No. _____

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

PETITION FOR A WRIT OF CERTIORARI

MARK RIENZI
ERIC C. RASSBACH
LUKE GOODRICH
HANNAH C. SMITH
DANIEL H. BLOMBERG
ADÈLE AUXIER KEIM
DIANA M. VERM
STEPHANIE BARCLAY
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W., Ste. 700
Washington, DC 20036

KEVIN C. WALSH
28 Westhampton Way
Richmond, VA 23173

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
Bancroft PLLC
500 New Jersey Ave., N.W.
7th Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

CARL C. SCHERZ
Locke Lord LLP
2200 Ross Ave.
Suite 2200
Dallas, TX 75201

Counsel for Petitioners

QUESTIONS PRESENTED

The text of the Affordable Care Act (ACA) says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. The Department of Health and Human Services (HHS) has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either directly or via a regulatory mechanism through which they must execute documents that authorize and obligate third parties to use their healthcare plans to facilitate the provision of contraceptive coverage to their employees and that, in the government's view, put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already considered the direct method of compliance and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). It is undisputed, however, that nonexempt religious employers such as petitioners hold equally sincere religious objections to the regulatory method of compliance as well. It is further undisputed that they face draconian fines if they refuse to comply via one of those two avenues.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

3. Does the First Amendment allow HHS to discriminate among nonprofit religious employers who share the same sincere religious objections to the contraceptive mandate by exempting some religious employers while insisting that others comply?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners, who were Plaintiffs below, are the Little Sisters of the Poor Home for the Aged, Denver, Colorado, a Colorado nonprofit corporation; Little Sisters of the Poor, Baltimore, Inc., a Maryland nonprofit nonstock corporation, by themselves and on behalf of all others similarly situated; Christian Brothers Services, a New Mexico nonprofit corporation; Christian Brothers Employee Benefit Trust; Reaching Souls International, Inc., an Oklahoma not-for-profit corporation; Truett-McConnell College, Inc., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; and GuideStone Financial Resources of the Southern Baptist Convention, a Texas nonprofit corporation. GuideStone's sole member is the Southern Baptist Convention, a Georgia religious-nonprofit corporation. No other petitioner has a parent corporation. No publicly held corporation owns any portion of any of the petitioners.

Respondents, who were Defendants below, are Sylvia Burwell in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary

of the United States Department of the Treasury; and the United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. The government has put them to the impossible choice of either violating the law or violating the faith upon which their lives and ministry are based. HHS insists that the Little Sisters must comply with a mandate that their employee healthcare plans "provide coverage" for free contraceptives. Although there is no dispute that the Little Sisters sincerely believe that all the available compliance methods would make them morally complicit in grave sin, HHS refuses to give them the exemption it has given other religious employers, and instead requires them to comply, either directly or by executing documents that authorize and obligate others to use the Little Sisters' healthcare plans to accomplish the "seamless" provision of contraceptive coverage.

HHS does not dispute that the Little Sisters sincerely believe that their religion no more allows them to comply with the mandate via this regulatory mechanism than to do so directly. But HHS disagrees with the Little Sisters' moral analysis. In its view, the Little Sisters are "fighting an invisible dragon" that can be vanquished with the "stroke of their own pen." If the Little Sisters follow their own moral compass instead of HHS's, they face millions of dollars in penalties.

This Court addressed a nearly identical dynamic in upholding the religious exercise claim of three family-owned for-profit companies in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). The Court made clear beyond cavil—as it had in a long

line of cases preceding *Hobby Lobby*—that courts may not second-guess sincerely-held religious beliefs by suggesting that the degree of complicity required is insufficient to violate religious scruples. Thus, especially after *Hobby Lobby*, there should be no doubt that the religious exercise of the Little Sisters and their co-petitioners has been substantially burdened. The mandate and the penalties for noncompliance here are identical, and petitioners sincerely believe that the only avenues for complying with the mandate violate their religion. That should be the end of the substantial burden inquiry.

Remarkably, the Tenth Circuit nonetheless concluded that there is no substantial burden on religious exercise because, in its view, the regulatory avenue does not really make petitioners morally complicit. That approach plainly conflicts with *Hobby Lobby* and decades of cases before it forbidding courts from engaging in any such inquiry. It also plainly conflicts with RFRA itself, which protects "any religious exercise," not just those exercises that a court finds reasonable or consistent with its own views of an adherent's religion. Without this Court's intervention, the Little Sisters will be forced to choose between violating their religion or violating the ACA, as a consequence of a decision that is flatly irreconcilable with this Court's precedents.

That would be reason enough for plenary review, but a number of additional considerations strongly support this Court's review at this juncture and in this case. This Court has already used its extraordinary authority under the All Writs Act in three cases involving challenges to the mandate by nonprofit re-

ligious employers, including this one. The felt need for that extraordinary intervention both underscores the extraordinary importance of this issue and makes clear that deferring review will produce not orderly percolation, but the need for further extraordinary intervention by this Court.

Furthermore, this case vividly illustrates just how extreme HHS's position really is, as HHS has demanded that the Little Sisters comply with the mandate via the regulatory option to which they object even though HHS itself insists that doing so will not fulfill its regulatory objective of providing free contraceptives to the Little Sisters' employees. That makes the need for review particularly important here. Whatever the strength of the government's interest in overriding sincere religious objections when doing so will allow it to accomplish its regulatory objectives, it cannot possibly have a compelling interest in overriding sincere religious objections when the government claims doing so will not even produce that result. Accordingly, for the Little Sisters and the over-400 employers in their class action, HHS's least restrictive means case is distinctly weak. Thus, the Little Sisters should prevail no matter how the Court ultimately resolves that analysis for other religious objectors as to which HHS's insistence on regulatory compliance is more likely to fulfill its regulatory objective. Because this petition includes both the Little Sisters (and its class) as well as employers like Reaching Souls, it allows the Court to consider both least restrictive means contexts together. But even if the Court grants another petition, it should grant the instant petition to ensure that HHS's insistence on overriding sincere religious objections even when it

says it cannot accomplish its regulatory goals does not escape this Court's review.

After the decision below, the right of the Little Sisters to practice their religion as they understand it hangs in the balance. And their religious objections are hardly idiosyncratic. Indeed, objections to HHS's regulatory compliance method are so pervasive and profound that it is inevitable that this Court will need to resolve the exceptionally important questions presented. The Court should do so in time to ensure that religious exercise rights of the Little Sisters and their fellow petitioners are not sacrificed to a fundamentally misguided decision about what constitutes a substantial burden and the proper role for an Article III court in evaluating sincere religious beliefs.

OPINIONS BELOW

The district court's opinion in *Little Sisters* is reported at 6 F.Supp.3d 1225. App.152a. The district court's opinion in *Reaching Souls*, 2013 WL 6804259, is unreported. App.190a. The Tenth Circuit's opinion is reported at --- F.3d ---, 2015 WL 4232096. App.2a.

JURISDICTION

The Tenth Circuit's judgment was entered on July 14, 2015. App.2a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The provisions are set forth in Appendix E (App.211a).

STATEMENT

The Contraceptive Mandate

The ACA mandates that any "group health plan" must "provide coverage" for "preventive care" for women without "any cost sharing." 42 U.S.C. 300gg-13(a). Congress itself did not define "preventive care" but instead allowed HHS to do so. *Ibid.* HHS outsourced that "important and sensitive decision" to the Institute of Medicine, a private organization. *Hobby Lobby*, 134 S.Ct. at 2762. The Institute's definition, which HHS adopted, includes all FDA-approved contraceptive methods and sterilization procedures, including four methods that can prevent the implantation of a fertilized egg. *Id.* at 2762-63. Failure to "provide coverage" for all FDA-approved methods and procedures triggers severe penalties. See, *e.g.*, 26 U.S.C. 4980D ($100 per day per affected individual); 26 U.S.C. 4980H ($2000 per year per full-time employee).

The mandate to cover all FDA-approved contraceptives is not universal; instead, it is subject to both statutory and regulatory exemptions. First, as a statutory matter, employers with "grandfathered" healthcare plans—plans that existed before March 30, 2010, and have not made certain changes after that date—need not comply with the "provide coverage" mandate at all. See 42 U.S.C. 18011; *Hobby Lobby*, 134 S.Ct. at 2764. Although these plans cover tens of millions of individuals and must comply with a subset of ACA reforms that Congress prioritized and "HHS has described as 'particularly significant protections,'" the statutory mandate to cover preventative care, which has been administratively inter-

preted to mandate contraceptive coverage, "is expressly excluded from this subset." *Id.* at 2780 (quoting 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)); see also 42 U.S.C. 18011(a)(4). That exclusion exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S.Ct. at 2764. Although HHS has suggested that it intends to phase grandfathered plans out over time, it has not actually done so; instead, "there is no legal requirement that grandfathered plans ever be phased out." *Id.* at 2764, n.10.

Second, the statute provides that employers with fewer than fifty employees are not required to offer insurance at all. See 26 U.S.C. 4980H(c)(2)(A). These small employers—who collectively employ an estimated 34 million Americans—can avoid the mandate by not offering insurance. *Hobby Lobby*, 134 S.Ct. at 2764.

Third, after an initial outcry, HHS recognized that its mandate implicated sincere religious objections and created a regulatory exemption for certain "religious employers." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and "integrated auxiliaries," a category defined by how a ministry is funded and how closely it is controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would allow anyone to seize its employee healthcare infor-

mation and plan infrastructure to provide contraceptive coverage.

Nonprofit Religious Organizations and the Mandate

Although HHS was well aware that religious objections to the mandate were by no means limited to houses of worship or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the contraceptive mandate. Countless faith-based charities, orders of nuns, religious colleges and seminaries, and other religious organizations remain subject to the mandate. HHS attempted to justify that decision on the theory that houses of worship "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. So instead of exempting these nonprofit employers, HHS created another way for them to "comply" with the mandate. *Id.* at 39,879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"); accord 80 Fed. Reg. 41,318, 41,344 (July 14, 2015). To be clear, this so-called "accommodation" is not an exemption, but a means by which the nonprofit can *fulfill* its statutory obligation to provide coverage.

This regulatory compliance method requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1). That certification does not exempt the employer or its healthcare plan from the mandate. Instead, it "cause[s] the legal responsibility to provide contraceptive coverage to

shift" either to the employer's insurer or, for a self-insured employer (which many religious employers are), its TPA, App.48a, 80a, to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39,876; see 26 C.F.R. 54.9815-2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and other religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that still requires the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraceptive coverage.

Originally, objecting nonprofits had only one method of "self-certifying": executing and delivering to their insurer or TPA the Employment Benefits Security Administration Form 700. App.24a. Execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As the form states, upon execution and delivery, it becomes "an instrument under which the plan is operated." App.261a. It designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. 2510.3-16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to utilize plan information to pay *any* claims (let alone claims

for contraceptives excluded from the employer's plan), or the legal authority to use plan information for that purpose. And self-funded plans generally can be modified only by a written document, as a matter of both contract law and, where applicable, ERISA. 29 U.S.C. 1102(a)(1). Form 700 thus is necessary not only to trigger the regulatory obligation of the insurer or TPA to provide contraceptive coverage to the organization's employees, but also to "ensure[] that there is a party with legal authority"—both contractually and under ERISA—to make payments to plan beneficiaries for contraceptive services. 78 Fed. Reg. at 39,880. Additionally, only upon execution of this form does the insurer or TPA become authorized and legally obligated to provide such coverage, and (in the case of a TPA) eligible for 115% reimbursement for doing so. See 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014).

As HHS has acknowledged, forcing an employer to amend its plan documents to create this authority and obligation does not create "two separate health insurance policies." 78 Fed. Reg. at 39,876. Indeed, the government would not be able to use ERISA to help accomplish its goals if it were not regulating a benefit plan provided by an employer. 29 U.S.C. 1002. Instead, the "accommodation" is designed to effectuate contraceptive coverage from *inside* the employer's "insurance coverage network," to take advantage of the existing "coverage administration infrastructure." 80 Fed. Reg. at 41,328. In short, it is designed to force a religious employer to allow its own plan to be used to facilitate access to the very contraceptive coverage that it finds religiously objectionable.

The Little Sisters and this Court's Injunction

Unsurprisingly, religious organizations found little solace in this "accommodation." After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object to facilitating, or being complicit in, access to contraceptives; to paving the way for contraceptives to be provided under their plans; and to directly transferring their own obligations onto others. Being forced to "comply" with the mandate via the regulatory "accommodation" is no more compatible with their religious beliefs than being forced to comply with that mandate directly.

The Little Sisters are one group raising such objections. The Little Sisters are part of an international order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. Each Little Sister takes a vow of obedience to God and of hospitality "to care for the aged as if they were Christ himself." LSP C.A.App.149a, 151a. The Little Sisters treat each "individual with the dignity they are due as a person loved and created by God," and strive to "convey a public witness of respect for life, in the hope that [they] can build a Culture of Life in our society." LSP C.A.App.152a.

The Little Sisters provide health benefits through Christian Brothers Employee Benefit Trust (Trust), a self-insured church plan. A "church plan" is a benefit plan established by a church to serve its employees and other nonprofit religious organizations that share "common religious bonds and convictions." 29 U.S.C. 1002(33); 26 U.S.C. 414(e). The Trust's church plan is open only to nonprofits in good standing with

the Roman Catholic Church and approved for listing in *The Official Catholic Directory*. LSP C.A.App.165a. The plan is administered by petitioner Christian Brothers Services, a Catholic organization that serves other Catholic organizations by helping them to "remain faithful to [their] mission and the universal mission of the Catholic Church." LSP C.A.App.166a. Consistent with the sincerely held religious beliefs of the Catholic Church, the Trust does not provide contraceptive coverage. LSP C.A.App.169a.

When HHS was considering religious objections to its contraceptive mandate, commenters repeatedly requested that church plan participants be exempted from compliance.[1] HHS refused. Nonexempt employers who use a church plan therefore must comply with the mandate, either including contraceptive coverage in their plan or executing documents authorizing others to use their plan infrastructure to facilitate that coverage. 80 Fed. Reg. at 41,344; 26 C.F.R. 54.9815-2713A(a)(3).

There is, however, one important difference as to church plans. Because church plans are exempt from ERISA, 29 U.S.C. 1003(b)(2), HHS claims that it lacks authority to compel a church plan's TPA to comply with the obligation to provide contraceptive coverage that arises if an employer that utilizes the plan self-certifies. In HHS's own view, forcing an em-

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[1] Letter, Church Alliance to Dep't of Labor (Oct. 27, 2014) (summarizing comments submitted from 2011 to 2014) http://church-alliance.org/sites/default/files/images/u2/Comment-Letter-ACA-Preventive-Services-IFR-10-27-14.pdf.

ployer that uses a church plan to self-certify will not necessarily result in the provision of contraceptive coverage to its employees. This is a case in point. Christian Brothers Services has made clear that, because of its own religious objections, it would not comply with the obligation to provide contraceptive coverage if the Little Sisters were to self-certify, and HHS has disclaimed any enforcement authority to force it to do so. Nonetheless, HHS still insists that the Little Sisters must comply with the mandate via the "accommodation" even though HHS does not dispute either that they have a sincere religious objection to doing so, or that their objection exists independently of whether doing so will result in the provision of contraceptive coverage to their employees. LSP C.A.App.160a, 343a-48a, 352a-53a.[2]

The Little Sisters and Christian Brothers brought suit on behalf of themselves and a class of all employers in the Trust alleging that forcing them to comply with the mandate via the "accommodation" violates, among other things, their religious freedom rights under RFRA. After both the district court and

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[2] It is not necessarily true, moreover, that complying via the regulatory option would *not* result in the use of the Little Sisters' plan to facilitate provision of contraceptive coverage. As HHS conceded below, if the Little Sisters execute the requisite paperwork, HHS will consider itself empowered to convince *any* third party with which the Trust contracts to utilize the Little Sisters' plan to facilitate the provision of contraceptive coverage. LSP C.A.Tr.51:2-19; RSI C.A.Tr.18:2-19 (admitting at oral argument that HHS "will make that offer to Express Scripts"). Express Scripts is the Trust's prescription provider and does not share the Trust's religious objections. LSP C.A.App.495a.

the Tenth Circuit refused to grant preliminary injunctive relief mere days before fines would begin accruing, the Little Sisters turned to this Court for relief. This Court responded by issuing a rare injunction under the All Writs Act excusing them from executing Form 700 and ordering:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the [ACA] and related regulations pending final disposition of the[ir] appeal.

App.150a. The Court subsequently ordered similar relief in *Wheaton College* v. *Burwell*, 134 S.Ct. 2806 (2014).

The "Augmented" Regulatory Method for Compliance with the Contraceptive Mandate

HHS responded to this Court's injunctions by revising its regulation in form but not substance, and continuing to require objecting nonprofits to execute documents that HHS deems sufficient for compliance with the mandate. Specifically, HHS "augmented" the regulation to allow a nonprofit to communicate its objection through HHS instead of directly to its insurer or TPA. Just as with Form 700, however, this method of compliance is not an exemption. Nor, unlike the relief this Court ordered, does it consist solely of informing HHS of a religious objection. Instead,

like Form 700, it creates "an instrument under which the plan is operated." App.264a.

To that end, the notice must inform HHS of the name and type of the employer's health plan, as well as "the name and contact information for any of the plan's [TPAs]." 80 Fed. Reg. at 41,344. "If" the religious organization submits this "necessary" information, HHS "will send a separate notification to" its insurer or TPA informing of its new "obligations" to provide contraceptive coverage to participants in the organization's plan and its designation as a plan and claims administrator for that purpose. 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014); 29 C.F.R. 2510.3-16(b). If the employer takes these steps, it will authorize the use of its plans to provide no-cost access to the contraceptives, and HHS will deem the employer in compliance.

Whether an employer executes Form 700 or provides notice and information to HHS, "[t]he result is the same." *East Tex. Baptist Univ.* v. *Burwell,* No. 14-20112, 2015 WL 3852811, at *2 (5th Cir. June 22, 2015) ("*ETBU*"). The religious organization is deemed to have complied with the mandate to provide coverage to which it objects; its own healthcare plan becomes the vehicle for facilitating that coverage; and its own certification or notice serves as the legal "instrument" that triggers and authorizes provision of and reimbursement for that coverage. Only by taking the affirmative act of executing a legal "instrument" that puts itself in that position can a religious organization avoid massive financial penalties for excluding any contraceptives from its plan.

The Tenth Circuit Proceedings

After obtaining the injunction pending appeal from this Court, the Little Sisters and Christian Brothers proceeded with their appeal of the district court's denial of injunctive relief, and the Tenth Circuit aligned oral argument on that appeal with HHS's appeal of preliminary injunctive relief in another case, *Reaching Souls Int'l, Inc.* v. *Burwell*, No. 14-6028 (10th Cir.).[3]

Like the *Little Sisters* case, the *Reaching Souls* case involves both a church plan (GuideStone) and a class of religious employers who use that plan. Because plan sponsor GuideStone and those employers object to the four forms of contraception that can act as abortifacients, the plan does not provide coverage for those forms of contraception. RSI C.A.App.A162-71, A181-83, A190-91. The largest TPA with which GuideStone contracts has stated that should any of the employers who use GuideStone comply with the contraceptive mandate via the "accommodation," the TPA will communicate to that organization's employees (and their female beneficiaries, starting at age 10) that those abortifacients are available through the GuideStone plan. RSI C.A.App.A317, A321. 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.

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[3] The court also aligned argument in another HHS appeal. *Southern Nazarene Univ.* v. *Burwell*, No. 14-6026 (10th Cir.).

After hearing argument, the Tenth Circuit rejected petitioners' claims. As to their RFRA claims, the court accepted petitioners' uncontested testimony that "the accommodation scheme violates their sincerely held religious beliefs" that they may not be "complicit in providing contraceptive coverage." App.35a, 38a, 48a. And the court agreed that if petitioners do not comply, either directly or via the "accommodation," they will face massive penalties. But the majority nonetheless found no substantial burden because it "assesse[d] and ultimately reject[ed] the merits of" petitioners' sincere religious beliefs that complying via the "accommodation" would force them to be morally complicit in providing contraceptive coverage; instead, in the court's eyes, doing so would "relieve them from complicity." App.48a & n.20. The court also rejected petitioners' Free Exercise and Establishment Clause claims.

Judge Baldock dissented in part. He expressed considerable doubt that courts may "question[] a religious adherent's understanding of the significance of a compelled action," App.124a, and even if courts could so question, he concluded that the "accommodation" would violate RFRA as to self-insured employers. In his view, because "the government needs the self-insured plaintiffs to commit an act to further its contraceptive coverage efforts," the accommodation route imposes "a substantial burden on their religious exercise" even under the majority's conception of the analysis. App.137a, 146a. But because he accepted "for argument's sake" that a plaintiff must show that the actions forbidden by its religion would "necessarily cause" contraceptive coverage to demonstrate a substantial burden, he concluded that the

Little Sisters' RFRA claim fails because Christian Brothers Services does not intend to provide contraceptive coverage should the Little Sisters comply via the "accommodation." App.145a.

REASONS FOR GRANTING THE PETITION

I. This case presents an exceptionally important question.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with the mandate to provide healthcare coverage that includes abortifacients and contraceptives, either directly or via the "accommodation," violates their religious beliefs. And there is no dispute that unless these religious employers comply, they will face massive financial penalties. In short, there is no dispute that many religious ministries are being forced to choose between violating their sincere religious beliefs or violating federal law.

Understandably, this unprecedented situation has generated an unprecedented volume of litigation. Hundreds of religious institutions representing a wide cross-section of organizations and faiths have brought lawsuits seeking relief from the untenable position in which HHS has put them.[4] None of this

[4] See Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/; National Women's Law Center, *Challenges to the Birth Control Coverage Benefit*, http://www.nwlc.org/status-lawsuits-challenging-affordable-care-acts-birth-control-coverage-benefit.

should be surprising. Traditionally, the government has steered clear of mandating coverage as religiously sensitive as contraceptives and abortifacients, and has provided generous conscience clauses when mandates threaten to intrude upon religious beliefs, thus leaving religious organizations free to decide how to provide their employees with healthcare plans that comply with their religious beliefs.

The promulgation of a regulatory mandate requiring a wide swath of religious employers to provide healthcare coverage that includes contraceptives and abortifacients changed all that. Religious employers made it perfectly clear to HHS that compliance with this unprecedented regulatory mandate would violate their sincerely held beliefs. Yet HHS refused to exempt them, even though thousands of other employers have been exempted for reasons ranging from religious conscience to administrative convenience. Instead, HHS created only an alternative method for those employers to *comply* with the mandate to provide the coverage that HHS desires and that the employers' religions forbid. Religious employers once again made clear that providing such coverage, whether directly or via the "accommodation," would violate their religion.

Many of the lawsuits that followed, including one of the two cases here, met with success in the district courts. But in contrast to the district courts that found a RFRA violation based on a straightforward application of *Hobby Lobby*, the Third, Fifth, Seventh, D.C., and now Tenth Circuits concluded that using substantial penalties to force religious employers to comply with the mandate via the "accommoda-

tion" does not violate RFRA, even though doing so undisputedly would violate their sincere religious beliefs. Courts have done so, moreover, by employing a substantial burden analysis virtually identical to the reasoning this Court squarely rejected in *Hobby Lobby* and cases before it. See *infra* Part II. Those circuit decisions are profoundly flawed, but what matters at this juncture is not who is correct about the ultimate merits of this important and recurring nationwide controversy. What matters now is that, as a consequence of decisions like the one below, religious employers throughout the nation face the imminent prospect of being forced to choose between violating their sincere religious beliefs or violating the ACA.

That is reason enough for this Court to intervene now, rather than to allow this exceptionally important question to "percolate" while ministries face the abandonment of the free exercise rights that RFRA guarantees. This Court has already recognized—repeatedly—that this extraordinary situation demands extraordinary action. Three times, including once at the behest of the Little Sisters, the Court has been asked to provide extraordinary relief under the All Writs Act to prevent a religious nonprofit from being forced to comply with the mandate through HHS's "accommodation" before exhausting judicial review. And three times, this Court has complied, most recently by issuing an injunction pending resolution of a petition for *certiorari* challenging HHS's "augmented accommodation" in *Zubik* v. *Burwell*, 576 U.S. ---, 2015 WL 3947586 (June 29, 2015). See also App.261a; *Wheaton*, 134 S.Ct. 2806. As the Court has thus recognized, the stakes are simply too high to allow HHS to begin enforcing its novel regu-

latory scheme before its legality has been fully and finally litigated.

And this case is a particularly appropriate vehicle for this Court to play its essential role in that process. While petitioner Reaching Souls faces the more familiar dynamic in which compliance with HHS's regulatory demands will more likely accomplish HHS's regulatory goal of ensuring the provision of no-cost contraceptives via petitioner's plan, HHS's position vis-à-vis petitioner Little Sisters illustrates HHS's insistence that sincerely held religious beliefs must yield even when HHS says its regulatory objectives cannot be enforced. HHS has insisted that even if the Little Sisters sign the paperwork authorizing and obligating their TPA to provide their employees with contraceptive coverage, the government still cannot ensure that coverage will be provided because it currently lacks enforcement authority to do so. HHS seems to think that its current inability to achieve its regulatory objective somehow defeats the Little Sisters' religious objection.[5] In reality, since the government concedes the sincerity of Little Sisters' objection to filling out the requisite forms, HHS demonstrates only its willingness to override sincere religious beliefs even when it thinks doing so does not further its interests in the least. If nothing else, RFRA and the First Amendment must mean that the government cannot penalize religious institutions for no reason at all. Yet even in that circumstance, HHS still refuses to relent. Thus, as applied to Little Sis-

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[5] But see note 2, *supra*.

ters, the contraceptive mandate is as clear a RFRA violation as one can imagine.

That makes this Court's review of this particular case essential. Even accepting for the sake of argument the premise that the regulatory compliance method might survive a least restrictive means analysis when compliance will likely result in the provision of no-cost contraceptives (as in the Reaching Souls scenario), but see *infra* pp. 31-33, it certainly cannot survive that exceptionally demanding test when the government claims that overriding sincere religious beliefs will not even accomplish the government's objective (as in the Little Sisters scenario). This petition allows the Court to consider both scenarios together, rather than just the Reaching Souls scenario common to other petitions.[6] But even if this Court grants *certiorari* in one of the other pending petitions, it should grant the instant petition to ensure that HHS's insistence on overriding sincere religious beliefs even when it says its regulatory objective is unattainable does not escape this Court's review.

But ultimately, whether through this petition alone or some combination of petitions, what matters is that the Court resolve this exceptionally important

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[6] Moreover, this petition is unique in that it involves claims not just by employers, but also by the church plans themselves (the Trust and GuideStone) as well as a TPA (Christian Brothers Services), thereby ensuring the Court the fullest insight into how the "accommodation" appropriates a church plan's "coverage administration infrastructure." 80 Fed. Reg. 41,322 n.22, 41,328; see also RSI C.A.App.A317-A322.

question, and do so now. The arguments for each side have been exhaustively briefed and thoroughly considered by courts across the country, and hundreds of petitioners now stand before this Court. Unless they receive relief from this Court, they are out of options; they will be forced to choose between compliance with the mandate or compliance with their religious beliefs. That is precisely the type of impossible choice that Congress intended RFRA to protect against in all but the narrowest of circumstances. This Court should not let that extraordinary result come to pass without deciding for itself whether HHS's unprecedented effort to override sincere religious objections to actions that HHS itself considers sufficient to comply with the mandate can be reconciled with RFRA.

II. The decision below is exceptionally wrong.

This Court's intervention is all the more essential because the decision below is profoundly wrong. Indeed, the reasoning the Tenth Circuit employed in concluding that HHS has not imposed a substantial burden on petitioners' exercise of religion is impossible to reconcile with *Hobby Lobby* and decades of substantial burden cases before it.

1. As noted, there is no dispute that petitioners sincerely believe that complying with the mandate, whether directly or via the "accommodation," is forbidden by their religions. Nor is there any dispute that failure to comply will result in massive fines. That should be the end of the substantial burden analysis, as forcing petitioners to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of

money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts *agree* with petitioners that the action would (or should) violate their religion. And it is particularly so where, as here, the *reason* HHS states for needing compliance (namely, to expand contraceptive access) exactly matches petitioners' religious concerns.

Yet the Tenth Circuit still refused to accept that HHS has imposed a substantial burden on petitioners' religious exercise. In doing so, the panel did not dispute that petitioners sincerely believe that compliance with the mandate via the regulatory method would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance are massive penalties. Instead, the court insisted that the substantial burden analysis turns not on whether petitioners are being pressured to take religiously forbidden actions, but rather on whether, in the court's view, the religiously objectionable law adequately relieves them of moral complicity. The court thus rejected petitioners' RFRA claims because it concluded that they are simply wrong to believe that "the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme." App.48a. Unlike petitioners, the court thought that complying with the "accommodation" scheme actually "relieves [petitioners] from complicity," App.48a, and in any event is not very burdensome because it requires only "routine and minimal administrative paperwork." App.91-92a.

That approach—judges telling nuns how to analyze moral complicity—cannot be reconciled with this Court's substantial burden jurisprudence. "[I]t is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] * * * faith." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbiters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—*e.g.*, whether the degree of complicity required is religiously problematic. *Id.* at 715-16. This Court has made clear that "[h]eresy trials are foreign to our Constitution" and religious groups "may believe what they cannot prove." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). The only questions for courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[] * * * on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Thomas*, 450 U.S. at 718; see also *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

Hobby Lobby eliminated any doubt on that score. Just as here, "HHS's main argument" concerning substantial burden in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do * * * and the end that they find to be morally wrong * * * [wa]s simply too attenuated." 134 S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court found it entirely misplaced, as it "addresses a very different question that the federal courts have no

business addressing," and that the Court itself has "repeatedly refused" to answer. 134 S.Ct. at 2778 (collecting cases). The "difficult and important question" of where to draw "the line" as to what is "consistent with [one's] religious beliefs"—including how much facilitation or complicity is too much—is for the religious adherent alone to answer. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if so, whether HHS had substantially pressured them to cross that line. *Ibid.* And, the Court concluded, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably substantially pressures them to cross that line. *Id.* at 2779.

That same reasoning compels the conclusion that the nonprofit compliance method imposes a substantial burden. Indeed, the burden here is not just analogous to the burden in *Hobby Lobby*; it is identical. The ultimate statutory obligation with which petitioners must comply remains the contraceptive mandate, and the penalties for failure to do so—whether directly or via the "accommodation"—are the same as those faced by the for-profit employers in *Hobby Lobby*. The only difference is that HHS has given petitioners a method for fulfilling the mandate that was not initially offered to for-profit corporations. But as long as petitioners have sincere religious objections to the proffered means of fulfilling the mandate, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*.

Indeed, several judges have recognized as much. See, *e.g.*, *Eternal Word Television Network* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., concurring) ("*EWTN*") ("So long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [organization] is a substantial burden on its religious exercise."); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, (D.C. Cir. 2015), slip op. 10 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("*PFL*") ("we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing"); *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), vacated and remanded, 135 S.Ct. 1528 (2015) (whether the "accommodation" imposes a substantial burden "is not a question of legal causation but of religious faith"); *cf.* App.123a (Baldock, J., dissenting in part) ("learned judges have argued compellingly that, under [*Hobby Lobby*], 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").

Unfortunately, when it comes to nonprofit challenges to the contraceptive mandate, adherence to the clear teachings of *Hobby Lobby* and *Thomas* has become a feature more common to dissenting opinions than majorities. Indeed, each of the five courts of appeals that have resolved such challenges (including

the Tenth Circuit here) has employed a substantial burden analysis reminiscent of *Hobby Lobby* dissenters. See *ETBU*, 2015 WL 3852811, at *5 (finding no substantial burden because "the acts [religious objectors] are required to perform do not include providing or facilitating access to contraceptives"); *Geneva Coll.* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (insisting that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating coverage); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 611-12 (7th Cir. 2015) (Posner, J.) (*"Notre Dame II"*) ("[it] is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs"); *Wheaton Coll.* v. *Burwell*, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. July 1, 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014) (insisting that "accommodation" route requires only "a bit of paperwork" that "wash[es] [employers'] hands of any involvement in providing [contraceptive] coverage").

Like the decision below, those cases simply cannot be reconciled with this Court's repeated admonition that "[i]t is not within 'the judicial function and judicial competence'" to decide the "proper interpretation" of religious beliefs or "speculate whether" the peculiarities of a law's operation "ease or mitigate the perceived sin of participation." *Lee*, 455 U.S. at 257, 261 n.12 (quoting *Thomas*, 450 U.S. at 716). Just this past Term, applying RLUIPA's identical substantial burden test, this Court found it sufficient that an in-

mate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required. *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015). The Court spent no time evaluating whether maintaining a half-inch beard was necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. It was enough that petitioner's belief was sincere and that the government had substantially pressured him to violate it.

Holt also reiterated that it makes no difference whether the challenger remains "able to engage in *other* forms of religious exercise," *ibid.* (emphasis added), as RFRA protects "any exercise of religion," not merely partial or compromised exercises. 42 U.S.C. 2000cc-5(7)(A). That the regulatory method "provides an alternative" means of compliance with the contraceptive mandate that avoids *one* religious objection (*i.e.*, direct payment) is of no moment since the "alternative itself imposes a substantial burden." *PFL*, slip op. 14 (Kavanaugh, J., dissenting). But see App.42a-44a (suggesting that a less stringent analysis applies when government purports to be "accommodating" religious exercise). And when, as here, the alternative violates religious beliefs that are every bit as sincere as those at stake in *Hobby Lobby*, then *Hobby Lobby* plainly controls the substantial burden inquiry. That the Tenth Circuit (and others) failed to recognize as much is proof enough of the need for this Court's review.

2. To make matters worse, courts not only have impermissibly arrogated to themselves authority to

answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections. These cases are not about whether HHS may force religious employers to execute "routine and minimal administrative paperwork." App.91a-92a. Nor are they about whether religious employers may prevent employees from obtaining access to contraceptives. They are about whether HHS may force objecting religious employers to comply with a mandate to provide contraceptive coverage to their employees in a "seamless" way, by interjecting that coverage into the employer's own "insurance coverage network" and utilizing the plan's own "coverage administration infrastructure." 80 Fed. Reg. at 41,328.

HHS would seem to be poorly positioned to question that its compliance method involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from its regulatory mandate. Instead, the required documentation is viewed as a means both of expanding contraceptive access and of complying with the mandate. Having concluded that its "accommodation" is good enough (as a matter of administrative law) to put petitioners in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for HHS to then insist that this same "accommodation" involves no meaningful facilitation or complicity in the provision of that coverage. The "accommodation" cannot simultaneously "ensure" contraceptive coverage and have nothing to do with it. In any case, it is all well and good for HHS to think *it* has threaded the needle and found a way for religious nonprofits to comply

with the mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, HHS's need to ensure that its "accommodation" complies with ERISA (as well as the APA and HIPPA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." App.264a. That instrument is essential to "ensure[] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed. Reg. at 39,880, as a TPA would have no contractual authority to pay claims without it—or legal authority to either use plan information for that purpose or seek government reimbursement for doing so. It is that "gate-opening act" of executing that instrument—not the independent actions of any third parties—that petitioners sincerely believe would violate their religious beliefs. See App.138a (Baldock, J., dissenting in part). The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform abortions in the hospitals' surgical suites. It is not hard to see why a hospital would find little solace in the government's moral analysis that it is not "facilitating" abortion because its own doctors are not the ones

that the hospital has authorized to use its facility to perform abortions.[7]

The Tenth Circuit was therefore simply wrong to insist that HHS's regulatory compliance method would "relieve[] [petitioners] of complicity." App.48a. Indeed, "if the form were meaningless, why would the government require it?" *PFL*, slip op. 12 (Kavanaugh, J., dissenting). But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and this Court's cases is that petitioners *sincerely believe* that complying via the "accommodation" would be sinful, and that HHS nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on petitioners to do so. No matter which petitioner or plan type is at stake, the substantial burden analysis requires nothing more.

3. In employing a fundamentally flawed substantial burden analysis, the Tenth Circuit avoided the only question left open by *Hobby Lobby*—whether the regulatory nonprofit "accommodation" is "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. 2000bb-1. Many of the judges who have reached that question have readily

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[7] And in this hypothetical, the government could hardly save its "accommodation" by insisting that independent obstacles will prevent the doctors from actually showing up at certain hospitals. Even if true, this would not undermine the religious hospitals' objection to signing the form that opens their doors to abortions; it would just mean that the government is impermissibly disregarding religious beliefs even when doing so does not further its objectives.

concluded that it is not. See, *e.g.*, *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring); *PFL*, slip op. 17 (Brown, J., dissenting); *id.* at 23 (Kavanaugh, J., dissenting), *Notre Dame II*, 786 F.3d at 629-30 (Flaum, J., dissenting); App.147a-48a (Baldock, J., dissenting in part).

And with good reason, as 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). Most obviously, it could simply "treat employees [of religious objectors] * * * the same as it does employees whose employers provide no coverage" by "providing for subsidized * * * contraceptive coverage * * * on [the] exchanges." *PFL*, slip op. 17 (Brown, J., dissenting). Moreover, it is hard to see how HHS can claim a "compelling interest" in enforcing a mandate that "does not apply to tens of millions of people * * * includ[ing] those working for private employers with grandfathered plans, for employers with fewer than fifty employees," and for certain religious employers. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013); see also *Korte*, 735 F.3d at 686; *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1220-22 (D.C. Cir. 2013), vacated and remanded, 134 S.Ct. 2902 (2014); *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring). And it is even harder to see how HHS can claim a compelling—or even legitimate—interest in enforcing the mandate over sincere religious objections in the scenario where it says doing so will not even result in the provision of contraceptive coverage.

That makes this Court's review all the more essential, as the Tenth Circuit dodged the least restrictive means analysis by failing to employ the substantial burden test that this Court's precedents demand. And for employers in the Little Sisters' shoes, the substantial burden test really is the end of the RFRA analysis. It is bad enough that HHS's unprecedented effort to force religious employers to take actions that violate their sincerely held religious beliefs escaped meaningful RFRA review in the Tenth Circuit. Petitioners should not be denied meaningful review in this Court as well before being forced to make the untenable choice that HHS has thrust upon them.

III. The "accommodation" discriminates among religious organizations in violation of the Religion Clauses.

This Court should also grant *certiorari* to review the constitutionality of HHS's unprecedented decision to discriminate among religious objectors in doling out exceptions to its contraceptive mandate. Such arbitrary religious discrimination is impermissible, and particularly inappropriate coming from an agency that has neither the authority nor the expertise to decide which religious institutions are sufficiently "religious" to deserve accommodation. Indeed, while RFRA reflects a congressional mandate to accommodate all religious exercise pursuant to broadly applicable principles, HHS has taken it upon itself to exempt certain religious entities, while insisting that others comply, without following any congressional guidance. Small wonder that the result of deviating from RFRA's uniform approach is unconstitutional

discrimination among religious employers with the same sincere objections to the same mandate.

The Religion Clauses prohibit government from making "explicit and deliberate distinctions between different religious organizations" without good reason. *Larson* v. *Valente*, 456 U.S. 228, 247 n.23 (1982) (Establishment Clause); see also *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951); *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953). Yet that is precisely what HHS has done in exempting houses of worship and "integrated auxiliaries" from the contraceptive mandate while demanding compliance via the regulatory method by religious nonprofits like the Little Sisters, even though they are engaged in the same religious exercise, seek the same relief, and utilize the same Trust as many exempted organizations. See 78 Fed. Reg. at 39,874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). If the Little Sisters restructured their homes to be controlled by the bishops, they, too, would be exempted. But because the Little Sisters fund, operate, and control their ministry, they face millions of dollars in penalties. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S.Ct. 694, 706 (2012) (government must avoid "interfer[ing] with the internal governance of the church"). The same is true for the other petitioners.

HHS has no authority—and certainly no expertise—to parcel out fundamental religious liberty rights in this arbitrary fashion. The ACA certainly gives it no authority to make such sensitive judgments, and RFRA demands that those who hold sin-

cere beliefs be treated on equal terms. And just as the government may not privilege "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, it may not prefer "houses of worship[] and religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte*, 735 F.3d at 681 (rejecting argument that "[r]eligious exercise is protected in * * * the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way"). As the government recently—and successfully—argued, "allow[ing] houses of worship [an exemption], but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "create a serious Establishment Clause problem." Gov't Amicus Br. at 11, *Spencer* v. *World Vision*, 633 F.3d 723 (9th Cir. 2008) (No. 08-35532).

HHS does not deny that it has discriminated among religious organizations. Instead, it argues that its discrimination is justified because "[h]ouses of worship and their integrated auxiliaries * * * are more likely than other employers to employ people of the same faith," and therefore "less likely" to hire people who need contraceptives. 78 Fed. Reg. at 39,874. But HHS has offered exactly zero factual support for this speculation—and for good reason, as it is just as unfounded as the rationales this Court

rejected in *Larson*, 456 U.S. at 246-51, and *Lukumi*, 508 U.S. at 546-47. The Catholic petitioners' employees all work for openly Catholic institutions approved for listing in *The Official Catholic Directory*, and Reaching Souls and Truett-McConnell require employee statements of faith. LSP C.A.App.165a, RSI C.A.App.A15-17. There is no reason to suspect that the employees of these overtly religious institutions are any more likely to have religious disagreements with their employers than the employees of houses of worship.

Moreover, courts have been rightfully wary of allowing government to "discriminate[] among religious institutions on the basis of the * * * intensity of their belief." *Weaver*, 534 F.3d at 1249. And *HHS* certainly cannot claim either any particular authority or expertise to determine which religious organizations are "religious enough." *Cf. King* v. *Burwell*, No. 14-114, 2015 WL 2473448, at *8 (U.S. June 25, 2015) ("It is especially unlikely that Congress would have delegated this decision to the *IRS,* which has no expertise in crafting health insurance policy of this sort."). At the very least, if determinations about who must comply with the mandate are to turn on such religiously sensitive judgments, those determinations should be made by Congress.

But Congress has already spoken in RFRA, which among its many virtues avoids the discrimination among religions that inevitably results from HHS's ad hocery. That countless religious employers not among the happy few exempted by HHS are being forced to comply with the contraceptive mandate despite RFRA is ample cause for this Court's interven-

tion. That, in this case, HHS insists on overriding concededly sincere religious objections even when HHS itself does not believe forced compliance will actually advance its regulatory goals makes the need for this Court's intervention here particularly acute.

CONCLUSION

The petition should be granted.

Respectfully submitted.

MARK RIENZI
ERIC C. RASSBACH
LUKE GOODRICH
HANNAH C. SMITH
DANIEL H. BLOMBERG
ADÈLE AUXIER KEIM
DIANA M. VERM
STEPHANIE BARCLAY
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W., Ste. 700
Washington, DC 20036

KEVIN C. WALSH
28 Westhampton Way
Richmond, VA 23173

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
Bancroft PLLC
500 New Jersey Ave., N.W.
7th Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

CARL C. SCHERZ
Locke Lord LLP
2200 Ross Ave.
Suite 2200
Dallas, TX 75201

Counsel for Petitioners

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