Little Sisters are subject to the provisions of the Affordable Care Act not because they are taxpayers, but because they are employers. And federal law already provides guidance on the proper application of employment laws to religious employers in Title VII of the Civil Rights Act of 1964. Long before the ACA was passed, federal employment law had already dealt with the question of how to accommodate religious organizations in the context of its employment mandates, and did so in way that was much more respectful of the scope of free religious exercise and the range of religious devotion in the United States.

Recognizing the unique attributes of religious devotion and expression, Title VII of the Civil Rights Act of 1964 specifically exempts religious employers from antidiscrimination laws that apply to secular employers. These provisions allow religious employers to hire only people who share their religious beliefs without being subject to the penalties that apply to non-religious employers. 42 U.S.C. § 2000e-1. The law defines broadly which religious employers fit within this exemption:

> . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association,

> educational institution, or society of its activities.

Id. This exemption would clearly cover both Little Sisters of the Poor.

Indeed, other employment laws also track Title VII's definitions of religious organizations. The Americans with Disabilities Act, for example, similarly protects the ability of "a religious corporation, association, educational institution, or society" to hire employees who share their beliefs, 42 U.S.C. § 12113(d)(1), as do regulations of federal contractors and subcontractors, 48 C.F.R. § 22.807(b)(7), 41 C.F.R. § 60-1.5(a)(5), and recipients of Small Business Association assistance. 13 C.F.R. § 113.3-1(h).

Viewed in light of these other exemptions, the HHS Mandate's list of religious classifications is absurd. Religious employers like the Little Sisters of the Poor are expressly permitted by Title VII to hire only people who do not want contraceptives, but government penalties can drive them out of existence for failing to provide them.[7]

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[7] The Court has said in the context of a less sensitive First Amendment freedom, the protection of commercial speech, that "the flaw in the Government's case is more fundamental: The operation of [the statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broadcasting Association, Inc., et al. v. United States, et al.*, 527 U.S. 173, 190 (1999). In that case, one law banned advertising of casinos, and another one encouraged tribal casino gambling. The resulting havoc was considerably less troubling than that wreaked by the HHS mandate. As the Court noted in *Hobby Lobby*, the ACA itself, and the contraceptive mandate in particular, is riddled with exceptions and exemptions. 134 S. Ct. 2751, 2763-64 (2014).

Just as incomprehensible is HHS' explanation for limiting exemptions to houses of worship and related auxiliaries under § 6033. In its responses to more than 400,000 comments on proposed regulations governing coverage of certain preventive services, HHS opined:

> 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. 39,870, 39,874.

But if the likelihood that most employees share the organization's religious beliefs was the reason for exempting an organization from the HHS Mandate, it makes no sense for those exemptions to track *tax law* – and specifically the language dealing with *filing returns* – rather than the very employment laws that deal with hiring people of shared faith in the first place.

It is unsurprising that employment law would include broad religious exemptions. Employment law has the potential to interfere directly with these institutions' religious exercise by placing the government between religious institutions and the employees who carry out their mission. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 705-07 (2012) (applying employment discrimination law to churches "interferes with the internal governance of the church, depriving

the church of control over the selection of those who will personify its beliefs.").

Ironically, taxing religious organizations directly and providing free contraceptives from a general fund could have been less intrusive (at least in principle) than regulating religious entities' employment decisions. Mindful that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) (Marshall, J.), tax laws are less burdensome to religious exercise than the HHS Mandate. The tax laws do not require a religious organization to provide or assist in providing any benefits, or to engage in any activities, that it doesn't already. HHS' heavy-handed mandate, by contrast, insists the Little Sisters affirmatively act in contravention of their religious principles.

CONCLUSION

The HHS Mandate threatens the Little Sisters with fines that are more than just a substantial burden; they are a death sentence. Yet the only basis that HHS provides for treating the Little Sisters as a second-class religious institution is its classification for purposes of a tax reporting requirement having nothing to do with the relationship between employers and their employees and certainly nothing to with the Mandate.

The Little Sisters and other religious orders devote their entire financial resources to the accomplishment of their purpose – in the case of the Little Sisters, care of the elderly; in the case of Sisters of Life, care of pregnant women and their newborns; in the case of the Dominican Sisters, education of children – and to the food, clothing and shelter of the religious women

engaged in the mission. The government's failure to acknowledge and respect the Little Sisters' and similarly situated religious orders' adherence to a fundamental teaching of the faith to which they have dedicated their lives would deprive American communities of their valuable contributions to society.

Even if HHS was within its authority to require most employers to provide contraceptive coverage to female employees, it selected and applied irrelevant tax-law criteria in determining which employers are entitled to a religious exemption. Rather than pull irrelevant classifications from thin air, HHS should have adopted the relevant criteria already expressed in Title VII.

The Court should grant the petition.

Respectfully submitted,

Eileen J. O'Connor
Counsel of Record
Robert S. Logan
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 663-8380
eileen.oconnor@pillsburylaw.com

Carrie Severino
Jonathan Keim
Judicial Education Project
722 Twelfth Street, N.W. Fourth Floor
Washington, D.C. 20005
Counsel for Amici Curiae

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