Nos. 17-3752, 18-1253, 19-1129, 19-1189

In the United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff–Appellee,

v.

PRESIDENT, UNITED STATES OF AMERICA, *et al.*,

Defendants–Appellants,

and

LITTLE SISTERS OF THE POOR, SAINTS PETER AND PAUL HOME,

Intervenor–Defendant–Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:17-cv-4540-WB

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. *See* Fed. R. App. P. 26.1(a), 29(a)(4)(A).

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INTEREST OF *AMICUS CURIAE*[*]

The Religious Sisters of Mercy of Alma, Michigan ("Religious Sisters") is a Catholic religious institute. The goal of the Institute is the praise and worship of the Triune God for the boundless mercy that has been revealed 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, Religious Sisters established Sacred Heart Mercy Health Care, 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.

[*] 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.

Religious Sisters, following the authoritative teaching of the Catholic Church (the "Church"), believes that use of artificial contraception and abortion are grave moral evils.[1] Yet, before the 2017 Religious Exemption Interim Final Rule ("Religious Exemption IFR" or "IFR") and the 2018 Religious Exemption Final Rule were issued, HHS's regulations did not exempt Religious Sisters from the contraception mandate. As a result, before HHS issued the Religious Exemption IFR, Religious Sisters 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 Religious

[1] *See* U.S. Catholic Conference, Inc.—Libreria Editrice Vaticana, *Catechism of the Catholic Church* ¶ 2370 (2d ed. 1994) [hereinafter *Catechism*]. Catholic teaching deems "'every action which, whether in anticipation 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*. 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.

Sisters' insurer to provide contraceptive coverage through its own health plans. *Id*. § 147.131(c)(2)(i)(B).

Religious Sisters 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 Religious Sisters 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 whether the so-called accommodation violated the Religious Freedom Restoration Act of 1993 ("RFRA"). The Court declined to decide the RFRA question, instead vacating and 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, 47,835 (Oct. 13, 2017). The government promulgated final rules a year later. *See* 83 Fed. Reg.

57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption). The Religious Exemption Final Rule—which is applicable to Religious Sisters—keeps the contraception mandate in place but extends the religious exemption "to protect religious beliefs for certain entities and individuals with religious objections to contraception whose plans are subject to a mandate of contraceptive coverage." 83 Fed. Reg. at 57,540 (making the "accommodation process . . . optional"). By extending the religious exemption to religious non-profits, the Final Rule allows Religious Sisters to live out its unique spiritual calling without the threat of crippling monetary sanctions.

Religious Sisters files this *amicus* brief both to explain the constitutional problems inherent in the contraception mandate and HHS's prior implementing regulations and to describe the burden those regulations imposed on Catholic religious institutes in particular. This context is important in evaluating the district court's decision to enjoin the Religious Exemption Final Rule, which alleviated that burden and protected Religious Sisters' First Amendment rights.

INTRODUCTION

Before the government issued the 2017 Interim Final Rule and the 2018 Religious Exemption Final Rule, only "churches" and their "integrated auxiliaries" were categorically exempt from the contraception mandate—other religious non-profits (like Religious Sisters) were arbitrarily required to comply with it, despite their sincerely held religious objections.

HHS did offer Religious Sisters and other religious non-profits an "accommodation." But that so-called accommodation still required Religious Sisters—under pain of substantial, punitive fines—to violate its sincerely held religious beliefs by facilitating contraceptive coverage for its employees. *See* Brief for Petitioners at 1–2, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 93988, at *1–2 (explaining operation of—and religious objections to—the "accommodation"). Failing to comply subjected a religious organization to crippling fines.

Faced with a substantial burden on their religious exercise, numerous religious organizations sought to enjoin enforcement of HHS's prior regulations. In 2015, this Court rejected their arguments, *see Geneva Coll. v. HHS*, 778 F.3d 422 (3d Cir. 2015)—but the Supreme

Court vacated that decision in *Zubik v. Burwell*. *See* 136 S. Ct. at 1559–60 (vacating because parties agreed that "contraceptive coverage could be provided . . . without any such notice from [the religious organizations]" and remanding to provide "an opportunity to arrive at an approach going forward that accommodates [the religious organizations'] religious exercise").

Six months after the *Zubik* remand, the government was still "unable to develop an approach that could 'resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.'" *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 563 (E.D. Pa. 2017) ("*Trump I*"); *see also Pennsylvania v. Trump*, 2019 WL 190324, at *4 (E.D. Pa. Jan. 14, 2019) ("*Trump II*") ("Following the remand the Agencies reached an impasse").

Finally, in October 2017, the government conceded that its regulations violated RFRA because they (1) substantially burdened religious exercise by forcing religious non-profits to either violate their religious beliefs or pay crippling fines; (2) lacked a compelling government interest to justify the substantial burden; and (3) failed to

utilize the least restrictive means to further a compelling interest. 82 Fed. Reg. at 47,806 (requiring "compliance through the Mandate or accommodation has constituted a substantial burden on the religious exercise of many such entities"); *see also* 83 Fed. Reg. at 57546 ("The Departments now reaffirm the conclusion set forth in the Religious IFR, that requiring certain religiously objecting entities or individuals to choose between the Mandate, the accommodation, or incurring penalties for noncompliance imposes a substantial burden on religious exercise[.]").

To alleviate that substantial burden, HHS promulgated the 2017 Interim Final Rule, and—after complying with the Administrative Procedure Act's notice-and-comment procedures—finalized it with the 2018 Final Religious Exemption. The 2018 Final Rule is at issue here. The Final Rule extended the mandate's exemption to any non-profit with sincere religious objections to providing contraception coverage—in doing so, it placed Religious Sisters and other religious non-profits on the same footing as churches. *See Trump II*, 2019 WL 190324, at *5-6 (the Final Rule made "largely non-substantial technical revisions" to the IFR, which permitted employers to opt out of coverage based on sincerely held

religious beliefs and eliminated the need to file notices or certifications); *see also Trump I*, 281 F. Supp. 3d at 563 (describing the IFR).

The district court nevertheless enjoined enforcement of the 2018 Final Rule—even though it was promulgated in response to *Zubik* and the government agreed that its pre-IFR regulations were unlawful. Indeed, after the injunction was issued in this case, the *Geneva College* district court (on remand from *Zubik*) permanently enjoined enforcement of HHS's prior regulations. *Geneva Coll. v. Azar*, 2018 WL 3348982, at *2 (W.D. Pa. July 5, 2018).

Religious Sisters urges the Court to reverse the district court's injunction because the prior regulations—which the injunction effectively reinstates—violated the First Amendment by discriminating against religious organizations such as *amici*. Reversing the district court would allow the government to implement the Religious Exemption Final Rule, which lifted a substantial burden on Religious Sisters' First Amendment rights and ended the government's unconstitutional policies.

SUMMARY OF THE ARGUMENT

After the *Zubik* remand, HHS promulgated the Religious Exemption Final Rule to remedy the substantial burden imposed by its

prior regulations. By enjoining the Final Rule, the district court revived the prior regulations and their First Amendment defects.

1. The prior regulations' arbitrary preference for dioceses over religious institutes violated the essential unity of the Catholic Church by allowing only one manifestation of the Church to follow its religious tenets without sanction. That religious preference contravened the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (Religion Clauses absolutely forbid "government interference with an internal church decision that affects the faith and mission of the church itself"). By punishing religious institutes for following the authoritative teaching of the Church, HHS's regulations threatened to force ministries like Religious Sisters to close their doors and retreat from the public sphere. This would reshape and flatten the diversity of Catholic religious expression—one of the Church's defining features—by limiting the types of public ministries capable of operating in conformity with the Church's moral teaching.

2. HHS's prior regulations also ran afoul of the Establishment Clause by conferring an advantage on those religious organizations that HHS perceived to be more intensely religious—*i.e.*, those engaged

primarily in worship and prayer and that predominantly hired people who shared their religious convictions—while excluding organizations engaged in broader religious ministries. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–31 (3d Cir. 2007).

3. HHS's prior, explicitly non-neutral regulations also violated the Free Exercise Clause by imposing "a substantial burden on the religious exercise of many such [religious non-profits]." 82 Fed. Reg. at 47,806; *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–34 (1993) ("the minimum requirement of neutrality is that a law not discriminate on its face").

The Religious Exemption Final Rule avoids these constitutional defects by ending the arbitrary distinction between "churches" and other religious non-profits and extending the contraception-mandate exemption to Religious Sisters and other religious non-profits based on their sincerely held religious beliefs. Because the Final Rule is necessary to vindicate the First Amendment rights of Religious Sisters and those similarly situated, the district court's order enjoining the Final Rule should be reversed.

ARGUMENT

I. The Prior Version of the Contraception Mandate Unlawfully Disregarded the Catholic Church's Essential Unity and Suppressed 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." 565 U.S. at 190; *see Real Alternatives, Inc. v. HHS*, 867 F.3d 338, 352 n.12 (3d Cir. 2017) ("the Government may not dictate to houses of worship what to believe or how to structure their relations with clergy to implement and teach those beliefs"). HHS's prior regulations effected precisely such "interference" with the Church's internal governance by arbitrarily preferring 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.

A. The Prior Regulations 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 the mandate. As a result of this arbitrary distinction, Religious Sisters and other Catholic religious institutes were forced to implement the mandate—but Catholic dioceses were not.

1. A Catholic diocese is a "church" under the Internal Revenue Code, 26 U.S.C. § 6033(a)(3)(A)(i), and thus qualified for the exemption under HHS's prior regulations. *See* 45 C.F.R. § 147.131(a) (2015) (defining "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"). Accordingly, Catholic dioceses were "categorically exempt from the requirement to include coverage for contraceptive services for its employees." *Priests for Life v. HHS*, 772 F.3d 229, 239 (D.C. Cir. 2014), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016). A diocese was entitled to this exemption even if its employees worked in schools, hospitals, retreat centers, or other facilities owned and operated by the diocese—and regardless of whether the employees adhered to the Church's religious tenets.

2. Catholic religious institutes, by contrast, have not historically been recognized as "churches" or "conventions or associations of churches," under 26 U.S.C. § 6033(a)(3)(A)(i).[2] And although the Internal Revenue 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* U.S. Conference of Catholic Bishops, Office of General Counsel, *Annual Filing Requirements for Catholic Organizations* 11 (Mar. 1, 2015), http://goo.gl/3M7y0I ("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 of its charitable ministries.").

Consequently, under the prior regulations, religious institutes (*i.e.*, "religious orders") were not considered "religious employers" when they

[2] Some religious institutes may qualify as "integrated auxiliaries" of a church, 26 U.S.C. § 6033(a)(3)(A)(i), and thus would have qualified for the exemption under the prior regulations. However, religious institutes that operate schools, hospitals, retreat centers, elder-care homes, etc., are unlikely to satisfy IRS's "internally supported" test and thus are unlikely to qualify as "integrated auxiliaries." 26 C.F.R. § 1.6033-2(h)(1)(iii) (2015) ("the term integrated auxiliary of a church means an organization that is . . . [i]nternally supported").

hired individuals to work in schools, hospitals, and retreat centers that the institutes owned and operated, 45 C.F.R. § 147.131(a) (2015), so 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.

3. In short, the prior regulations granted Catholic dioceses a categorical exemption from the mandate—including for employees who worked in a variety of facilities, including diocesan schools, child-care centers, hospitals, and assisted-living facilities. But Catholic religious institutes that operated nearly identical facilities—pursuant to the same religious tenets—were denied a similar exemption. *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. In *Priests for Life*, for example, 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.* (emphasis added).

Thus, even when a diocese and a religious institute insured their employees *through the exact same plan*, the religious institute was required to take affirmative steps to ensure that its employees were provided with contraceptive coverage, even though the diocese did not.

B. This Discriminatory Treatment Pressured Religious Institutes to Abandon Their Unique Mission Within the Catholic Church

1. 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, while the "individual *bishops* are the visible source and foundation of unity in their own particular Churches." *Id.* ¶¶ 882, 886. 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.[3]

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* ¶ 8 (Vatican May 14, 1978) [hereinafter *Directives*], http://goo.gl/vRsjln (reflecting on the "ecclesial dimension" of the religious life—"namely the unquestionable bond of religious life with the life and holiness of the Church"). 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

[3] There are nearly two hundred archdioceses/dioceses in the United States. *See* U.S. Conference of Catholic Bishops, *Bishops and Dioceses* (Aug. 2018), http://www.usccb.org/about/bishops-and-dioceses. 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.

thus perform their various ministries—including education and health care—in communion with their local bishops. *See id.* ¶ 8.

HHS's prior 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.[4]

By imposing financial penalties on religious institutes but not dioceses, the prior regulations pressured the Church to transfer its social

[4] 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 in the United States. *See* U.S. Conference of Catholic Bishops, *Bishops and Dioceses*, *supra* note 3.

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 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 prior regulations—which allowed the government to dissect unified religious 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 First Amendment. HHS's 2018 Religious Exemption Final Rule, which puts Catholic

religious institutes (including Religious Sisters) on the same footing as dioceses, remedied this constitutional defect.

2. The prior regulations also flouted *Hosanna-Tabor*'s prohibition against "government interference with an internal church decision," because they threatened to suppress 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. 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 marks omitted).

One aspect of this diversity can be seen in the many Catholics (including Religious Sisters) who have consecrated themselves to "religious life," which the Church teaches is a special form of Christian devotion that is "[l]ived within institutes canonically erected by the

Church."[5] *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.

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 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 (Mar. 25, 1984) (emphasis added), https://goo.gl/KGzq6x.

[5] 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.

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.

3. Pursuant to this limited autonomy, religious institutes (including Religious Sisters) have managed their own ministries for decades in unity with the local bishops. Yet if they failed to comply with HHS's contraception mandate or so-called accommodation, these religious institutes would have been subjected to substantial fines that would have raised significantly the cost of operating their ministries. Because a diocese was not subject to a similar penalty for non-compliance, HHS's regulations made it less expensive for a diocese to manage the exact same types of ministries—schools, hospitals, retreat centers, etc.—that were managed by religious institutes as well. The

regulations thus placed significant financial pressure on religious institutes—like Religious Sisters—to transfer control of their facilities to the local diocese. Putting all schools, hospitals, and other ministries under the bishop's direct control (although perhaps allowing the ministries to survive for a time) would have prevented the religious institutes from living out fully their unique calling.

By denying religious institutes such as Religious Sisters a full exemption from the morally and religiously objectionable contraception mandate—and thereby discriminating against their public ministries—HHS's prior regulations threatened the vibrant diversity of the Catholic Church in the United States. Those regulations coerced religious institutes to choose between reorganizing themselves—often 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 may 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 the 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 Final Rule avoids these constitutional problems by offering a true exemption to religious institutes like Religious Sisters and eliminating the impermissible distinction between Catholic dioceses and Catholic religious institutes. HHS did not act unlawfully by ending its unconstitutional assault on Catholic religious life.

II. The Prior Regulations Violated the Establishment Clause by Conferring a Benefit Based on Perceived Religious Intensity.

The prior regulations exempted from the mandate the religious organizations that HHS perceived to be the most intensely religious—*i.e.*, those engaged primarily in worship and prayer, and that ostensibly hired more co-religionists than other religious non-profits—while disadvantaging those engaged in broader religious ministries.[6] Whereas

[6] HHS's distinction failed to account for the fact that religious organizations (like Religious Sisters) view educating children "with the heart and mind of Christ" and caring for the elderly as religious activities that flow directly from their expression of the love of God.

"churches" and their "integrated auxiliaries" were allowed to practice their faith freely, Religious Sisters and other religious organizations were forced to choose between violating their faith and incurring significant penalties. Discrimination based on the perceived intensity of religious belief violates the Establishment Clause.

1. The Supreme Court previously has disavowed legal distinctions based on the government's perception of whether an organization is "pervasively sectarian." *See Mitchell*, 530 U.S. at 828 (warning that such distinctions are "not only unnecessary but also offensive"). As *Mitchell* explained, "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*

See, *e.g.*, James 1:27, *The New American Bible* 2063 (Oxford Univ. Press 2011) ("Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction[.]"). Nevertheless, because the government did not view these activities as "exclusively religious," it denied the exemption to religious non-profits that perform them. 26 U.S.C. § 6033(a)(3)(A)(iii); 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*, 530 U.S. at 827–28.

& Visitors of Univ. of Va., 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981)); *see Trinity Lutheran*, 137 S. Ct. at 2022 (government cannot "condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status") (alterations omitted).

Indeed, the government has argued that such distinctions violate the Establishment Clause. *See* Brief of *Amicus Curiae* the United States Supporting Appellee at 21, *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (No. 08-35532), 2008 WL 5549423 ("To hold that [Title VII's religious-employer exemption] is limited to churches [ ] would create a serious Establishment Clause problem by discriminating among religious groups."). As the government explained, "allow[ing] houses of worship to engage in religious-based employment practices, but deny[ing] equal privileges to other, independent organizations that also have sincerely held religious tenets would unlawfully discriminate among religions." *Id*. at 22.

The Ninth Circuit agreed, holding that Title VII's religious-employer exemption must be available to any entity that "is organized

for a religious purpose, 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). 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); *see id*. at 741 (Kleinfeld, J., joining 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) (citing *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008)); *see also 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, C.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.").

2. 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, HHS's implementing regulations explicitly relied on the pervasiveness or intensity of religious belief—a constitutionally suspect criterion. *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.") (internal citation omitted).

* * *

This distinction was entirely unnecessary and contrived—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, that is precisely what the government did in the Religious Exemption Final Rule, which extends the exemption to all religious non-profit organizations, including Religious Sisters. This Court should reverse the district court, uphold the Religious Exemption Final Rule, and decline Pennsylvania's invitation to return to the constitutionally untenable regime that preceded it.

III. The Prior 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.

1. The contraception-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) (statute making "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) ("Houses of worship and their related 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.").

Although HHS never disputed that religious non-profit organizations like 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).

2. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. There is no question that the prior regulations burdened the religious exercise of religious non-profits that did not qualify for the church exemption. Indeed, as HHS itself has conceded, the prior regulations "constituted a substantial burden on the religious exercise" of religious non-profits—like Religious Sisters—by forcing them "to choose between the Mandate, the accommodation, or penalties for noncompliance." 83 Fed. Reg. at 57,546; *see Sherbert*, 374 U.S. at 403–04.

HHS also has conceded that its prior regulations did "not serve a compelling interest." 83 Fed. Reg. at 57,546; *see Sherbert*, 374 U.S. at 406–07 (asking "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right"). Nor were they "the least restrictive means of advancing a compelling government interest." 83 Fed. Reg. at 57,546. The government's "change of position"—reached after "reassessing the relevant interests" and

"further examination of the relevant provisions of the Affordable Care Act and the administrative record on which the Mandate was based," *id*. at 47,800–06—explains why, since *Zubik*, numerous courts have enjoined the enforcement of the prior regulations. *See*, *e.g*, *Geneva Coll.*, 2018 WL 3348982, at *2; *Reaching Souls Int'l, Inc. v. Azar*, 2018 WL 1352186, at *2 (W.D. Okla. Mar. 15, 2018).[7]

* * *

The Religious Exemption Final Rule, by contrast, is facially neutral—it avoids discriminating between entities that share the same religious objections. And it avoids substantially burdening religious exercise by exempting entities with sincerely held religious objections from the mandate, without forcing them to file notices or certifications. The Religious Exemption Final Rule thus avoids the severe Free Exercise problems inherent in the prior regulations.

[7] Because the prior regulations imposed a substantial burden on religious exercise and failed to advance a compelling government interest by the least restrictive means necessary, Religious Sisters agrees with Appellants that the prior regulations also violated RFRA. *See* Little Sisters of the Poor Br. 36–38, 45–53.

CONCLUSION

The 2018 Final Rule alleviated the unconstitutional aspects of HHS's prior regulations by treating religious non-profits the same as churches and by exempting them from the contraception mandate based on their sincerely held religious beliefs. By enjoining the Final Rule, the district court re-imposed that unconstitutional regime. This Court should reverse the judgment of the district court and allow the government to alleviate the burden it unconstitutionally imposed on Religious Sisters and other religious non-profits.

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Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the U.S. Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29, I certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,985 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Pursuant to Local Rule 31.1(c), I certify that (1) the text of this electronic brief is identical to the text in the paper copies submitted to the Court, and (2) the electronic submission was scanned for viruses with Symantec Endpoint Protection, version 14.0, and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system on February 22, 2019. 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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