No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

HHS finally concedes that this Court should resolve the exceptionally important question whether HHS has violated RFRA by insisting that religious nonprofits like petitioners comply with the contraceptive mandate or pay massive fines. Rather than simply acquiesce in this petition, however, HHS now seeks to hand-pick its preferred opponent and to constrain the scope of this Court's review. But HHS's efforts to evade review of this particular petition and the constitutional issues it uniquely raises only highlight the weakness of HHS's position in this case. While that certainly explains HHS's interest in having the Court review a different case, vehicle problems for HHS do not translate into vehicle problems for this Court. After impermissibly trying to pick and choose which religious groups to exempt from the contraceptive mandate, HHS should not now be allowed to pick and choose its opponent or which questions it must confront in defending its actions.

HHS first suggests that the Little Sisters of the Poor are an "especially unsuitable" employer to complain about being forced to take the affirmative actions that HHS deems sufficient to put them in compliance with the mandate because those actions may not actually result in the provision of contraceptive coverage to their employees. In fact, that makes the Little Sisters especially well-suited to complain, as whatever interest HHS may have in demanding that a religious nonprofit sacrifice its religious beliefs so that HHS can accomplish its regulatory goal, surely it does not have a compelling interest in demanding that same sacrifice when it may still leave HHS's ultimate objective

unsatisfied. That makes this case a uniquely suitable vehicle for resolving the RFRA question, as this case alone provides the Court with the opportunity to consider HHS's regulatory scheme both in a situation where compliance *will* result in contraceptive coverage (the *Reaching Souls* petitioners) and a situation where it may not (the *Little Sisters* petitioners).

Moreover, this case alone presents the additional question of whether the discrimination among religious employers that has given rise to petitioners' RFRA claims can be reconciled with the Constitution. HHS understandably would prefer not to have to explain to this Court how it is that the dioceses of the Catholic Church are entitled to an exemption from the contraceptive mandate while the Little Sisters are not, even though both unquestionably are religious organizations that share the exact same religious objection. HHS instead attempts to downplay that discrimination by labeling its exemption for houses of worship and their integrated auxiliaries an "automatic exemption." But that "automatic" exemption is the *only* exemption HHS allows; for every other religious employer, it is either compliance or ruinous fines. Remarkably, HHS no longer appears willing to defend the principal justification that it advanced and that the regulations still state for so narrowly confining its exemption (*viz.*, its sheer speculation about the likelihood that employees share their employers' religious beliefs), leaving its discrimination among religious employers essentially unexplained. No wonder HHS seeks to avoid review of the constitutional question.

In short, HHS's peculiarly strong resistance to this particular petition can be explained only by its strong desire to avoid the questions this petition alone would

force it to confront. Indeed, HHS does not even try to explain how it could possibly have a compelling interest in requiring an employer in the Little Sisters' situation to take actions that it sincerely believes would violate its religion, or in refusing to grant an order of nuns the same exemption that it would provide if the exact same home for the elderly were funded and controlled by bishops instead of nuns. Having conceded that certiorari on the RFRA issue is appropriate, HHS has no valid basis to limit this Court's review to cases where its compelling interest argument may be stronger and where the constitutionality of its religious discrimination is not squarely presented.

I. This petition is an ideal vehicle to resolve the RFRA question that HHS now concedes warrants this court's review.

Although HHS acknowledges that this Court should resolve the RFRA question that has divided the Circuits, it insists that this is "an especially unsuitable vehicle" in which to do so because "the unusual and uncertain circumstances" of the Little Sisters somehow "weaken" their substantial burden argument. BIO 20. But setting aside the fact that those circumstances are common to more than 400 non-exempt religious employers, LSP C.A.App.172a, the uncertainty to which HHS alludes—namely, whether HHS will actually succeed in turning the Little Sisters' forced compliance with the contraceptive mandate into the provision of coverage through their plans—does not materially alter the substantial burden analysis. The Little Sisters sincerely object to taking actions that HHS deems sufficient to comply with its contraceptive mandate and that may result in the provision of contraceptives. HHS is in no position to question the sincerity of

the Little Sisters' beliefs, and the only alternative to compliance HHS offers is payment of the same fines that constituted a substantial burden in *Hobby Lobby*. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014); Pet.App.196a, 212a-13a.

HHS claims that the substantial burden argument is "weaker" only because it continues to mischaracterize petitioners' RFRA claims as objecting only to "the government's independent arrangements with third parties." BIO 18, 20. But as petitioners have confirmed time and again, their objections are not to the actions of third parties, but to the actions HHS would compel *petitioners* to take—indeed, threatens them with ruinous fines unless they take—to assist HHS in its efforts to obligate or incentivize those third parties to provide contraceptive coverage to their employees. The Little Sisters must take precisely the same religiously forbidden actions as all other non-exempt religious employers, and they face precisely the same penalties if they fail to do so. That is because HHS requires *every* non-exempt religious employer to supply it with the information and authority it needs to try to obligate or convince third parties to provide coverage, even if HHS has little reason to believe that it will actually succeed in doing either.

What this petition really reveals, then, is not any weakness in the Little Sisters' case, but rather a glaring weakness in *HHS*'s case. HHS cannot plausibly claim the kind of compelling interest that RFRA demands when the most HHS can say is that the forced sacrifice of sincerely held religious beliefs might—but just as well might not—achieve its ultimate regulatory objective of providing contraceptive coverage. Indeed, HHS does not even try to explain how it could satisfy

the compelling interest test as to the Little Sisters. That certainly explains HHS's desire to avoid this particular petition, but what matters is which vehicle is best for this Court, not for HHS. And the fact that HHS has a particularly weak case as to the Little Sisters and hundreds of similarly situated employers underscores why it is essential to take this petition even if the Court takes another as well, so the Court is in a position to determine whether that weakness is fatal under RFRA.

Moreover, HHS largely ignores the fact that the Little Sisters are not the only parties to this petition. The petitioners also include the parties to the *Reaching Souls* case, in which the record confirms that the largest TPA associated with the employers' plans said it *will* provide contraceptive coverage if employers comply with the mandate via the "accommodation." Specifically, the record demonstrates that the TPA will communicate to each organization's employees (and their female dependents, starting at age 10) that the objected-to abortifacients are available through the plan. RSI C.A.App.A317, A321-22. And the TPA would facilitate that coverage by using GuideStone's plan infrastructure to contact all participants, identify participants by "payroll location," and perform "[o]ngoing nightly feeds" of information. RSI C.A.App.A321.[1]

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[1] The existence of this record evidence is a product of another advantage unique to this petition—namely, that it includes not just employers but also plans (GuideStone and Christian Brothers Employee Benefit Trust) and a TPA (Christian Brothers Services). The presence of these parties

That makes this a particularly good vehicle for resolving the RFRA question, as it combines the only two scenarios in which the differences among employers and plans could even arguably make a difference under RFRA. While HHS continues to focus its vehicle arguments on distinctions between insured versus self-insured plans, and church versus non-church plans, neither HHS nor any petitioner has argued that those distinctions matter on the merits at all. Instead, the only even potentially relevant distinction for RFRA purposes is between a case in which HHS can at least claim that forcing the employer to violate its religious beliefs would achieve HHS's ultimate regulatory objective, and a case in which HHS cannot even say that. While every case—regardless of the employer's plan—falls into one of those two categories, this petition alone combines both a case in which the ultimate provision of coverage is uncertain (*Little Sisters*) and one in which coverage is certain, because the TPA has stated that it will comply (*Reaching Souls*).

HHS alternatively complains that the Tenth Circuit did not reach the compelling interest or least restrictive means questions. BIO 20. But those issues not only were fully developed in both courts below, but (as in the Fifth Circuit case) actually were resolved by one of the District Courts in granting injunctive relief. HHS thus is just as free to defend the judgment on those alternative grounds as it would be in any other pending petition, and it is just as free to rely on the

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resulted in more detailed evidence about the mechanics of HHS's regulatory scheme and ensures that the Court will hear from parties in all of the relevant roles—employer, plan, and TPA.

D.C. Circuit's dicta on those issues if it chooses to do so. Indeed, HHS does not suggest that anything would preclude the Court from resolving those issues, and HHS undoubtedly would ask the Court to do so given that Tenth Circuit precedent would make remand on the compelling interest question futile. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143-45 (10th Cir. 2013) (en banc).

II. This petition alone presents the question whether HHS's actions are constitutional.

This petition also is a particularly good vehicle because it alone presents the question of whether the facial discrimination among religious groups that gave rise to petitioners' RFRA claims violates the First Amendment. That discrimination is evident both in HHS's treatment of the *Little Sisters* petitioners, and in its treatment of the evangelical Christian organizations in *Reaching Souls*, which are traditionally even less likely to integrate with a particular house of worship.

HHS's brief certainly succeeds in revealing just how loath it is to defend its inexplicable view that orders of nuns are not entitled to the same exemption from the contraceptive mandate that would be available if the exact same homes, with the exact same employees, were operated by their local dioceses. But HHS utterly fails to explain why this Court should confine itself to considering the RFRA problems with HHS's regulatory scheme when those problems exist only because that scheme unconstitutionally discriminates among religious groups.

As an initial matter, just as HHS persists in misrepresenting the nature of petitioners' RFRA claims,

it likewise seeks to artificially cabin the scope of their constitutional claims, proceeding as if they implicate only the Establishment Clause when petitioners have argued throughout this case that HHS's actions violate *both* Religion Clauses. See, *e.g.*, Pet.34; Pet.App.96a, LSP C.A.App.136a. And they have done so for good reason, as *both* clauses restrict the government's ability to pass laws or regulations expressly designed to treat some religious organizations more favorably than others. Indeed, it is well settled under both pre- and post-*Smith* law that withholding religious exemptions from some religious groups but not others "without compelling reason" violates the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 537 (1993); see also, *e.g.*, *Employment Division* v. *Smith*, 494 U.S. 872, 884 (1990); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

More notable still, HHS offers absolutely no defense of the justification for discriminating among religious groups that it advanced in the Federal Register and dozens of filings across the lower courts—namely, its speculation that houses of worship and their integrated auxiliaries are more likely than other religious groups to hire coreligionists. See, *e.g.*, Pet. 35-36 (quoting 78 Fed. Reg. 39,870, 39,874). That omission is tantamount to an admission that HHS's guesswork about the beliefs of employees of religious organizations has "zero factual support." Pet. 35; see also Carmelite Sisters Amicus Br. 15-20. Of course, that implicit admission is hardly surprising given that HHS has not one iota of experience or expertise or authority to assess

such questions. But HHS's failure to defend its contemporaneous explanation for picking and choosing among religious employers is reason enough for this Court's plenary review of the constitutional question.

Instead of defending its contemporaneous explanation for its religious discrimination, HHS now just drops a footnote asserting that its discrimination was actually the product of "tradition." BIO 22 n.12. This newfound defense not only comes far too late (this is not rational basis review where late-breaking theories count), but also fails on its own terms, as there simply is no "tradition" of favoring parish priests over orders of nuns. To be sure, the Internal Revenue Code asks some religious groups to provide more information than others to assist in determining their tax liability. But that has no bearing whatsoever on the scope of religious groups' constitutional rights, particularly when all sorts of other laws entitle religious groups such as petitioners to the same protections as houses of worship and their integrated auxiliaries. See, *e.g.*, Dominican Sisters of Mary Amicus Br. 6-19; Carmelite Sisters Amicus Br. 21-23.

If any "tradition" is relevant here, moreover, it is the constitutional tradition of equal treatment for all with sincerely held religious beliefs and the statutory tradition of exempting *all* religious employers, not just houses of worship and their integrated auxiliaries, from prohibitions on considering religion when hiring employees. See 42 U.S.C. 2000e-1(a). As that statutory exemption reflects, Congress itself has recognized that the Constitution entitles *all* religious employers, not just those that have a particular "organizational form," BIO 23, to exemption from laws that would interfere with their ability to conduct their workplace

relations in a manner consistent with their religious beliefs. HHS's insistence on consulting the Internal Revenue Code, rather than civil rights laws, for wisdom about the proper scope of religious protections suggests it was looking in the wrong place for a post-hoc justification for the miserly scope of an exemption that properly belongs to all religious employers.

In any event, this Court has already emphatically rejected the notion that the government may consider religious groups' internal structures when handing out sensitive conscience rights. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012); *Larson* v. *Valente*, 456 U.S. 228, 246 n.23 (1982). HHS tried a variation on the same argument in *Hobby Lobby* and lost. Conscience rights do not turn on corporate form; they should not turn on religious polity either. Independent Women's Forum Amicus Br. 4-7; accord *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) ("The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations."). Indeed, "organizational form" is barely even a rational reason—let alone a "compelling" one, *Lukumi*, 508 U.S. at 537—for exempting some religious groups but not others from a requirement as sensitive as the contraceptive mandate. And it certainly is not a reason that can suffice when HHS's own regulations and briefs defending them confirm that it is using "organizational form" as a proxy for intensity of belief—*i.e.*, for something that the Religion Clauses unquestionably prevent the government from invoking as a basis for deciding whose religious exercise to protect.

In short, it is hard to think of a clearer violation of the Constitution's Religion Clauses than a regulation that is specifically designed to protect houses of worship but leave out equally religious organizations like petitioners, even though they assert the exact same religious objection with the exact same religious conviction, to the exact same religiously sensitive requirement. "[W]hen the [government] passes laws that facially regulate religious issues"—as HHS's scheme unabashedly does—"it must treat individual religions and religious institutions without discrimination or preference." *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) (internal quotation marks omitted). By failing to do so, HHS has violated not just RFRA, but also the Constitution.

* * *

HHS is in a bind. It acknowledges, as it must, that it can no longer try to keep this Court from reviewing its novel attempt to force religious employers to take actions that HHS itself deems sufficient to put them in compliance with a mandate that concededly runs counter to one of their most fundamental religious beliefs. But HHS does not want the Court to consider this *particular* petition, these *particular* petitioners, or these *particular* issues. The reasons for HHS's resistance are self-evident. Whereas HHS would prefer to obscure the details of its regulatory scheme, this case makes them clear. Whereas HHS would prefer not to talk about the First Amendment, this case would oblige it to. And whereas HHS would prefer to sidestep the clarifying reality—highlighted by petitioners' unique level of amicus support—that it is discriminating against an order of nuns on the basis of

religious distinctions it has no business making, this case makes that reality undeniable. If RFRA and the Constitution really allow that, then HHS should make its case here.

Respectfully submitted.

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