Case Nos. 18-15144; 18-15166; 18-15255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II in his official capacity as Acting Secretary of the U.S. Department of Health and Human Services, *et al*.,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE, and MARCH FOR LIFE EDUCATION AND DEFENSE FUND

Intervenors-Defendants-Appellants,

Appeal from the United States District Court,
Northern District of California

BRIEF OF *AMICUS CURIAE* RELIGIOUS SISTERS OF MERCY IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Religious Sisters of Mercy is a non-profit corporation organized under the laws of Michigan. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.[1]

[1] Fed R. App. P. 26.1(a), 29(c)(1).

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INTEREST OF *AMICUS CURIAE*

Amicus curiae The Religious Sisters of Mercy of Alma, Michigan ("Religious Sisters") is a Catholic religious institute.[2] The goal of the Institute is the praise and worship of the Triune God for the boundless mercy which has been revealed to us through the works of creation, redemption, and sanctification. The service of the Institute to the Catholic Church includes comprehensive health care, understood as the care of the entire person—spiritual, intellectual, physical, and emotional. The sisters express their love and devotion to God through the religious activity of providing care for others, which includes numerous activities, such as teaching and health care. These activities are of the nature of and essential to the religious institute. To advance its mission, the Religious Sisters established Sacred Heart Mercy Health Care ("SMHC"), which operates two health care clinics in the United States. The sisters work in these clinics and also teach and work for various dioceses around the country.

The Religious Sisters, following the authoritative teaching of the Catholic Church (the "Church"), believe that use of artificial contraception and abortion are grave moral evils.[3] Yet, prior to the 2017 Religious Exemption Interim Final Rule

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[2] This brief was prepared in whole by counsel in consultation with *amicus curiae*, but neither counsel nor any other person contributed money intended to fund preparing or submitting this brief. No party's counsel authored this brief in whole or in part. All parties have consented to the filing of this brief.

[3] *See* United States Catholic Conference, *Catechism of the Catholic Church* ¶ 2370 (1995). Catholic teaching deems "'every action which, whether in anticipation

("Religious Exemption IFR" or "IFR"), HHS's regulations did not exempt *amicus* from the contraception mandate. As a result, before HHS issued the Religious Exemption IFR, *amicus* was required to implement the contraception mandate either by providing contraceptive coverage to its female employees, 45 C.F.R. § 147.130(a)(1)(iv) (2015), or by self-certifying that it was a religious organization that had religious objections to providing contraceptive coverage, *id.* § 147.131(c)(1). Such self-certification—which HHS called an "accommodation"—would have obligated *amicus*'s insurer to provide contraceptive coverage through its own health plans. *Id.* § 147.131(c)(2)(i)(B).

Amicus believes that implementing the mandate in either way would make it complicit with the provision of contraceptive coverage, in direct contravention of its religious beliefs. But if *amicus* refused to comply—*i.e.*, by declining to provide contraceptive coverage or submitting the self-certification to HHS—it would have been subjected to punitive fines that would have crippled its ability to carry out the faith-based activities so fundamental to the expression of its religious beliefs. *See* 26 U.S.C. §§ 4980D(b)(1), 4980H(c)(1).

In 2015, the Supreme Court granted certiorari in several cases to decide

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of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible,'" to be "intrinsically evil." *Id.* (citation omitted). The Church also teaches that "[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." *Id.* ¶ 2270.

whether the so-called "accommodation" violated the Religious Freedom Restoration Act of 1993 ("RFRA"). The court declined to decide the RFRA question, instead remanding the cases to afford the parties another opportunity to come to an agreement. *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016). On October 6, 2017, the government issued two new interim final rules addressing the concerns of religious non-profits. *See* 82 Fed. Reg. 47,792, 47,838 (Oct. 13, 2017). The Religious Exemption IFR—which is applicable to the Religious Sisters—keeps the contraceptive mandate in place but extends the religious exemption "to encompass entities, and individuals, with sincerely held religious beliefs objecting to contraceptive or sterilization coverage," and makes "the accommodation process optional for eligible organizations." 82 Fed. Reg. 47,808. By extending the religious exemption to religious non-profits, the IFR allows *amicus* to live out its unique spiritual calling without the threat of crippling monetary sanctions.

Amicus files this brief to explain the constitutional problems inherent in the contraceptive mandate and HHS's prior implementing regulations, and to describe the burden the old regulations imposed on Catholic religious institutes in particular. This context is important in evaluating the district court's decision to enjoin the Religious Exemption IFR, which had lifted those burdens and upheld *amicus's* First Amendment rights.

SUMMARY OF ARGUMENT

HHS's prior regulations categorically exempted "churches" and their "integrated auxiliaries" from the mandate, while requiring other religious non-profit

organizations, such as the Religious Sisters, to implement the mandate. Under the so-called "accommodation," religious non-profit organizations either had to include contraceptive coverage in their health plans or file a form that would have resulted in the provision of contraceptive coverage through their health plans. *See, e.g.*, Br. for the Pet'rs at 1–2, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (explaining how the "accommodation" operated and the religious objections to it). If they refused to comply, they were subjected to crippling fines. This discriminatory scheme would have exempted a church even if it operated a child care center or assisted living facility, while denying such an exemption to a Catholic order of religious sisters operating similar facilities. Similarly, a church that hired hundreds of individuals who did not share the church's religious objection to contraception would have been exempt from the mandate, but a religious order that hired mostly Catholic employees that shared the order's objection to the mandate would not have been exempt.

The application of HHS's facially discriminatory regulations created significant Free Exercise and Establishment Clause problems. As the Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012), the Free Exercise Clause absolutely forbids "government interference with an internal church decision that affects the faith and mission of the church itself." Yet HHS's arbitrary preference for dioceses over religious institutes

violated the essential unity of the Catholic Church—allowing only one manifestation of the Church to follow its religious tenets without sanction.

Furthermore, by punishing religious institutes for following the authoritative teaching of the Church, HHS's regulations threatened to force ministries like the Religious Sisters to close their doors and retreat from the public sphere. But diversity of religious expression is one of the defining features of the Catholic Church, and limiting the types of public ministries that could operate in conformity with the Church's moral teaching would reshape and flatten Catholic religious expression. HHS's prior regulations thus constituted "government interference with an internal church decision . . . affect[ing] the life and mission of the church itself"—which the First Amendment prohibits. *Hosanna-Tabor*, 565 U.S. at 190.

Additionally, the Free Exercise Clause requires courts to apply strict scrutiny to laws burdening religious exercise when those laws are not "neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The "minimum requirement of neutrality is that a law not discriminate on its face," *id*. at 533, but HHS's implementing regulations facially discriminated between different types of religious organizations. As a result, the contraceptive mandate and its attendant regulations—which unquestionably burdened religious exercise by sanctioning religious entities that refused to implement the mandate—violated the Free Exercise Clause.

The regulations also ran afoul of the Establishment Clause because they had the effect of conferring an advantage on those religious organizations that HHS perceived to be more intensely religious—i.e., organizations that engaged primarily in worship and prayer and that predominantly hired people who shared their religious convictions—while disadvantaging those organizations that engaged in broader religious ministries. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (noting the Court's consistent rejection of laws "discriminating in the distribution of public benefits based upon religious status or sincerity") (citations omitted); *Spencer v. World Vision, Inc*., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (holding that Title VII's exemption for religious employers could not be limited to "churches").

The Religious Exemption IFR avoids these constitutional defects by providing a true exemption to *amicus* and other religious non-profit organizations, and by ending the arbitrary discrimination between "churches" and other religious non-profit organizations like the Religious Sisters. Because the IFR is necessary to vindicate the First Amendment rights of *amicus* and those similarly situated, the district court's order enjoining the IFR should be reversed.

ARGUMENT

The "accommodation" available to the Religious Sisters prior to the Religious Exemption IFR forced *amicus* to facilitate contraceptive coverage to its employees

in violation of its sincerely held religious beliefs. The government now agrees that the so-called "accommodation" violated RFRA because (1) it imposed a substantial burden on religious exercise by forcing religious non-profits to either violate their religious beliefs or pay crippling fines; (2) this substantial burden was not justified by any compelling government interest in requiring religious non-profits to implement the contraceptive mandate; and (3) HHS had not utilized the least restrictive means to further any such interest it might have had. 82 Fed. Reg. 47,806 ("[W]e now believe that requiring . . . compliance [with the accommodation] led to the violation of RFRA in many instances.").

But HHS's prior regulations did more than just violate RFRA; they also violated the First Amendment by facially discriminating among "churches" and other religious non-profit organizations like the Religious Sisters. The Religious Exemption IFR—which extends the exemption equally to all non-profit organizations with sincere religious objections to the contraception mandate—resolved these constitutional problems by placing *amicus* and other religious non-profits on equal footing with churches. In its order preliminarily enjoining the IFR, the district court asserted it "believe[d] it likely that the prior framing of the religious exemption and accommodation permissibly ensured . . . protection [for religious liberty and conscience]." *California v. Dep't of Health and Human Servs.*, 281 F. Supp. 3d 806, 831 (N.D. Cal. 2017). But this conclusion cannot be squared with the

First Amendment, which prohibits the government from interfering with matters of church governance or discriminating among religious groups. The district court thus abused its discretion by reviving the constitutional problems remedied by the IFR. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) ("[A] district court abuses its discretion when it makes an error of law.").

A. The Prior Regulations Arbitrarily Discriminated Between "Churches" and Religious Institutes

Although HHS's prior regulations required religious institutes to implement the contraception mandate either by providing contraceptive coverage or submitting the self-certification to HHS, the regulations categorically exempted "churches" and their "integrated auxiliaries" from complying with the mandate. As a result of this arbitrary distinction, Catholic religious institutes, such as *amicus*, were forced to implement the mandate, while Catholic dioceses were not.

It is undisputed that a Catholic diocese is considered a "church" under the Internal Revenue Code ("IRC"), 26 U.S.C. § 6033(a)(3)(A)(i), and thus qualified for the exemption under HHS's prior regulations, which defined "religious employer" as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986[.]" 45 C.F.R. § 147.131(a) (2015). A Catholic diocese was thus "categorically exempt from the requirement to include coverage for contraceptive services for its

employees[.]" *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 239 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016). A diocese was entitled to this exemption even when its employees worked in schools, hospitals, retreat centers, or any other facility owned and operated by the diocese, and regardless of whether they adhered to the religious tenets of the Catholic Church.

Catholic religious institutes, by contrast, have not historically been recognized as "churches" or "conventions or associations of churches." 26 U.S.C. § 6033(a)(3)(A)(i).[4] And although the Tax Code exempts the "exclusively religious activities of any religious order" from the filing requirement, *id*. § 6033(a)(3)(A)(iii), the government has taken a cramped view of "religious activity," which does not include the operation of schools and hospitals. *See* United States Conference of Catholic Bishops, *Annual Filing Requirements for Catholic Organizations* at 11 (Mar. 1, 2015) ("The filing exemption for the exclusively religious activities of any religious order is limited to the internal matters of the religious order to the exclusion

[4] Some religious institutes may qualify as "integrated auxiliaries" of a church, 26 U.S.C. § 6033(a)(3)(A)(i), and thus would qualify for the exemption to the contraception mandate. However, religious institutes that operate schools, hospitals, retreat centers, elder care homes, etc. are unlikely to satisfy the IRS's "internally supported" test and thus are unlikely to be considered "integrated auxiliaries." 26 C.F.R. § 1.6033-2(h)(1) ("[T]he term integrated auxiliary of a church means an organization that is—. . . (iii) Internally supported.").

of its charitable ministries."), *available at* http://goo.gl/3M7y0I (last accessed Apr. 12, 2018). Consequently, under the prior regulations, religious institutes (*i.e.*, "religious orders") were not considered "religious employers" when they hired individuals to work in schools, hospitals, and retreat centers that they owned and operated, 45 C.F.R. § 147.131(a) (2015), and thus they did not qualify for the categorical exemption to the contraception mandate. To avoid crushing penalties, religious institutes were thus required to implement the contraception mandate, thereby participating in the provision of contraceptive coverage (including abortifacients) to their employees.

In short, under prior regulations, Catholic dioceses were entitled to the exemption with respect to employees working in diocesan schools and hospitals, but Catholic religious institutes that operated schools and hospitals pursuant to the same religious tenets were not entitled to the same exemption as to their employees. *See* 26 C.F.R. § 1.6033-2(g)(1)(ii); 45 C.F.R. § 147.131(a) (2015). This anomalous treatment persisted even when religious institutes arranged for health insurance coverage for their employees through plans sponsored by a local diocese. For example, in *Priests for Life*, certain religious non-profits affiliated with the Roman Catholic Archdiocese of Washington provided health insurance to their employees by participating in the Archdiocese's self-insured church plan. 772 F.3d at 240. The D.C. Circuit nevertheless found it "undisputed that, under the government's

regulations, each [religious non-profit] is eligible for the accommodation, but not the exemption extended to houses of worship." *Id.* Thus, even when a diocese and a religious institute insured their employees *through the exact same plan*, the religious institute was required to implement the mandate by taking affirmative steps to ensure that employees working in its schools and hospitals were provided with contraceptive coverage, even though the diocese was exempt from that requirement as to employees working in *its* schools and hospitals.

B. The Previous Implementing Regulations Violated the First Amendment by Disregarding the Catholic Church's Essential Unity and Suppressing Its Rich Diversity of Religious Expression

In *Hosanna-Tabor*, the Supreme Court held that the First Amendment prohibits "government interference with . . . internal church decision[s] that affect[] the faith and mission of the [C]hurch itself." *Hosanna-Tabor*, 565 U.S. at 190. HHS's prior regulations engaged in just such "interference" with the Catholic Church's internal governance by expressing an arbitrary preference for dioceses over religious institutes—even though both serve the same faith-based function. This impermissible distinction represented a dangerous assault on the essential unity of the Church and threatened to stamp out the diversity of religious expression that is a hallmark of Catholicism in the United States.

First, HHS's discriminatory preference for dioceses over religious institutes trampled on the ecclesiastical and spiritual unity of the Catholic Church. The

Catechism, a compendium of Catholic doctrine, declares that "[u]nity is of the essence of the Church[.]" *Catechism* ¶ 813. The *Catechism* further provides that the visible sign of the Church's unity is the Pope, *id.* ¶ 882, while the "individual *bishops* are the visible source and foundation of unity in their own particular Churches," *id.* ¶ 886 (emphasis in original). Catholic doctrine teaches that these "particular churches," called "diocese[s]," are communities "of the Christian faithful in communion of faith and sacraments with their bishop ordained in apostolic succession." *Id*. ¶ 833.[5]

It is also bedrock Catholic doctrine that religious institutes are ecclesiastically and spiritually united with the bishops. *Id.* ¶ 927 ("All religious, whether exempt or not, take their place among the collaborators of the diocesan bishop in his pastoral duty."); *see also* Sacred Congregation for Bishops, *Directives for the Mutual Relations Between Bishops and Religious in the Church* (hereafter "*Directives*") ¶ 8, Vatican (May 14, 1978) (reflecting on the "ecclesial dimension" of the religious life—"namely the unquestionable bond of religious life with the life and holiness of the Church"), *available at* http://goo.gl/vRsjln (last accessed Apr. 12, 2018).

[5] There are nearly two hundred archdioceses/dioceses in the United States. *See* United States Conference of Catholic Bishops, Bishops and Dioceses (Jan. 2018), *available at* http://www.usccb.org/about/bishops-and-dioceses (last accessed Apr. 12, 2018). An archdiocese is presided over by an archbishop, and a diocese is presided over by a bishop. Within these dioceses are thousands of local parishes where individual Catholics worship and serve God together.

According to the Church, "[i]t would be a serious mistake to make the two realities—religious life and ecclesial structures—independent one of the other, or to oppose one to the other as if they could subsist as two distant entities, one charismatic, the other institutional." *Id.* ¶ 34. Religious institutes thus perform their various ministries—including education and health care—in communion with their local bishops. *See id.* ¶ 8.

HHS's previous regulations violated this essential unity and drove a wedge between dioceses and religious institutes. Under the "accommodation," religious institutes were treated as less Catholic than the dioceses—as if they were less bound by the teaching of the Church or somehow free from the authority of the bishops. The regulations were thus as religiously offensive as would be a regulation that exempted archdioceses but not ordinary dioceses, or a regulation that exempted Latin Catholic Dioceses but not Eastern Catholic Dioceses.[6]

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[6] The Church recognizes several different "liturgical traditions or rites" that have developed over the centuries. *Catechism* ¶ 1203. The most common rite in the United States is the Latin rite, but there are many Catholic dioceses that belong to various Eastern rites, including "the Byzantine, Alexandrian or Coptic, Syriac, Armenian, Maronite and Chaldean rites." *Id.* Although each rite expresses the Catholic faith in its own unique way, the "Church holds all lawfully recognized rites to be of equal right and dignity[.]" *Id.* There are currently 145 Latin Catholic Dioceses, 33 Latin Catholic archdioceses, 16 Eastern Catholic dioceses, and 2 Eastern Catholic archdioceses. *See* Bishops and Dioceses, http://www.usccb.org/about/bishops-and-dioceses.

By imposing financial penalties on religious institutes but not dioceses, the prior regulations pressured the Church to transfer its social services ministries from religious institutes to dioceses, thereby intruding upon the Church's constitutionally protected "right to shape its own faith and mission." *Hosanna-Tabor*, 565 U.S. at 188 ; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) ("[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'") (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450 (1988)); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (pressuring an organization to "predict which of its activities a secular court will consider religious" would impose a "significant burden" and "affect the way an organization carried out what it understood to be its religious mission"). In short, the previous regulations—which allowed the government to dissect unified ecclesiastical bodies such as the Catholic Church and decide which aspects of that body could follow the Church's religious tenets without sanctions and which could not—violated the Free Exercise Clause. HHS's new Religious Exemption IFR avoids this constitutional defect.

The prior regulations also flouted *Hosanna-Tabor*'s prohibition against "government interference with an internal church decision" because they would have suppressed one of the Catholic Church's most unique features—the diverse

expression of religious devotion and public service embodied in its many different religious institutes. *See Hosanna-Tabor*, 565 U.S. at 190. The Catholic Church has, "[f]rom the beginning, . . . been marked by a great *diversity*," and the Church has long recognized many "different gifts, offices, conditions, and ways of life" as legitimate expressions of the Catholic faith. *Catechism* ¶ 814 ("The great richness of such diversity is not opposed to the Church's unity."); *id.*¶ 873 ("[I]n the church there is diversity of ministry but unity of mission." (quotation omitted)). One aspect of this diversity can be seen in the many Catholics, including the Religious Sisters, that have consecrated themselves to what the Church teaches is a special form of Christian devotion called "religious life," which is "[l]ived within institutes canonically erected by the Church[.]"[7] *Id.* ¶ 925. Catholic doctrine teaches that "[r]eligious life in its various forms is called to signify the very charity of God in the language of our time." *Id.* ¶ 926. The Religious Sisters, for example, strives to show God's love by educating the young and caring for the sick and aging. As Pope John Paul II explained in his 1984 Apostolic Exhortation:

> This consecration determines your place in the vast community of the Church, the People of God. And at the same time this consecration introduces into the universal mission of this people a special source of spiritual and supernatural energy: a particular style of life, witness and

[7] Those who have taken religious vows and joined a religious institute—such as nuns, sisters, brothers, etc.—are typically referred to simply as "religious" in Catholic literature. Similarly, the "religious life" in Catholic terminology refers to the unique vocation of the religious.

> apostolate, in fidelity to the mission of your institute and to its identity and spiritual heritage. The universal mission of the People of God is rooted in the messianic mission of Christ Himself—Prophet, Priest and King—a mission in which all share in different ways. The form of sharing proper to "consecrated" persons corresponds to your manner of being rooted in Christ. The depth and power of this being rooted in Christ is decided precisely by religious profession.

Pope John Paul II, *Apostolic Exhortation: Redemptionis Donum* ¶ 7 (March 25, 1984), *available at* https://goo.gl/KGzq6x (last accessed Apr. 12, 2018).

Catholic religious institutes pursue these public ministries in unique ways as they reflect the spirituality of their founders. The Church blesses these unique and authentic expressions of Catholic faith by giving religious institutes special freedom to manage their own ministries under the supervision of the local bishops. *Directives* ¶ 22. For example, "Catholic schools conducted by religious are . . . subject to the local ordinaries as regards their general policy and supervision without prejudice, however, to the right of the religious to manage them." *Id.* ¶ 44.

Pursuant to this limited autonomy, religious institutes, including *amicus*, have managed their own ministries for decades in unity with the local bishops. Yet if they did not comply with HHS's contraception mandate or so-called "accommodation," these religious institutes would have been subjected to substantial fines that would have significantly raised the cost of operating their ministries. Because a diocese was not similarly penalized for non-compliance, HHS's regulations made it less expensive for a diocese to manage the same types of ministries—schools, hospitals,

retreat centers, etc.—that religious institutes also managed. The regulations thus placed significant financial pressure on a religious institute such as *amicus* to transfer control of its facilities to the local diocese. Putting all schools, hospitals, and other ministries under the direct control of the bishop, although perhaps allowing the ministries to survive for a time, would have prevented the religious institutes from fully living out their unique calling.

By denying religious institutes such as *amicus* a full exemption from the morally objectionable contraception mandate, and thereby discriminating against their public ministries, HHS's previous regulations threatened the vibrant diversity of the Catholic Church in the United States by coercing religious institutes to choose between reorganizing themselves—in ways inimical to their religious beliefs—or facing ruinous fines. This pressure to conform to the government's idealized conception of a religious organization violated the Supreme Court's admonition that the government not interfere with any "internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190.

Ultimately, the financial sanctions imposed by prior regulations would have squeezed Catholic religious institutes out of the public square, relegating them to the narrow realm of "exclusively religious" activity. The Religious Exemption IFR avoids these constitutional problems by offering a true exemption to religious

institutes such as *amicus* and eliminating the impermissible distinction between Catholic dioceses and Catholic religious institutes.

C. The Previous Implementing Regulations Violated the Free Exercise Clause's Requirement of Neutrality

The Supreme Court has held that laws burdening religious practices that are not "neutral and of general applicability . . . must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. The "minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. The contraceptive mandate scheme failed this fundamental requirement of neutrality because HHS's implementing regulations discriminated on their face between different types of religious organizations. *See Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (a law that makes "explicit and deliberate distinctions between different religious organizations" is "not . . . a facially neutral statute").

Indeed, HHS did not even pretend that the regulations were neutral. Rather, it explicitly declined to extend the exemption to organizations that it perceived to be ecumenical. *See* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (asserting that "[h]ouses of worship . . . that object to contraceptive coverage on religious grounds are more likely . . . to employ people of the same faith who share the same objection"). Although HHS never disputed that religious non-profit organizations like the Religious Sisters have sincere religious objections to providing artificial

contraception to their employees, HHS deliberately crafted its regulations to compel these organizations to implement the mandate. By withholding the exemption from religious non-profits on the basis of their perceived ecumenism—*i.e.*, HHS's belief that such organizations do not predominantly hire co-religionists—HHS violated the bedrock "governmental obligation of neutrality in the face of religious differences[.]" *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

The Religious Exemption IFR, by contrast, is facially neutral because it does not discriminate between entities that share the same religious objections. It thus avoids the severe Free Exercise problems inherent in the previous regulations.

D. The Prior Implementing Regulations Ran Afoul of the Establishment Clause by Conferring a Benefit Based on Perceived Religious Intensity

In addition to infringing upon religious institutes' Free Exercise rights, the prior HHS regulations also violated the Establishment Clause. The regulations had the effect of conferring an advantage on those religious organizations that HHS perceived to be more intensely religious—*i.e.*, organizations that engaged primarily in worship and prayer and ostensibly hired co-religionists more than other religious non-profits—while disadvantaging those organizations that engaged in broader religious ministries.[8] Whereas "churches" and their "integrated auxiliaries" were

[8] HHS's distinction failed to account for the fact that religious organizations like *amicus* view educating children "with the heart and mind of Christ" and caring

allowed to practice their faith freely, other religious organizations were forced to choose between violating their faith and incurring significant penalties. Thus, through its exemption and accommodation scheme, HHS granted the religious beliefs of churches greater dignity than the religious beliefs of other faith-based organizations, including *amicus*.

The Supreme Court has previously disavowed legal distinctions based on the government's perception of whether an organization is "pervasively sectarian." *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (warning that such distinctions are "not only unnecessary but also offensive"). The *Mitchell* plurality rightly observed that "application of the 'pervasively sectarian' factor collides with [the Court's] decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.* (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar*

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for the elderly as religious activities that flow directly from their expression of the love of God. *See*, *e.g.*, James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction[.]") (NABRE translation). Nevertheless, because the government did not view these activities as "exclusively religious," 26 U.S.C. § 6033(a)(3)(A)(iii), it chose to deny the exemption to religious non-profits that perform them, 45 C.F.R. § 147.131(a). As the Supreme Court has recognized, "it is most bizarre" to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives[.]" *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion).

v. Vincent, 454 U.S. 263 (1981)); *see also Trinity Lutheran*, 137 S. Ct. at 2022 (the government man not "'condition the availability of [government] benefits upon a recipient's willingness to surrender his religiously impelled status'" (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion)) (internal alterations omitted)).

Indeed, the government itself has argued in the past that such distinctions violate the Establishment Clause. *See* Br. for the United States as *Amicus Curiae* at 21, *Spencer v. World Vision, Inc.*, No. 08-35532, 2008 WL 5549423 (9th Cir. 2008) (arguing that limiting Title VII's religious-employer exemption to "churches" would "discriminat[e] among religious groups" and thus "create a serious Establishment Clause problem"). As the government explained, "[t]o allow houses of worship to engage in religious-based employment practices, but deny equal privileges to other, independent organizations that also have sincerely held religious tenets would unlawfully discriminate among religions, and give the former group a competitive advantage in the religious marketplace." *Id*. at 22.

The government's argument prevailed, and this Court held that Title VII's exemption for religious employers was available to any entity "organized for a religious purpose [that] is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for

money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam). The court explained that "interpreting the statute such that it requires an organization to be a 'church' to qualify for the exemption would discriminate against religious institutions which are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." *Id.* at 728 (O'Scannlain, J., concurring) (quotation and citation omitted); *see also id.* at 741 (Kleinfeld, J., concurring) ("I concur in Parts I and II of Judge O'Scannlain's concurrence."). Such discrimination "would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs." *Id.* at 729 (O'Scannlain, J., concurring) (citations omitted); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools."); *Columbia Union Coll. v. Clark*e, 159 F.3d 151, 172 (4th Cir. 1998) (Wilkinson, J., dissenting) ("The denial of state aid to only certain types of religious institutions—namely, pervasively sectarian ones . . . . directly violate[s] a . . . core principle of the Establishment Clause, the requirement of nondiscrimination among religions.").

Here, the "pervasiveness or intensity" of religious belief—as manifested (allegedly) in an organization's hiring practices—was the *asserted basis* for the

distinction between churches and other religious organizations. Thus, unlike federal statutes that have relied on secular criteria to draw constitutional distinctions between churches and other religious organizations, the implementing regulations explicitly relied on a constitutionally suspect criterion—namely, the pervasiveness or intensity of religious belief. *See Colo. Christian*, 534 F.3d at 1259 ("Although application of secular criteria does not invalidate a law even if there is a disparate impact, that logic will not save a law that discriminates among religious institutions on the basis of the pervasiveness or intensity of their belief.") (citations omitted). This distinction was entirely unnecessary and contrived, as HHS could instead have drawn a clear and constitutional boundary around the exemption by granting it to organizations with sincere religious objections to providing contraceptive coverage. To its credit, the government has now done precisely that, and the Religious Exemption IFR extends the exemption to all religious non-profit organizations, including the Religious Sisters. This Court should uphold the new IFR and decline the States' invitation to return to the constitutionally untenable regime that preceded it.

CONCLUSION

The judgment of the District Court should be reversed.

Dated: April 16, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29 I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and complies with the word count limitations set forth in Fed. R. App. P. 29(a)(5). This Brief has 5,509 words, excluding the portions exempted by Fed. R. App. P. 32, according to the word count feature of Microsoft Word used to generate this Brief.

Dated: April 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 16, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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