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 MATHEWS BURWELL, SECRETARY OF HEALTH & 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 CARMELITE SISTERS OF THE MOST SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY OF ALMA, MICHIGAN, AND SCHOOL SISTERS OF CHRIST THE KING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304-1211
(650) 849-5384

AUTUM L. FLORES
GIBSON, DUNN & CRUTCHER LLP
1801 California Street
Suite 4200
Denver, CO 80202-2642
(303) 298-5957

THOMAS G. HUNGAR
Counsel of Record
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
thungar@gibsondunn.com

MARY G. H. LANG
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
(949) 451-3800

Counsel for Amici Curiae

QUESTION PRESENTED

The Department of Health and Human Services (HHS) promulgated regulations under the Affordable Care Act (ACA) requiring employers, through their healthcare plans, to provide at no cost the full range of FDA-approved contraceptives. HHS exempted "churches" and their "integrated auxiliaries" from complying with the mandate but did not grant that exemption to other religious nonprofit organizations that hold the same religious objectives to artificial contraception. HHS's only purported justification for this discriminatory approach was its unsubstantiated assumption that churches 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." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (emphasis added).

The question presented is:

Do HHS's regulations, which exempt some religious organizations from the contraceptive mandate but require other religious organizations to fulfill their obligations under the mandate (or pay fines), violate the Free Exercise and Establishment Clauses of the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

BRIEF FOR *AMICI CURIAE* CARMELITE SISTERS OF THE MOST SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY OF ALMA, MICHIGAN, AND SCHOOL SISTERS OF CHRIST THE KING[1]

I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae are Catholic institutes of religious sisters that, following the authoritative teaching of the Catholic Church, believe that use of artificial contraception is a grave moral evil. 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 renewal.

Amici are all religious nonprofit 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

[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Counsel of record received timely notice of the intent to file this *amicus curiae* brief, and all parties have granted consent to its filing.

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(b)(4), 4(c)(1)), which in turn 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 render them complicit with the provision of contraceptive coverage. 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 Carmelite 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 operate two health care clinics, and the sisters also teach and work for various dioceses around the country. The Religious Sisters are dedicated to providing comprehensive health care, understood by the Religious Sisters 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. The Religious Sisters are part of the Michigan Catholic Conference's Blue Cross plan, which covers the dioceses and parishes in Michigan.

School Sisters of Christ the King of Lincoln, Nebraska ("School Sisters"): The School Sisters is a religious institute founded to bring 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. The School Sisters are part of a health insurance plan with Blue Cross Blue Shield of Nebraska through the Catholic Diocese of Lincoln, Nebraska. The diocesan health insurance plan has been specifically contracted for to exclude coverage for purposes of contraception, abortifacients, sterilization, and related services.

II. SUMMARY OF THE ARGUMENT

HHS does not impose the contraception mandate equally on religious organizations. Although some organizations ("churches" and their "integrated auxiliaries") are exempt from the mandate, other religious organizations that have the same religious ob-

jections to providing contraceptive coverage are not. Religious nonprofit organizations that actively serve the community—like *amici*—are forced to implement the mandate. Under HHS's "accommodation," these religious entities may comply either by including contraceptive coverage in their health plans or by filing a form that results in having contraceptive coverage provided 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.

The Court should grant certiorari because the Tenth Circuit decided an important question of federal law in a way that conflicts with decisions of this Court and which will result in First Amendment violations on a massive scale. Because of HHS's regulations, thousands of religious nonprofit organizations face crippling fines that will hinder or eliminate their ability to carry out their faith-based missions. If the Court delays in determining the constitutionality of the HHS regulations, many of these organizations will be forced to close their doors. Furthermore, among all of the petitions this Court has received (and will receive) challenging the contraception mandate, The Little Sisters' petition may be the only case in which the First Amendment challenge is squarely presented.[2] Because The Little Sisters' pe-

---

[2] *See* Pet. Cert., *Geneva Coll. v. Burwell*, No. 15-191, 2015 WL 4748954 (Aug. 11, 2015) (presenting question under RFRA, but not First Amendment); Pet. Cert., *S. Nazarene Univ. v. Burwell*, No. 15-119, 2015 WL 4538191 (July 24, 2015) (same); Pet. Cert., *Houston Baptist Univ. v. Burwell*, No. 15-35, 2015 WL 4123412 (July 8, 2015) (same); Pet. Cert., *Roman Catholic Archbishop of Wash. v. Burwell*, No. 14-1505, 2015 WL 3862736

tition also presents a challenge under the Religious Freedom Restoration Act (RFRA), it is an excellent vehicle for considering the full array of challenges to HHS's regulations.

I. The Tenth Circuit's decision rejecting petitioners' free exercise challenge under rational basis review cannot be reconciled with this Court's clear statement that laws that are not neutral and generally applicable must be subjected to strict scrutiny under the Free Exercise Clause if they burden religious practice. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The Tenth Circuit's decision also creates a circuit conflict with the Third Circuit regarding the proper test for determining whether government action is "generally applicable" and thus subject to rational-basis review under the Free Exercise Clause.

HHS's regulations, which substantially burden religious exercise, are subject to strict scrutiny under the Free Exercise Clause because they are neither neutral nor generally applicable. *Lukumi*, 508 U.S. at 531-32. The regulations are not neutral because they facially discriminate between "churches" and other religious nonprofits on the theory that churches predominantly hire people who share their religious beliefs whereas other religious nonprofits do not. In concluding that the regulations are neutral, the Tenth Circuit disregarded this Court's clear

---

(June 19, 2015) (same); Pet. Cert., *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 14-1453, 2015 WL 3637475 (June 9, 2015) (same); Pet. Cert., *Zubik v. Burwell*, No. 14-1418, 2015 WL 3486599 (May 29, 2015) (same); *cf.* Pet. Cert., *Mich. Catholic Conference v. Burwell*, No. 14-701, 2014 WL 7166539 (Dec. 12, 2014) (same).

teaching that a law that discriminates on its face is not neutral. *Id.* at 533.

HHS's regulations are not generally applicable because the exemption to the contraception mandate is categorically unavailable to certain types of employers—namely, religious nonprofits that are not considered "churches" or their "integrated auxiliaries" under the tax code. The Tenth Circuit ignored this feature of the regulations because "[n]one of the categorical exemptions enacted by the ACA and its implementing regulations establish a system of individualized objections." Pet. App. 100a-101a n.52. But that restricted view of the "general applicability" requirement squarely conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.), which "reject[ed] the argument that, because the [relevant] exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule does not apply." Accordingly, certiorari is warranted to resolve the conflict between the Tenth and Third Circuits and to clarify that strict scrutiny is appropriate when certain religious organizations are categorically excluded from exemptions that are available to other religious organizations.

This petition is an excellent vehicle for resolving this question because the level of scrutiny is dispositive. If strict scrutiny applies, the government must show that it has a compelling interest in forcing religious nonprofit organizations that have religious objections to artificial contraception to implement the mandate. It cannot do so because its single justification for granting the exemption to churches but not to religious nonprofits—the notion that churches hire

people who share their religious convictions whereas religious nonprofits do not—is baseless. Many religious nonprofit organizations hire people who share their religious views, and many churches hire those who do not. HHS cannot steamroll the religious beliefs of disfavored religious organizations by simply inventing (but not substantiating) a supposed distinction in their hiring practices.

Under strict scrutiny, the government would also be required to show that the regulations are narrowly tailored to the government's compelling interest, but it cannot carry this burden either because 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).

Review is warranted because the Tenth Circuit's decision conflicts with this Court's free exercise jurisprudence, creates a conflict with the Third Circuit, and, if allowed to stand, will violate the free exercise rights of thousands of religious nonprofit organizations.

II. Review is also warranted because the Tenth Circuit's decision upholding regulations that favor purportedly sectarian religious organizations over purportedly ecumenical ones conflicts with the Ninth Circuit's decision in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010) (per curiam), which held that discriminating among religious organizations on the basis of the assumed pervasiveness or intensity of their religious beliefs violates the Establishment Clause. This Court should grant certiorari to resolve this conflict and erase any doubt that the Establish-

ment Clause forbids the government from favoring more sectarian religious organizations while disfavoring ecumenical religious organizations.

III. ARGUMENT

HHS has exempted some religious organizations—but not others—from the contraceptive mandate. Instead of *exempting* religious orders and any other bona fide religious nonprofits, HHS devised a Rube Goldberg "accommodation" that simply imposes an alternative mechanism for implementing the mandate. *Amici* have strong religious objections to implementing the mandate, whether by providing contraceptive services directly or by submitting the self-certification form or HHS notification that modifies their health plan to provide such coverage. But if *amici* do not comply with the mandate in one of these two ways, they will be subjected to crippling fines. The "accommodation" thus imposes the same burden on *amici*'s exercise of religion as the mandate itself.

The petition for certiorari filed by the Little Sisters of the Poor ably explains why the Tenth Circuit's decision cannot be reconciled with this Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which held that applying the contraception mandate to for-profit institutions with sincere religious objections to artificial contraception violated RFRA. The petition also correctly observes that this Court has thrice used its powers under the All Writs Act to stay the application of HHS's regulations to nonprofit religious employers.

Amici agree that plenary review is warranted for both of those reasons, and they will not repeat peti-

tioners' arguments here. Rather, *amici* seek to focus the Court's attention on the issue raised in petitioners' third question presented: the fundamental First Amendment problem with HHS's arbitrary distinction between churches and other religious nonprofits—a distinction that strongly favors the rights of some religious organizations over others. Simply stated, HHS does not extend the exemption to religious orders that the government deems insufficiently "religious." 26 C.F.R. § 1.6033-2(g)(ii); *see also* 45 C.F.R. § 147.131(a).

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. By drawing arbitrary distinctions between churches and other religious nonprofit organizations that hold equally sincere religious objections to the contraception mandate, HHS has violated both the Free Exercise Clause and the Establishment Clause of the First Amendment.

If left intact, the Tenth Circuit's decision will put countless religious nonprofits to the choice of either violating their firmly held religious beliefs or paying devastating fines that will force them to cease performing their faith-based works of charity. The constitutional questions in this case are thus of the utmost importance both to the religious nonprofits affected by HHS's onerous regulations and to the peo-

ple they serve. Accordingly, this Court should grant the petition for review.

The Tenth Circuit's decision, which upheld HHS's regulations against petitioners' constitutional challenges, has also created two separate circuit conflicts: First, the Tenth Circuit disagreed with the Third Circuit regarding the proper test for determining whether government action is "generally applicable" and thus subject to rational-basis review under the Free Exercise Clause. Second, the court below reached a different conclusion from the Ninth Circuit regarding the constitutionality of government action that favors sectarian organizations over ecumenical organizations. Review is needed to resolve these circuit conflicts and to bring clarity to the law in this important area.

A. HHS's Exemption And "Accommodation" Violate The Free Exercise Clause

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). As petitioners' brief demonstrates, the "accommodation" burdens the religious practice of religious organizations like *amici*. Strict scrutiny is thus required because HHS's regulations are neither neutral nor generally applicable. The government cannot satisfy strict scrutiny because even if HHS had a compelling interest in ensuring access to free contraceptive coverage—which it does not—HHS has failed to show that its regulations are narrowly tai-

lored to any such interest. HHS's regulations thus violate the free exercise rights of *amici* and thousands of similarly situated religious nonprofit organizations. The Tenth Circuit's decision to the contrary cannot be reconciled with this Court's Free Exercise precedents.

1. The Exemption And "Accommodation" Are Neither Neutral or Generally Applicable

The "minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. 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). 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 nonprofits 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).

The Tenth Circuit, after noting that the *mandate* was facially neutral with regard to employers, brushed aside the neutrality requirement for the *exemption* because, in its view, the substitute accommodation "was developed to facilitate the free exercise of religion, not to target religious groups or burden religious practice." Pet. App. 99a. But HHS's supposedly benign motive is not dispositive of the neutrality question. *Cf. Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("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." (cita-

tion 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.[3]

This Court has held that "in circumstances in which individualized exemptions from a general re-

---

[3] The Tenth Circuit's decision touches on a well-developed circuit conflict over whether strict scrutiny is required under *Lukumi* only if a law singles out religious conduct for adverse treatment (*i.e.* the law has a discriminatory motive), or whether strict scrutiny is required whenever a law treats a substantial category of nonreligious conduct more favorably than similar religious conduct. The First, Second, Fourth, and Eighth Circuits have embraced the former position—holding that the plaintiff must prove that the law targets conduct for uniquely adverse treatment "*because of* [its] religious motivation." *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013) (emphasis added); *see also Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999); *Skoros v. City of N.Y.*, 437 F.3d 1, 39 (2d Cir. 2006); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("Absent evidence of an intent to regulate religious worship, a law is a neutral law of general applicability." (citation and quotation marks omitted)). By contrast, the Third, Sixth, Tenth, and Eleventh Circuits have maintained that motive is irrelevant. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.); *Ward v. Polite*, 667 F.3d 727, 738-40 (6th Cir. 2012) (Sutton, J.); *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) ("[T]he Free Exercise Clause is not confined to actions based on animus."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) ("Under *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law."). Although the conflict is not directly implicated here because HHS's regulations are facially discriminatory, this petition presents the Court with an opportunity to clarify the "neutrality" and "general applicability" requirements.

quirement 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. 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 Tenth Circuit held that this *Smith/Lukumi* rule was inapplicable here because "[n]one of the *categorical* exemptions enacted by the ACA and its implementing regulations establish a system of *individualized* objections." Pet. App. 100a-101a n.52 (emphasis added). That holding squarely conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.), which expressly "reject[ed] the argument that, because the [relevant] exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule does not apply." The Third Circuit explained that, although "the Supreme Court did speak in terms of 'individualized exemptions' in *Smith* and *Lukumi*," the Court's concern about devaluing certain religious motivations "is only *further implicated* when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection

but not for individuals with a religious objection." *Id.* (emphasis added).

Under *Fraternal Order*, the implementing regulations' categorical exemption for certain religious organizations but not others makes the exemption and accommodation scheme *even more* suspect under the Free Exercise Clause than a scheme of individualized exemptions. And because the *Smith*/*Lukumi* rule requires a compelling reason for such a distinction, the Tenth Circuit exacerbated the circuit conflict by applying rational-basis review to petitioners' Free Exercise challenge. *Compare* Pet. App. 100a-104a (applying rational basis to petitioner's challenge to HHS's categorical refusal to grant exemption to religious nonprofits), *with Fraternal Order*, 170 F.3d at 365-66 (applying strict scrutiny to the government's categorical refusal to provide religious exemptions).

2. The Government Has No Compelling Interest In Forcing Religious Nonprofits To Implement The Mandate

Certiorari is especially appropriate because the government cannot satisfy the demands of strict scrutiny. Accordingly, if this Court determines that HHS's regulations violate the principles of neutrality and general applicability, the Tenth Circuit's decision cannot stand.

By exempting churches and their integrated auxiliaries 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). Yet HHS purports to have such an interest in requiring

religious nonprofits that hold precisely the same religious beliefs to implement the mandate via the so-called "accommodation." HHS has 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 religious objections would not use artificial contraception even if it were provided. Conversely, HHS believes that its interest in requiring other religious nonprofits, like *amici*, to implement the mandate is compelling because employees of those organizations *would* use artificial contraception if provided.[4] HHS's reliance on this assumed difference in hiring practices is especially puzzling in light of its decision

---

[4] *Amici* assume *arguendo* that the government has a compelling interest in ensuring access to cost-free contraceptive coverage. As petitioners have noted, however, the contraception mandate does not apply to employers with fewer than 50 employees or to those with grandfathered health plans. The government's willingness to let millions of employees receive health insurance that does not include cost-free contraceptive coverage severely undermines any claim that it has a compelling interest in providing such coverage.

to remove the requirement that a "religious employer" must "primarily employ[] persons who share its religious tenets." *Compare* 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012), *with* 78 Fed. Reg. at 39,873-74 (July 2, 2013). 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. 41318, 41325 (July 14, 2015).

More problematically, HHS's rationale for denying the exemption to religious nonprofits is entirely contrived. To be sure, some of the public comments filed in HHS's rulemaking suggest that 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.[5]

---

[5] HHS also ignores that, under its own (flawed) reasoning, the burden on religious exercise imposed by the regulatory scheme would be *greater* for nonprofit religious organizations like *amici*. If nonprofit religious organizations hire a greater proportion of people who do not share their religious beliefs, the organizations' health plans would be more likely to distribute contraceptives to covered employees, thus increasing the degree

Not only is there zero empirical support for the 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 its 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 (emphasis added). 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*.

Not surprisingly, many of the job listings posted by the Archdiocese do not require the applicant to be a practicing Catholic. *Id*. For example, on August 7, 2015, the Cathedral of Our Lady of the Angels, the seat of the Archbishop of Los Angeles, posted a job for a Full Charge Bookkeeper. *See* http://www.la-archdiocese.org/SitePages/Job%20Detail.aspx?ItemID=3470, last visited Aug. 7, 2015. The job requirements included a minimum of five years of professional accounting experience and a bachelor's degree in accounting, finance or related field. The job listing did *not* require applicants to profess the Catholic faith or affirm the Church's moral teachings. In fact, the general Employment Application Form for

---

to which the religious nonprofit organizations perceive themselves complicit in moral evil.

the Cathedral of Our Lady of the Angels says 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 (emphasis added). Indeed, the form does not even ask applicants to identify their religion or religious beliefs. *Id*.

And even if the Archdiocese exercised its prerogative to hire 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 the Archdiocese hired self-identified Catholics exclusively, it would have no assurance that its health plan was not being used to facilitate the distribution of contraceptives. Forcing the Archdiocese, 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 why HHS has exempted them from the mandate altogether. But religious nonprofit 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 constitutionally indefensible.

3. The Exemption And "Accommodation" Are Not Narrowly Tailored

If the interests identified by the government "could be achieved by narrower [regulations] that burdened religion to a far lesser degree," the government has violated the Free Exercise Clause.

Lukumi, 508 U.S. at 546. Here, 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, it could treat employees of religious nonprofits as it treats employees of exempted "religious employers" by providing subsidized contraceptive coverage on the exchanges. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir. 2015), slip op. 17 (Kavanaugh, J., dissenting from denial of rehearing en banc).

* * *

Given the substantial likelihood of wholesale constitutional violations, this case presents an issue of extreme importance that warrants review by this Court. In addition, this Court should grant certiorari to resolve the conflict between the Tenth and Third Circuits and bring needed clarity to this important area of the law.

B. HHS's Exemption And "Accommodation" Violate The Establishment Clause

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 reli-

gious ministries.[6] 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 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.

The government itself has argued in the past that such distinctions violate the Establishment Clause. *See* United States Amicus Br. at 11, *Spencer v. World Vision, Inc.*, No. 08-35532, 2008 WL 5549423 (9th Cir. 2008) (arguing that discriminating between churches and other nonprofit religious organizations "would 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.*

---

[6] 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)).

The Ninth Circuit agreed, holding 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). As Judge O'Scannlain explained, "interpreting [a] statute such that it requires an organization to be a 'church' to qualify for [an] 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); *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 728 (O'Scannlain, J., concurring) (internal citations omitted); *see also University of Great Falls v. NLRB*, 278 F.3d 135, 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, although 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, the Tenth Circuit found no Establishment Clause violation. The Tenth Circuit reasoned that the distinction was constitutional because "[e]xempting churches while requiring other religious objectors to seek an accommodation is standard practice under the tax code." Pet. App. 104a-105a. That argument is a non sequitur, because the distinction in the tax code does not force non-exempt religious organizations to violate their faith. By contrast, the distinction that HHS has drawn allows certain religious organizations to abide by their faith but requires other religious organizations to choose between violating their faith and incurring significant penalties. Moreover, the Tenth Circuit's concern (Pet. App. 106a) that forbidding the distinction drawn here might call into question any limitations on the scope of religious exemptions is misplaced, because 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.

Accordingly, plenary review is warranted both to resolve the conflict between the Ninth and Tenth Circuits and to make clear that the government may not put its thumb on the scale by favoring more sectarian organizations over ecumenical ones.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304-1211
(650) 849-5384

AUTUM L. FLORES
GIBSON, DUNN & CRUTCHER LLP
1801 California Street
Suite 4200
Denver, CO 80202-2642
(303) 298-5957

THOMAS G. HUNGAR
Counsel of Record
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
thungar@gibsondunn.com

MARY G. H. LANG
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
(949) 451-3800

Counsel for Amici Curiae Carmelite Sisters of the Most Sacred Heart of Los Angeles, Religious Sisters of Mercy of Alma, Michigan, and School Sisters of Christ the King

August 24, 2015