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

IN THE
# Supreme Court of the United States

ZUBIK, DAVID A., ET AL.,
*Petitioners*,
v.
SYLVIA MATTHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Third, Fifth, Tenth and D.C. Circuits**

## BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS AND REVERSAL


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## BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College as amici curiae in support of petitioners.[1]

## INTEREST OF AMICI CURIAE

Amici are four religious, non-profit retirement communities and two religious, non-profit colleges associated with The Christian and Missionary Alliance ("CMA") denomination. All amici follow the religious doctrines and teachings of the CMA. This includes the belief that all life is equally sacred and blessed of God and must be preserved and nurtured. Because of their belief in the sacredness of all human life, the amici's sincere religious convictions preclude them from providing for, facilitating, or authorizing, directly or indirectly, the provision of drugs, devices, procedures, or counseling that could harm or kill a fertilized egg. Amici thus have a strong interest in preserving their right under the Religious Freedom Restoration Act of 1993 to choose

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters from the petitioners and the respondents consenting to all amici briefs are on file with the Clerk's office.

to offer health insurance coverage that comports with their sincere religious beliefs.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

> *Now, what … kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined?*
> *— Justice Kennedy during oral argument in* Burwell v. Hobby Lobby Stores[2]

Religious liberty in our constitutional tradition means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But it also means much more. It allows individuals to "preserv[e] their own dignity and … striv[e] for a self-definition shaped by their religious precepts." *Id.* And it protects the individual's "right to express [her] beliefs and to establish [her] religious (or non-religious) self-definition in the political, civic, and economic life of our larger community." *Id.*

A believer's ability to act in accordance with his religious beliefs is inestimably important. In religion, as in all aspects of life, actions speak louder than words. Simply put, "the 'exercise of religion' involves 'not only belief and profession but [also] the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Id.* at

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[2] Transcript of Oral Argument at 56, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

2770 (majority opinion) (quoting *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

Reiterating and reinforcing this tradition, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). In RFRA, Congress made a clear determination about the importance of religious liberty—including the right to act in accordance with one's faith. Congress declared, as a default rule, that religious beliefs must be respected, even if that means religious believers have to be exempted from otherwise generally applicable laws. It made this default rule applicable to the entire U.S. Code, including to subsequent enactments like the Affordable Care Act ("ACA"), unless it specifically indicated otherwise. And it afforded protection to all religious believers without drawing presumptive distinctions among them.

Despite this architecture, when implementing the "preventive care" provision of the ACA, the Department of Health and Human Services ("HHS") decided that only *some* religious believers were entitled to the full protections that RFRA provides. Knowing that several religious entities—both churches and other religious organizations—objected to having any involvement in providing contraceptives, HHS nonetheless decided to provide a complete exemption from the contraceptive mandate only for churches, and not for other religious organizations. In HHS's view, non-church religious organizations that shared *identical* religious beliefs with exempt churches did not deserve the same protection. Instead, they merited only an "accommodation," which required them to authorize another entity to take over a portion of their healthcare plans and use the plans to provide

contraceptive coverage in their stead—an action that the religious objectors consider morally tantamount to providing the objected-to contraceptives themselves.

HHS exceeded its delegated authority and violated the text of RFRA, as well as its history and express purpose, when it refused to protect *all* religious objectors on equal terms, and created a bifurcated scheme separating those it believed were *sufficiently* "religious" from those it deemed *insufficiently* "religious." HHS's repeated disregard for the RFRA rights of religious objectors should not be allowed to stand.

## ARGUMENT

### A. Congress Enacted RFRA to Protect *All* Religious Objectors from *All* Federal Laws That Substantially Burden Their Religious Beliefs—Not Just the HHS-Approved Objectors Deemed Worthy of a Complete Religious Exemption.

When it enacted RFRA, Congress made a sweeping statement regarding the importance of religious liberty. It recognized "free exercise of religion as an unalienable right." 42 U.S.C. § 2000bb(a)(1). It affirmed that, in light of the importance of free religious exercise, "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(3). And it acknowledged that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

Congress's pronouncement was not mere rhetoric. It gave these sweeping statements equally sweeping

effect. In RFRA, Congress provided that the government—including any "branch, department, agency, instrumentality, [or] official" of the United States, *id.* § 2000bb-2(1)—could not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," *id.* § 2000bb-1(a). And it made this rule applicable to every federal law and every implementation of federal law whether it predated RFRA's passage or was enacted thereafter, thereby rendering RFRA a presumptive part of *every* statute in the United States Code. *Id.* § 2000bb-3(a). Congress in essence created a "super-statute"—a statutory requirement of religious accommodation for *all* believers that "cut[s] across all other federal statutes (now and future, unless specifically exempted) and modif[ies] their reach." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom & the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995); *see also Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

Congress offered only two narrow means for overriding the presumptive protection RFRA affords religious exercise: (1) Congress may "explicitly" except a particular enactment from RFRA's reach or (2) the government may, on a case-by-case basis, prove that a "substantial burden" on religious exercise furthers a compelling government interest using the least restrictive means. 42 U.S.C. § 2000bb-3(b); *id.* § 2000bb-1(b). If neither of these exceptions is satisfied, the government may not burden an individual's religious exercise regardless of whether the law is otherwise generally applicable. *Id.* § 2000bb-1.

Notably, nowhere does RFRA provide an administrative agency the power to do what HHS has done here: divide religious objectors into favored and dis-

favored groups based on a completely irrelevant distinction in their tax-exempt status[3]—protecting the religious liberty of churches subject to an automatic tax exemption, while substantially burdening the *identical* sincere beliefs of other religious organizations. Instead, it leaves in the hands of Congress—and Congress alone—the power to decide whether and how RFRA should apply to similar groups of religious believers that present the same objection to a statutory requirement. *See* 42 U.S.C. § 2000bb-3(b) (noting that RFRA's universal protections apply unless "[f]ederal *statutory* law … explicitly excludes [their] application" (emphasis added)). Because Congress reserved to itself the power to exempt or limit RFRA's application, "RFRA is inconsistent with the insistence of an *agency* … on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (emphasis added).

Congress, in short, enacted RFRA to protect *all* religious objectors from *all* laws that substantially burden their religious beliefs, it made RFRA a presumptive part of every statute in the U.S. Code, including the ACA, and it provided only two limitations on the reach of RFRA's broad protection of religious liberty—first, where Congress explicitly countermands its protection, and second, where a religious exception cannot be given in an individual case

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[3] HHS delineated the churches exempt from the contraceptive mandate using a tax exemption found in the Internal Revenue Code. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii) to define exempt churches); *see also* 26 C.F.R. § 1.6033-2(g)(1)(i)–(ii).

because application of the law is the least restrictive means of achieving a compelling government interest. Here, HHS found it both necessary and possible to offer churches a complete exemption from the contraceptive mandate to protect their sincere religious beliefs. It thus had no authority to deny other sincere religious objectors the *same* exemption to protect the *same* sincere beliefs merely because they were not tax-code-designated "churches." *See id.* at 2769–72 (majority opinion).

1. The ACA does not contain any references at all to RFRA—much less an "explicit" exception from RFRA's requirements. When it enacted the ACA, Congress determined that the ACA's goals were not so compelling that they should override religious objections—for if they were so compelling, Congress would have explicitly exempted the ACA from RFRA's reach or, at the very least, narrowed RFRA's default religious exemption to cover only specific religious objectors.

As enactments in other contexts illustrate, Congress knows full well how to place limits on statutory religious exemptions when it determines that such limitations are appropriate. *See, e.g.*, 42 U.S.C. § 3607(a) (incorporating Title VII exemption for religious staffing "unless membership in such religion is restricted on account of race, color, or national origin"). That it did not do so in the context of the ACA affirms that Congress intended RFRA's protections to fully apply—and to apply equally to *all* religious believers whose sincere beliefs were substantially burdened. *See Neder v. United States,* 527 U.S. 1, 22 (1999) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are

presumed to have been used in that sense.") (quoting *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) (alterations omitted)).

2. Congress's decision not to exempt or limit RFRA's application to the ACA means that every requirement that the ACA imposes is subject to an express statutory exemption available to any person who can show that the ACA's requirements impose a substantial burden on his or her sincere religious beliefs. Only if the government shows that imposing a burden on the sincere beliefs of a particular believer is the least restrictive means of furthering a compelling interest can RFRA's presumptive exemption be overcome. *See* 42 U.S.C. § 2000bb-1(b). And in making this showing, the government must isolate a compelling interest *apart from the need to effectuate the burden-imposing law itself*, as Congress already decided that the ACA's policy goals—including its goal of providing "preventive care" to women—should be subject to RFRA's religious exceptions when it decided not to exclude or otherwise limit RFRA's application to the ACA. *See id.* § 2000bb-3(b).

Congress's decision to subject the ACA to RFRA-based requests for religious exemptions is a statutory limitation on the ACA that should have guided and restrained HHS when it crafted regulatory guidance regarding the forms of "preventive care" that individual and group health plans would be required to provide. *See* 42 U.S.C. § 300gg-13(a)(4). After all, HHS's authority, even if broad, always remains subservient to clear statutory direction. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444–45 (2014). And together, RFRA and the ACA direct that RFRA's religious liberty protections apply

without limitation to all aspects of the ACA. Instead of respecting this statutory command to accommodate all sincere religious objections, however, HHS proceeded to issue regulations that do what Congress expressly directed should *not* be done: the regulations categorically narrow the scope of RFRA's protections in the context of the ACA to exclude from those protections religious entities that do not qualify as churches or integrated auxiliaries of churches under the Internal Revenue Code. In making this decision to categorically narrow RFRA's protections, HHS exceeded its regulatory authority.

a. Shortly after HHS issued its initial proposed list of "preventive care" services that individual and group health plans would be required to provide, several religious organizations—both churches and non-churches—objected to the requirement that their plans supply all FDA-approved contraceptive methods. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). The religious objectors pointed out that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." *Id.* Many religious employers had never covered these benefits, and they objected to being forced to do so in contravention of their sincere religious beliefs. *See id.*

HHS responded by "balanc[ing] the extension of any coverage of contraceptive services … to as many women as possible" against "the unique relationship between certain religious employers and their employees in certain religious positions." *Id.* In making its own determination about how to appropriately strike this balance, HHS decided to offer a religious exemption to *some* religious objectors but not

others. Churches and their integrated auxiliaries were exempted from the contraceptive mandate; all other religious objectors were not. 78 Fed. Reg. 39870, 39873–75 (July 2, 2013); *see also* 45 C.F.R. § 147.131. According to HHS, those other objectors ought to be sufficiently "accommodated" if an outsider—*i.e.*, third-party administrator, insurance provider, or other insurance-plan contractor—is deputized to dispense objectionable contraceptives using their insurance plans. Unsurprisingly, the religious objectors did not agree with HHS that this "accommodation" alleviated their moral qualms, and they have made their continued religious objections well known. *See* 78 Fed. Reg. at 39873–75; *see infra* at 15–17, 21–25.

b. In deciding to respect the moral objections of some religious organizations but not others, HHS has attempted to restrike a balance that Congress already struck when it enacted the ACA without exempting or limiting RFRA's application to it. Congress was well aware that by enacting the ACA without an exception from RFRA, it was leaving fully intact RFRA's requirements. And given Congress's decision to leave RFRA's protections fully intact in the ACA, HHS lacked the regulatory authority to limit RFRA's application by drawing categorical, tax-code-based distinctions between the protections afforded to the religious liberty of different religious organizations that share the same sincere beliefs: RFRA is a part of the ACA and "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering

both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

In other words, HHS's line-drawing contravenes the line that Congress—the law-making authority—drew. Congress could have decided that the protections RFRA affords religious liberty should apply only to churches—but it did not. Congress could have decided that the "preventive care" requirement in the ACA was so important that no, or only some, religious objectors should be exempt from it—but it did not. Congress instead left RFRA fully applicable to the ACA. *See* 42 U.S.C. § 2000bb-3(a). HHS is bound to take action consistent with this legislative determination. It does not have the power to revise or reverse it by making its own decision about the appropriate "balanc[e] [between] the extension of … coverage of contraceptive services … to as many women as possible" and "the unique relationship between certain religious employers and their employees in certain religious positions." 76 Fed. Reg. at 46623.

Putting the case in a different context illustrates the point. If Congress enacted a law that required any power plant that emitted pollutants to obtain a permit, but also created a statutory exemption from that law for power plants that emitted fewer than 100,000 tons of pollutants per year, could an agency decide to "'tailor' [the statutory exception] to [its] bureaucratic policy goals" by offering the statutory exception only to power plants that emitted fewer than 500 tons of pollutants per year? *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–45. Certainly not. Imposing this type of regulatory limit on a statutory exception would contradict the "unambiguously expressed intent of Congress" and thus go "well beyond

the 'bounds of [the agency's] statutory authority.'" *See id.* at 2445 (citation omitted).

So too in the context of the ACA. No one would suppose that HHS could decide to limit the statutory exception for grandfathered health plans to exclude grandfathered plans that are less than ten years old. *See* 42 U.S.C. § 18011. And no one would suppose that HHS could decide to revise the statutory exception for small employers to exclude companies that employ fewer than forty individuals rather than those who employ fewer than fifty. 26 U.S.C. § 4980H(c)(2)(A). There is no reason to treat the exemption for religious objectors in RFRA any differently. HHS cannot arbitrarily restrict the exemption for *all* religious objectors to tax-code-labeled churches any more than it can restrict the exception for all grandfathered plans to those that are less than ten years old or the exception for small employers to those that have fewer than forty employees.

3. HHS's actions in implementing the ACA demonstrate that it sees RFRA's command to protect religious exercise as a secondary consideration, subordinate to HHS's regulatory goal of distributing contraceptives. Indeed, as the facts of some of these cases demonstrate, HHS sees RFRA's command as so subordinate to its regulatory goals that it is willing to demand compliance with the "accommodation" even if compliance does nothing more than force religious objectors to violate the tenets of their faith. *See, e.g.*, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1166–67 (10th Cir. 2015) (noting that Little Sisters of the Poor must comply with the "accommodation" even though its employees receive coverage through a self-insured church plan and "the Departments con-

cede they [presently] lack authority to compel church plan TPAs to provide contraceptive coverage"). Congress could not have been more clear in requiring the opposite. In RFRA, Congress expressly exempted individuals or entities from "rule[s] of general applicability" that "substantially burden" their "exercise of religion," 42 U.S.C. § 2000bb-1(a), and it made this exemption fully applicable to subsequent enactments such as the ACA, *id.* § 2000bb-3(a). Congress firmly decided that statutory requirements, including the ACA, *could and should* tolerate religious exceptions for *any* person whose sincere beliefs were substantially burdened. HHS had no authority to contravene or reevaluate that decision.

### B. By Creating a Bifurcated Exemption Scheme, HHS Impermissibly Distinguishes Between Religious Believers—Fully Protecting Only Those Groups It Deems Sufficiently "Religious."

HHS does not contest the sincerity of any of the religious objectors' beliefs. And HHS cannot dispute that both churches and non-churches have the same objections to its contraceptive mandate—indeed, in many cases, the church and non-church religious objectors are simply different arms of the same organization subject to different tax rules. *See, e.g.*, *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 607 (W.D. Pa. 2013). Despite these concessions, HHS treats the two groups differently, offering one an exemption and the other an "accommodation" that it knows continues to offend their sincere religious beliefs.

HHS claims that RFRA allows it to draw a distinction between these two groups of admittedly sincere religious objectors for two reasons: (1) churches

are more likely than other religious organizations to hire people who share the same faith, and (2) there is a long-standing "tradition" in our society of affording churches special protection. But neither of these reasons is factually or legally supportable. And even if they were, neither of these reasons justifies an *agency's* effort to draw categorical distinctions between religious believers when *Congress* decided not to draw any such distinction in RFRA.

HHS likewise claims that it has not imposed a substantial burden on the sincere religious beliefs of the non-church religious objectors because complying with the "accommodation" it offers *should* not constitute a substantial burden. HHS's own decision to completely exempt some religious organizations from the contraceptive mandate undermines its assertion that the "accommodation" does not impose a substantial burden on religious beliefs. And nowhere does RFRA allow an agency to make a determination about whether compliance with a requirement should be a substantial burden—it asks only whether the religious belief is sincere and, if it is, whether the degree of coercion the government imposes to force the believer to violate it is substantial. In this case, the answer to both these questions is yes, and that resolves this case in the religious objectors' favor.

Here, two groups of religious believers share the same, admittedly sincere, belief. RFRA thus requires that they be offered the same protection from the offending law—in this case, a complete exemption from the contraceptive mandate.

1. At the time it issued the contraceptive mandate, HHS knew that many religious organizations

objected to participating directly or indirectly in providing contraceptives. *See, e.g.*, 76 Fed. Reg. at 46623. It has never questioned the sincerity of the religious beliefs that underlie these objections. Nor has it disputed that the non-church religious organizations that object to the mandate share sincere beliefs *identical* to those of the churches with which they are associated.

But despite religious objectors' shared sincere objection to the contraceptive mandate, HHS automatically exempted only *some* of them from the obligations it imposes—namely, those entities that qualify as churches or their integrated auxiliaries under the tax code. HHS effectively determined that other objectors with identical beliefs are not as deserving of protection from interference with their religious exercise.

The difference between the exemption offered to churches and the "accommodation" offered to non-church religious objectors is religiously significant because the "accommodation" requires religious objectors to remain morally complicit in the contraceptive mandate. Churches, as a result of their exemption, need not certify their religious beliefs or provide any notice to HHS or any other entity of their objection to the mandate, which—most significantly—means that churches are not required to take any discrete action that would allow others to provide contraceptives to their employees through their own healthcare plans. *See* 78 Fed. Reg. at 39873–74; *see also* 45 C.F.R. § 147.131(a). But the "accommodation" that HHS offers non-church religious objectors continues to require them to "comply" with the mandate-imposed obligation to provide contraceptives. 78 Fed. Reg. at 39879.

Unlike churches, non-church religious objectors must either complete a self-certification form or provide notice to HHS of their religious objections to some or all of the contraceptives that the mandate would otherwise require them to provide to satisfy their obligations under the ACA. 80 Fed. Reg. 41318, 41322–23 (July 14, 2015). This self-certification or HHS notification has two important consequences. *First*, for those that purchase group insurance and for most self-insured plans, the notice or self-certification shifts financial and some of the administrative responsibility for providing contraceptive coverage to either the objector's insurer or, if it is self-insured, to its third-party administrator. *See id.* at 41323; 78 Fed. Reg. at 39876. *Second*, in all cases, the notice or self-certification gives the insurer, third-party administrator, or other plan contractors the authority to use the "insurance coverage network" and the "coverage administration infrastructure" that the objector has established to provide the objected-to contraceptives. 80 Fed. Reg. at 41328–29; 78 Fed. Reg. at 39879–80. That is, rather than creating "two separate health insurance policies," 78 Fed. Reg. at 39876, the accommodation allows other entities to use the objector's own healthcare plan to provide the contraceptives. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876.

In short, whether non-church religious objectors complete the self-certification form or provide HHS notice, the result is the same: They become complicit in the mandate, and in most (if not all) cases their insurers, third-party administrators, or other plan contractors will use their healthcare plans to "provide coverage for contraceptive services without cost sharing to participants and beneficiaries." 80 Fed.

Reg. at 41323; 78 Fed. Reg. at 39876.[4] In effect, the accommodation scheme requires religious objectors to hand over their healthcare plans to other entities, knowing that those entities will use the plan to provide contraceptives.

This accommodation substantially burdens religious objectors' sincere religious beliefs. Religious objectors such as the petitioners adamantly believe that *any* facilitation of or complicity in the provision of contraceptives will have eternal ramifications. And they adamantly believe that participating in the government's proposed accommodation scheme forces them to facilitate the provision of contraceptives. But, unlike tax-code-labeled churches, the religious objectors here must comply with HHS's contraceptive mandate (directly or indirectly) or pay substantial fines. This categorical preference for churches over other, equally sincere believers should not be permitted, especially given Congress's decision not to draw such a distinction in RFRA. *See supra* at 5–13.

2. By creating a bifurcated system in which churches receive a religious exemption, but all other believers receive only an "accommodation" that does

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[4] Although HHS concedes that it currently may not force the third-party administrators for self-insured church plans to provide contraceptive coverage, *see Little Sisters of the Poor*, 794 F.3d at 1166–67, it evidently believes that it will be able to convince or coerce *someone* to provide contraceptives through the religious objector's healthcare plan. Specifically, HHS believes that once a religious objector complies with the accommodation, HHS has the power to authorize *any* of the plan's third-party contractors to provide contraceptive coverage through the plan. *See* Pet. for Writ of Cert. at 12 n.2, *Little Sisters of the Poor Home for the Aged, Denver, Colo., et al. v. Burwell*, No. 15-105.

not resolve their moral objections, HHS has created a two-tier scheme of protection for religious liberty that treats churches as more "important" religious adherents than other religious organizations. *See* 78 Fed. Reg. at 39873–74.

HHS attempted to justify the categorical distinction that it drew by explaining that it exempted churches because it believed that "[h]ouses 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." 78 Fed. Reg. at 39874; *see also* 80 Fed. Reg. at 41325. And, when a commenter recently pointed out that some churches and integrated auxiliaries might not employ people of the same faith, HHS further justified its decision to afford churches special treatment by claiming that the exemption was consistent with churches' "special status under longstanding tradition in our society and under federal law." 80 Fed. Reg. at 41325.

HHS's attempt to justify drawing a distinction between the protection afforded to the religious liberty of churches and other religious objectors should not carry any weight given Congress's determination that the ACA's goals ought not be pursued at the expense of *any person's* religious liberty. *See supra* at 5–13. And, in any event, drawing a distinction between religious believers based on the structure in which they put their faith into practice makes no sense. Just as religious beliefs do not become any less sincere or deserving of protection when the believer decides to make a living using a business organized in the corporate form, *see Hobby Lobby*, 134 S. Ct. at 2769–72, religious beliefs do not become any

less sincere or deserving of protection when the believers decide to pursue educational and charitable endeavors in accordance with their faith, *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–09 (2012). The "enigmatic" result of HHS's bifurcated exemption-accommodation scheme is that individuals who "share identical[] religious beliefs" can adhere to those beliefs when the Internal Revenue Code labels them a church, but not "when acting as the heads of the charitable and educational arms of [that same] Church." *See, e.g., Zubik*, 983 F. Supp. 2d at 607.

The reasons HHS has given for singling out churches for greater protection do not justify this impermissible and unsupportable line-drawing exercise. HHS has cited no support for the proposition that a church is more likely than other religious organizations to share its religious beliefs with its employees. And, beyond the supposition that churches are inherently more religious than other institutions, there is no reason to believe this is true. To the contrary, past cases show that numerous other types of religious organizations, including schools and charitable organizations like the Little Sisters of the Poor, are just as likely as churches to hire individuals who share their religious beliefs. *See Hosanna-Tabor Evangelical Lutheran Church*, 132 S. Ct. at 699–700; *see also Little Sisters of the Poor*, 794 F.3d at 1167–68. Congress recognized as much when it exempted not only churches, but any "religious corporation, association, educational institution, or society" from the equal employment provisions of Title VII. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2).

And HHS's newly discovered justification for treating churches differently than other religious in-

stitutions fares no better. Contrary to HHS's assertion, with respect to protections for religious exercise, churches have *not* been singled out for a "special status under longstanding tradition in our society." 80 Fed. Reg. at 41325. Instead, this Court has held that all religious believers are entitled to the same protection, regardless of whether they pursue their faith in an established church or elsewhere. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246, 246 n.23 & 255 (1982) (criticizing a statute that effectively drew distinctions between "well-established churches" and "churches which are new and lacking in a constituency" as "set[ting] up precisely the sort of official denominational preference that the Framers of the First Amendment forbade"); *see also Hobby Lobby*, 134 S. Ct. at 2767–68; *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993).

More to the point, HHS's argument that some religious believers should be treated differently than others under the ACA because of a "longstanding tradition in our society" has already been rejected by this Court. *See Hobby Lobby*, 134 S. Ct. at 2773–74. In *Hobby Lobby*, this Court was not persuaded by HHS's argument that a line should be drawn between "churches and other nonprofit religious institutions," on the one hand, and "for-profit corporations," on the other, based on a national "tradition."[5]

[5] Interestingly, in *Hobby Lobby*, HHS touted the exemption for all religious organizations in Title VII as the best evidence of a national "tradition" of providing exemptions to accommodate religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2773. Yet in adopting the bifurcated exemption-accommodation scheme, HHS chose to ignore the scope of the traditional Title VII ex-

*Id.* at 2773. HHS now puts forth essentially the same argument that failed before, only altering *where* it wants to draw the line: According to HHS, "longstanding tradition in our society" now supports a distinction between churches and other religious adherents rather than between non-profit and for-profit entities. 80 Fed. Reg. at 41325. This new-found "longstanding tradition" should be rejected for the same reasons this Court rejected the "tradition" in *Hobby Lobby*: Congress drew no such distinction in RFRA. *See Hobby Lobby*, 134 S. Ct. at 2773–74. As has been repeatedly emphasized, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

3. HHS has implicitly decided that offering a complete exemption from the contraceptive mandate to what it deems the more "religious" objectors is necessary to avoid imposing a substantial burden on their beliefs.

By deciding to afford a complete exemption to churches, HHS has already implicitly recognized

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emption that was crafted expressly for the employment context, and to instead apply one codified in the Internal Revenue Code, under the theory that the latter is better tailored to identify employers who are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874. HHS has not explained this logic, and it is irrational on its face to conclude that distinctions drawn in the tax laws are better indicators of prevailing beliefs among religious entities' employees than distinctions embedded in the employment laws for this very purpose.

that the proposed accommodation is not sufficient to avoid substantially burdening sincere religious beliefs. And rightly so. The purported accommodation gives religious objectors two choices: Take an action directly contradictory to their sincerely held religious beliefs or pay a hefty fine. That should be enough to find that the religious objectors' beliefs have been substantially burdened in violation of RFRA. *See Hobby Lobby*, 134 S. Ct. at 2777–79. After all, "the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA." *Little Sisters of the Poor*, 794 F.3d at 1208 (Baldock, J., dissenting in part). And the penalties the ACA imposes for non-compliance with the contraceptive mandate have already been found substantial. *Hobby Lobby*, 134 S. Ct. at 2775–77.

HHS, and many of the circuit courts below, however, went beyond asking whether the religious objectors *did* have a sincere belief that the law demanded they violate and additionally asked whether the religious objectors *should* have held that belief in light of the legal mechanics that underlie HHS's accommodation. This inquiry crossed a line that courts and administrative agencies have no business crossing.

As this Court already held, neither HHS nor the courts have the authority to tell a religious objector that his belief about what types of actions are immoral is "flawed" because "the connection between what the objecting parties must do ... and the end that they find to be morally wrong ... is simply too

attenuated." *Hobby Lobby*, 134 S. Ct. at 2777. Instead, "the question that RFRA presents [is] … whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Id.* at 2278. Courts have "no business addressing" moral and philosophical questions regarding "whether the religious belief asserted in a RFRA case is reasonable." *Id.* Indeed, even prior to RFRA, this Court held that evaluating the reasonableness of a religious belief was simply not a task courts could or should undertake. *See id.* (citing *Smith*, 494 U.S. at 887; *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

Even assuming that it is permissible for HHS or the courts to evaluate the reasonableness of religious objectors' beliefs, they have no reason to second-guess the moral logic of the objectors in this case. The accommodation scheme leaves religious objectors three choices. *First*, they can directly provide contraceptives—an act that everyone agrees would substantially burden sincerely held religious beliefs if compelled. *Second*, they can refuse to provide healthcare coverage to avoid providing contraceptives and pay substantial monetary fines instead—also an act that all agree would substantially burden sincere religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2776–77. Or *third*, they can participate in HHS's accommodation scheme—the act that HHS claims is not a substantial burden.

This third option, however, imposes a substantial burden that is functionally indistinguishable from the first option. To participate in the "accommoda-

tion," the religious objector is required to facilitate the distribution of contraceptives by authorizing the government to commandeer its healthcare plan and provide contraceptives through it. *See supra* at 15–17. The accommodation, in essence, forces religious objectors to provide material aid to those who would commit the ultimately wrongful act. Several different faith traditions recognize this type of complicity as immoral.[6] And so too do moral philosophers and society at large, as evidenced by provisions criminalizing similarly complicit conduct.[7]

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[6] *See, e.g.*, *Catechism of the Catholic Church*, 2d ed. (Washington DC: United States Catholic Conference, 2011), sec. 1868, *available at* http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/epub/index.cfm (indicating that Catholic adherents "have a responsibility for the sins committed by others when *[they] cooperate in them*," including by "not disclosing or hindering them when we have an obligation to do so").

[7] *See Hobby Lobby*, 134 S. Ct. at 2778 n.34 (recognizing that moral "[c]ooperation occurs 'when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does.'" (quoting 1 H. Davis, Moral and Pastoral Theology 341 (1935))); *United States v. Florez*, 368 F.3d 1042, 1043–44 (8th Cir. 2004) (holding that a woman that allowed her bank account to be used by another to launder cash had aided and abetted the offense of money laundering); *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996) (holding that a man that allowed his car to be used to transport a gun and a group intent on committing a drug crime had aided and abetted the offense of carrying or using a gun during a drug crime); *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995) (holding that a man that allowed his house to be used for a meeting where guns were displayed and discussed and later used in a drug crime had aided and abetted the offense of carrying or using a gun during a drug crime).

The religious objectors in this case are thus applying a well-recognized logic of moral culpability in objecting to the contraceptive mandate. They believe that providing another (their insurer, third-party administrator, or any other plan contractor) with a means (their healthcare plans) to achieve an immoral end (providing contraceptives) is itself an immoral act. Far from being an idiosyncratic view of the degree of involvement necessary to give rise to moral blameworthiness, their view is broadly accepted as a matter of religious and moral philosophy and criminal liability. It follows that neither HHS nor the courts have any reason to second-guess the religious objectors' moral logic, even if RFRA gave them the power to do so.

4. Because the purported accommodation burdens the admittedly sincere religious beliefs of religious objectors who are fully protected under RFRA, requiring religious objectors to invoke it can be justified only if it is the least restrictive means of achieving a compelling government interest. *See supra* at 5–13. By its own actions, however, HHS has demonstrated that the accommodation is not the least restrictive means available to prevent the mandate from imposing a substantial burden on the religious objectors' sincere beliefs: HHS has already shown it is possible to completely exempt from the mandate the religious objectors it deems worthy. *See* 78 Fed. Reg. at 39873–74. There is no reason HHS cannot do the same for other religious objectors whose *identical* religious beliefs cause them to raise the *same* objection as the exempted churches. RFRA, in fact, *obligates* HHS to do so, as it "is inconsistent with the insistence of an agency … on distinguishing between different religious believers—burdening one while

accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

## CONCLUSION

For the foregoing reasons, the decisions below should be reversed.

Respectfully submitted,

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