No. 15-105

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF *AMICUS CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, IN SUPPORT OF PETITIONERS LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.

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QUESTIONS PRESENTED

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?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

Amicus curiae, The Council for Christian Colleges and Universities, respectfully submits that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, About CCCU, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 122 members in North America, all of which are regionally accredited colleges and universities with curricula rooted in the arts and sciences. In addition, the CCCU has another 61 affiliate member institutions with Christian missions. The CCCU's

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

membership spans 33 states and 19 countries and has over 400,000 students enrolled and almost 2 million alumni.

CCCU members Southern Nazarene University, Oklahoma Wesleyan University, and Oklahoma Baptist University are the plaintiffs in one of the consolidated cases decided by the Tenth Circuit. Like all CCCU member institutions, these universities are committed to applying Christian doctrine and belief to all areas of human endeavor. That includes when life begins, the morality of ending an innocent life, and the responsibility of people and institutions for complicity with provision of abortifacient products. For that reason, in an unprecedented series of lawsuits, 15 CCCU member institutions have sought to enjoin application of the federal requirement that requires member institutions to provide their students and employees with cost-free access to FDA-approved abortifacients.[2]

The Tenth Circuit's decision is inconsistent with the religious liberty guaranteed by the Constitution and the Religious Freedom Restoration Act. As this Court recently explained, federal judges may not substitute their views of moral complicity for those of religious individuals and organizations. Such questions are the very type of government interference with the exercise of religion that the

[2] The list of all CCCU member institutions' lawsuits is provided in Appendix A.

Religious Freedom Restoration Act was intended to prevent.

STATEMENT

Religious colleges and universities have played an important role in the history of our nation. Many of the nation's best-known institutions of higher education including Harvard, Yale, Princeton, and Rutgers were founded by churches and denominations. Throughout the nation's history, religious institutions of higher learning have wrestled with the moral and practical implications of Christianity. Because of this, for instance, religious institutions were motivated to train abolitionists in the early 1800s who helped contribute to the end of slavery decades later. For example, Oberlin College in 1850, then a Presbyterian college, was a hotbed for abolitionists. Harriet Beecher Stowe was the daughter of the president of Lane Seminary in Cincinnati, another center of abolitionist training in the 1830s.

The commitment to wrestle with the moral implications of being centers of learning with deep Christian convictions continues at religious colleges and universities throughout the country to this day. This commitment compels religious colleges and universities throughout the country to object to any participation in the provision of some or all of the contraceptive services required by the Affordable Care Act.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision is deeply flawed. Not only did the Court expropriate to the judiciary

the theological decision of when an organization is complicit in the taking of innocent life, but it also concluded that government is free to favor the free exercise of some religious organizations and not others, contrary to the Religious Freedom Restoration Act and the First Amendment.

The government's decision to exempt some religious employers from providing contraceptive coverage while requiring others to comply with the mandate demonstrates that the government's approach is not the least restrictive means necessary to advance its interests. The government concedes that when religious organizations that oppose the use of contraceptives generally, or a subset of some forms of FDA-approved contraceptives that may operate as abortifacients more specifically, hire co-religionists, their employees are "less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). And the government acknowledges that exempting certain religious employers does not impair its interests. Many religious organizations, including all of CCCU's member institutions, restrict their hiring for most or all positions to co-religionists. And these institutions' religious exercise is indistinguishable from that of exempt religious employers. Both teach the faith, engage in regular corporate worship, pray, and provide faith-based volunteer and social services. In other words, the government's distinction between which groups are exempt and which are administratively accommodated is arbitrary and unnecessary for the effectiveness of the Affordable Care Act. The government's interests will

not be frustrated by exempting Petitioners (and other similar religious organizations) from complying with the contraceptive mandate. Indeed, this is precisely what the Religious Freedom Restoration Act requires.

Worse yet, the government's discrimination between types of religious organizations is at odds with the First Amendment, which forbids arbitrary distinctions in the treatment of religious groups. The distinction the Departments draw between churches, other religious nonprofits, and non-religious nonprofits is both unprecedented and unconstitutional.

ARGUMENT

I. The Court should grant the petition because the government has forced religious nonprofits to choose between their religious duties.

The issues raised in the Petition have exceptional implications for the health-insurance decisions of religious nonprofits, including CCCU's member institutions. This is perhaps best demonstrated by the recent decision of Wheaton College to end its student health insurance plan. After an adverse ruling by the Seventh Circuit, *Wheaton Coll.* v. *Burwell*, 791 F.3d 792 (7th Cir. 2015), Wheaton made the difficult decision to terminate its student health insurance plan to avoid being complicit in providing abortifacient drugs and devices to Wheaton's students. Wheaton College Health Insurance Announcement (Jul. 10, 2015) *available at* http://tinyurl.com/qb29b8e (last visited

Aug. 24, 2015). Other religious colleges and universities have made similar painful decisions. See Libby A. Nelson, College Ends Student Health Plan, Inside Higher Ed (May 16, 2012) *available at* http://tinyurl.com/nna7jjc (last visited Aug. 24, 2015); Ave Maria University Discontinues Student Health Insurance Because of Federal Government's Mandate (May 21, 2012) *available at* http://tinyurl.com/p8r4fx2 (last visited Aug. 24, 2015). Because the issues raised are of exceptional importance to the nation's religious nonprofit institutions, the Court should grant the Petition.

II. Imposition of the contraceptive mandate on religious entities like Petitioners does not advance a compelling government interest in the least restrictive manner.

It is difficult, if not impossible, to understand how enforcing the contraceptive mandate against Petitioners is the least restrictive manner in which to protect an interest of the highest order (see 42 U.S.C. § 2000bb-1), given that the government has already conceded that it does no harm to exclude churches and integrated auxiliaries from the mandate.

Under the Affordable Care Act, employer-sponsored group health plans must meet minimum coverage requirements. These requirements include covering preventive health care services without requiring health plan participants or beneficiaries to share the costs of these services through copayments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13.

The Departments of Health and Human Services, Labor, and Treasury issued regulations

that require employer-sponsored group health plans to include the full range of FDA-approved contraceptive services as preventive health care services. See 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Resources and Services Administration, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Aug. 7, 2015).

The Departments exempted religious employers, but limited the scope of "religious employers" to those non-profit organizations that are exempt from filing informational tax returns under the Internal Revenue Code. 45 C.F.R. § 147.131(a) (referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The Internal Revenue Code provides that all tax-exempt organizations must file informational tax returns except, inter alia, "churches, their integrated auxiliaries, and conventions or associations of churches, . . . or the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A).

Congress requires tax-exempt nonprofit organizations to file informational tax returns "to provide the Internal Revenue Service with the information needed to enforce the tax laws." H.R. Rep. No. 413, at 36 (1969). In other words, informational returns are required to allow the IRS to police whether a given entity continues to be tax exempt. Congress exempted churches and their integrated auxiliaries from the requirement, likely with the purpose of avoiding any First Amendment issues. Congress was not seeking to determine which organizations were religious and which were not. And Congress did not create a tripartite system

in which churches and their integrated auxiliaries were exempt from filing informational returns, other religious nonprofits were required to provide modified informational returns, and nonreligious nonprofits were required to provide complete informational returns.

The Departments, however, have created that exact tripartite structure, distinguishing between religious employers and all other religious nonprofits. The Departments theorize 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, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The Departments offer no support for this assumption.

Recognizing that many religious organizations that are not "churches, their integrated auxiliaries, . . . or . . . religious orders" objected to providing coverage for some or all contraceptives, the Departments devised an "accommodation" for nonexempt religious employers. See 45 C.F.R. § 147.131(c)(1). A similar accommodation exists for religious colleges and universities that arrange for student health insurance coverage. 45 C.F.R. § 147.131(f). The accommodation allows certain religious nonprofit employers to fulfill their statutory obligation to provide coverage including all FDA-approved contraceptives. In other words, the employees of religious nonprofits who are accommodated still receive insurance coverage for

religiously objectionable contraceptives by virtue of their employment by the religious nonprofit.

Religious colleges and universities cannot be exempt employers. Even a religious college or university that is affiliated with a church or an association of churches cannot be an "integrated auxiliary" because colleges and universities receive more than 50% of their support from students and outside sources. See 26 C.F.R. § 1.6033-2(h)(1), (h)(4). Consequently, religious colleges and universities must comply with the contraceptive mandate.

The government's decision to exempt fully a category of entities—religious employers—regardless of whether they even object to contraceptive coverage cannot be squared with its refusal to exempt other religious groups like Petitioners who actually do have religious objections. See *Hobby Lobby*, 134 S. Ct. at 2777 n.33. The government offers no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J. concurring). After all, "[e]verything the government says about [exempt religious employers] applies in equal measure to" Petitioners. *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

The government concedes that exempting churches and their integrated auxiliaries "does not undermine the governmental interests furthered by the contraceptive coverage requirement [because

they] employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. This is no less true for religious non-profits. For instance, all CCCU member institutions, like many other religious nonprofits, restrict their hiring practices for full-time faculty, administrators, and in many instances, all positions, to Christians. See CCCU, Members & Affiliates: Membership Requirements, *available at* http://www.cccu.org/ members_and_affiliates (last visited Aug. 8, 2015) ("Member campuses must have a continuing institutional policy and practice . . . to hire as full-time faculty members and administrators (non-hourly staff) only persons who profess faith in Jesus Christ.").) Thus, the government cannot reasonably contend that extending the exemption to Petitioners and avoiding substantially burdening Petitioners' religious exercise would undermine the government's interests.

The government's method for distinguishing between exempt religious employers and religious employers who must comply with the contraceptive mandate bears no relation to the civil rights of religious organizations that the government is obligated to protect. The Internal Revenue Code exempts churches from filing informational tax returns but not other 501(c)(3) religious organizations. This is understandable given that requiring churches to provide detailed financial information including the identity of all their financial supporters would impose a substantial administrative burden on churches and could serve

to chill religious exercise. But it is beyond strange to apply that same distinction to decide which religious nonprofit organizations' civil rights deserve second-class treatment.

The government's distinction between religious nonprofits is even less defensible when applied to religious colleges and universities. Like houses of worship, the very purpose for which religious colleges and universities exist is "the propagation of a religious faith." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). For that reason, Petitioners and CCCU's member institutions engage in many of the same religious activities as houses of worship and their integrated auxiliaries including organized worship, corporate prayer, pastoral counseling, communal singing of religious songs, proselytizing, faith-based social service, and evangelistic outreach.

The government's distinction thus ultimately discriminates among "types of institutions on the basis of the nature of the religious practice [that the government perceives] these institutions are engaged in." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). Such distinctions are at the least constitutionally suspect. See *ibid.* The government's definition of religious employer favors religions, religious denominations, and religious organizations that fit neatly into the government's view of what constitutes religious activity, while disadvantaging groups that exercise their faith through other means such as fulfilling their educational missions or that for theological reasons are organized in ways that do not fit neatly within the government's box.

The absurdity of the Departments' distinction between exempt religious employers and non-exempt religious employers is shown by the treatment of seminaries. Seminaries that are affiliated with a church or association of churches are exempt from the contraceptive mandate because they are exempt from the internal-support requirement. See 26 C.F.R. § 1.6033-2(h)(5). Seminaries that are not affiliated with a church or association of churches are not exempt even though they provide exactly the same service (training ministers) and even if they hire only co-religionists as employees. If, for theological reasons, a seminary is established independent from any church, synagogue, or denomination, that seminary is not exempt. But if the seminary is affiliated with a denomination, it is exempt from the contraceptive mandate and the government concedes that would not frustrate its interests. Civil rights should not vary based upon whether that institution is or is not affiliated with a church or other house of worship.

In fact, the "religious employer" definition is itself offensive to religions when it defines religious employers essentially as including only houses of worship. This may be consistent with how the U.S. Department of Health and Human Services Administration views "religion." But wholly aside from the problems inherent with the accommodation, it likely violates RFRA for the Government to define religious employer in such a way as to exclude religious organizations like the CCCU's members.

The religious-employer exemption demonstrates that the government's accommodation for nonexempt

religious employers is not the least restrictive means for advancing the government's interests.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

The following CCCU member institutions have initiated litigation to enjoin the contraceptive mandate as to at least abortifacient contraceptive services:

1. *East Texas Baptist Univ.* v. *Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013) (granting summary judgment against the government) *rev'd sub. nom. East Texas Baptist Univ. v. Burwell*, --- F.3d ---, 2015 WL 3852811 (5th Cir. July 9, 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Houston Baptist University

   East Texas Baptist University

   Westminster Theological Seminary

2. *Southern Nazarene Univ.* v. *Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, --- F.3d ---, 2015 WL 4232096 (10th Cir. Jul. 14, 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Southern Nazarene University

   Oklahoma Baptist University

   Oklahoma Wesleyan University

3. *Geneva Coll.* v. *Sebelius*, 960 F. Supp. 2d 588 (W.D. Pa. 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub. nom. Geneva Coll.* v. *Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (cert. pet. pending)

   The following CCCU member is a party:

   Geneva College

4. *Wheaton Coll.* v. *Burwell*, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (denying preliminary injunction against enforcement of the contraceptive mandate) *aff'd* --- F.3d ---, 2015 WL 3988356 (7th Cir. 2015) (time for filing petition for writ of certiorari expires September 29, 2015)

   The following CCCU member is a party:

   Wheaton College

5. *Dordt Coll.* v. *Sebelius*, 22 F. Supp. 3d 934 (W.D. Ia. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Eighth Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Dordt College

   Cornerstone University

6. *Grace Schs.* v. *Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2014) (granting preliminary injunction against enforcement of the contraceptive

mandate) (appeal to Seventh Circuit is pending, argued in December 2014)

The following CCCU members are parties:

Grace College

Biola University

7. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) (dismissed on mootness grounds)

   The following CCCU member is a party:

   Franciscan University of Steubenville

8. *School of the Ozarks, Inc.* v. *Sebelius*, --- F. Supp. 3d ---, 2015 WL 527671 (W.D. Mo. 2015) (granting summary judgment in favor of the government) (appeal to the Eighth Circuit is pending)

   The following CCCU member is a party:

   College of the Ozarks

9. *Louisiana Coll.* v. *Sebelius*, 38 F. Supp. 3d 766 (W.D. La. 2014) (granting summary judgment against government) (appeal to the Fifth Circuit is pending)

   The following CCCU member is a party:

   Louisiana College

10. *Colorado Christian Univ.* v. *Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014) (granting preliminary injunction against enforcement of the

contraceptive mandate) (appeal to the Tenth Circuit is pending)

The following CCCU member is a party:

Colorado Christian University