Nos. 19-431 & 19-454

IN THE

Supreme Court of the United States

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

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE CATHOLIC BENEFITS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

Amicus curiae is **The Catholic Benefits Association** ("CBA"), an Oklahoma not for profit corporation committed to assisting its Catholic employer-members in providing health coverage to their employees consistent with Catholic values. The CBA provides such assistance through its website, training webinars, legal and practical advice for member-employers, and litigation services protecting members' rights of conscience. The CBA has over 1000 Catholic member-employers, including dioceses, schools, universities, social-service agencies, cemeteries, hospitals, senior housing, nursing facilities, and closely held for-profit businesses. One of the conditions of membership is affirmation that the member's healthcare coverage complies with Catholic values.

Because of its regular interactions with health insurers, benefits consultants, third party administrators, and many types of Catholic employers, the CBA has developed substantial familiarity with the Affordable Care Act; its mandate that employer health plans cover contraceptives, abortion-inducing drugs and devices, sterilization, and related counseling ("CASC Mandate" or "Mandate"); the religious exemptions to the Mandate and the "accommodation"; and the potentially ruinous fines for violating the Mandate.

The CBA's bylaws require it to have "an Ethics Committee comprised of the Catholic bishops serving

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.3(a).

on [its] board plus any additional number of Catholic bishops as appointed by the committee." This committee has exclusive authority to determine that the CBA's activities and services conform to Catholic values and doctrine. The committee's members are the Catholic archbishops of Baltimore, Oklahoma City, New Orleans, Kansas City, and St. Paul/Minneapolis.

SUMMARY OF ARGUMENT

Before the government issued the final rule broadening the religious exemption, 83 Fed. Reg. 57,536 (Nov. 15, 2018) ("Final Rule"), its regulations creating the Mandate were built on a distinction between "religious employers," who were exempt, and everyone else. But the definition of "religious employer" was exceedingly narrow. Only a small class of entities that are excused from filing informational tax returns under Section 6033(a) of the Internal Revenue Code, such as churches and their "integrated auxiliaries," were deemed exempt. Other religious organizations, despite their equally strenuous objections to the Mandate, were forced to comply.

The government's decision to cleave religious organization into two camps was bad enough. But doing so based on a tax code provision designed for a completely different purpose made no sense at all, and it yielded results both strange and constitutionally problematic. For example, within the same Catholic diocese, some Catholic elementary schools were exempt from the Mandate while others were not. Or, a Catholic Charities in one diocese was exempt while a Catholic Charities in a neighboring diocese was not. Why this divide? It was not because these organizations differed in their faithfulness to Catholic teaching or their opposition to the Mandate. Rather, it was only because some were deemed "integrated auxiliaries" under

Section 6033(a) and exempt from filing informational tax returns, while others were not. In the same way, the Mandate exempted some Protestant evangelical ministries if they remained closely connected with a church, but ministries that maintained their independence from church control, even for avowedly theological reasons, were forced to comply.

After years of legal challenges by hundreds of religious nonprofits, including *amicus* and its members, the government finally did away with this arbitrary religious class system, rightly observing in the Final Rule that "religious exercise in this country has long been understood to encompass actions outside of houses of worship and their integrated auxiliaries." 83 Fed. Reg. at 57,561. The Religious Freedom Restoration Act (RFRA) reflects this understanding, broadly prohibiting any "branch, department, [or] agency . . . of the United States" government from unjustifiably burdening "*a person's* exercise of religion." *See* 42 U.S.C. §§ 2000bb-2(1), 2000bb-1(a) (emphasis added).

But in its confused decision below, the Third Circuit not only reinstated the old system; it effectively mandated it, restoring a legal and regulatory status quo that does not withstand RFRA's scrutiny.

En route to invalidating the Final Rule, the Third Circuit concluded that the government is foreclosed from granting *any* exemptions to the Mandate. *See Pennsylvania v. President of U.S.*, 930 F.3d 543, 570 (3d Cir. 2019) ("Nothing from § 300gg-13(a) gives HRSA the discretion to wholly exempt actors of its choosing from providing the guidelines services."). Under this reasoning, even the narrow Section 6033(a) exemption must go – as the Third Circuit itself recognized, calling this exemption "facially at odds" with its

conclusion. But that exemption could stay, the court said, because "Supreme Court precedent dictates a narrow form of exemption for houses of worship." *Id.* at 570 n.26. This was error piled on error. The Third Circuit's decision misconceives the scope of Section 6033(a), resurrects the government's arbitrary religious class system, misreads this Court's precedents, and embraces a cramped view of free exercise at odds with RFRA.

The government never should have used an obscure tax code provision to sift the nation's religious employers. But that choice was made only worse by the fact that the Mandate leaves "tens of millions" outside of its protections to advance other policy objectives, like promoting small businesses (the small-employer exemption) or letting people keep their health plans (the grandfathered-plan exemption). *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 699-700 (2012) (quotation omitted). As a result, the government's prior efforts to force Catholic and evangelical ministries to comply with the Mandate—through the accommodation or otherwise—was legally unsustainable. The arbitrary religious exemption, coupled with secular exemptions that undermined the Mandate's ostensible purpose, meant that the Mandate as previously conceived could not satisfy RFRA's requirement of strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); 42 U.S.C. § 2000bb-1(b).

In the Final Rule, the government recognized this problem and rectified it, broadening the religious exemption. In contrast, the decision below reinstates the old regime and resurrects the RFRA violation.

Part I of this brief unpacks the implications of the government's original choice to use Section 6033(a) of

the tax code to distinguish between religious ministries that are exempt from the Mandate and those that must comply. Section 6033(a) requires tax-exempt entities to file an annual informational tax return. It was enacted over fifty years ago to ferret out entities that were abusing their tax-exempt status and engaging in income-producing activities unrelated to their exempt purposes. *See* Br. for *Amici Curiae* Dominican Sisters of Mary et al., in Supp. of Pet. for Cert. at 9, *Little Sisters of the Poor v. Burwell* (Jan. 11, 2016) (No. 15-105). But Congress tailored this demand for financial information by exempting churches, their "integrated auxiliaries," and "the exclusively religious activities of any religious order," as well as other entities if the Secretary of the Treasury "determines that such filing is not necessary to the efficient administration of the internal revenue laws." 26 U.S.C. § 6033(a)(3).

The line Congress drew in Section 6033(a) makes good sense for the tax and informational purposes it serves. But to graft the same criterion into a mandate to cover contraceptives, as a way to identify which organizations are religious enough to be exempt, is manifestly arbitrary. Although the government rightly jettisoned its misconceived "religious employer" exemption in the Final Rule, the Third Circuit reinstated it as the outer limit of permissible religious accommodation. But as Part I lays out in detail, using this tax reporting provision as a proxy for a religious exemption does not withstand even rational basis review, much less the withering scrutiny that RFRA demands.

Part II describes the secular exemptions that together leave tens of millions unprotected by the Mandate: the grandfathered-plan exemption and the small-employer exemption.

Although the government long argued that the number of employers with grandfathered plans would quickly phase down, the number has remained high. Twenty percent of firms that offer health benefits had grandfathered plans in 2018, down only three percent from the year before. Twenty-four million people were enrolled in grandfathered plans in 2018. And about 26% of all workers, or 33 million people, work for small employers that are not required to offer their employees health insurance at all.

Putting tens of millions of workers beyond the reach of the Mandate means the Mandate cannot satisfy strict scrutiny. If small businesses get to opt out, along with companies that want to "avoi[d] the inconvenience of amending an existing plan," *Hobby Lobby*, 573 U.S. at 727, then the government does not have a compelling interest in forcing the Mandate on Catholic schools and evangelical seminaries with religious objections. These secular exemptions also weaken the government's ability to meet the "exceptionally demanding" least-restrictive-means requirement. The government never would have left tens of millions unserved by the Mandate unless it could ensure workers had access to CASC services by other means. One of those means is Title X funding for family planning services, which the government has now retooled to ensure that women who work for ministries that object to the Mandate can access contraceptives.

ARGUMENT

I. The government doesn't have a compelling interest in forcing some ministries to comply with the Mandate when other ministries, essentially identical, are excused.

The decision below enshrines the prior "religious employer" exemption, grounded in Section 6033(a) of the tax code, as the only permissible religious exemption to the Mandate. But this exemption does not hold up to RFRA's scrutiny.

To meet its burden under RFRA, the government must show a compelling interest in enforcing the Mandate, not in the abstract, but as applied to particular nonexempt religious ministries. To do that, the government must prove that there's a substantive difference between the few ministries that qualify under Section 6033(a) and the many others that don't. The prior regulations said there was a difference because the "religious employers" that qualify for the Section 6033(a) exemption "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). This was never more than indiscriminate guesswork by government regulators. And the facts do not bear it out. To the contrary, the facts show how nonsensically narrow the "religious employer" exemption was. Moreover, rewarding or punishing a ministry on so trivial a basis as its standing under a single provision of the tax code undermines any possible "compelling governmental interest" in the Mandate.

Administrative agencies may not "act on hunches or wild guesses," particularly when, as here, they are freighted with such constitutional significance. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). The artificial demarcation between "religious employers" and nonexempt religious ministries hardly satisfies rational-basis review, much less strict scrutiny.

A. Using Section 6033(a) to identify ministries who hold deep religious convictions and hire like-minded employees is seriously underinclusive and irrational.

While the prior regulations exempted "religious employers" from the Mandate, that term encompassed only a narrow class of entities that are excused from having to file informational tax returns. 26 U.S.C. § 6033(a)(3)(A)(i), (iii).[2] The government defined "religious employer" in this way because, it said, ministries that must file informational tax returns are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. at 39,874.

It makes good sense for Congress to require some ministries to disclose more financial information than others. No one is questioning that. But using Section 6033(a) as a proxy for deciding which ministries are "religious enough" to be exempt from the Mandate is seriously underinclusive and yields bizarre results.

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[2] For historical background on Section 6033(a) and its legislative rationale, see generally Br. for *Amici Curiae* Dominican Sisters of Mary et al., in Supp. of Pet. for Cert., *Little Sisters of the Poor v. Burwell* (Jan. 11, 2016) (No. 15-105).

For proof, look no further than the ministries that have sought relief in this Court.

1. In the context of the Mandate, Section 6033(a) irrationally discriminates against the separately incorporated ministries of Catholic dioceses.

Among the hundreds of religious organizations that challenged the Mandate and the so-called accommodation are twelve Catholic dioceses and archdioceses, three of which were before the Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016): the Archdiocese of Washington, the Diocese of Pittsburgh, and the Diocese of Erie. Ministries within these dioceses are prime examples of why it was so unreasonable for the government to use the tax code to determine which ministries are exempt "religious employers" and which are not.

a. The exemption irrationally discriminates among Catholic schools.

Within the Archdiocese of Washington are fifty-three elementary schools that are organized under the Archdiocese and, thus, are recognized as "religious employers." Pet. for a Writ of Cert. at 15–16, *Roman Catholic Archbishop of Washington v. Burwell* (June 19, 2015) (No. 14-1505). But one school in particular, Mary of Nazareth Elementary School, is not exempt. *Id.* Why?

It's not because Mary of Nazareth doesn't have a close working relationship with its archbishop. To the contrary, the school was founded in response to a call by Cardinal James Hickey, who also dedicated the school's current facility. Mary of Nazareth, History, https://www.maryofnazareth.org/about/history/ (last visited Mar. 2, 2020). It's also not because Mary of

Nazareth doesn't depend on the Archdiocese for support. The school opened on farm property acquired by the Archdiocese, and its gymnasium was built with the Archdiocese's support. *Id.*

Nor is it because Catholicism isn't central to all that Mary of Nazareth does. To the contrary, the school's mission is to "prepar[e] children for lives of service to God and neighbor, through a rigorous academic program rooted in the faith and teachings of the Roman Catholic Church, as professed in the Creed, celebrated in the sacraments, lived in Christian virtue and affirmed in prayer."[3] The school uses the Archdiocese of Washington's model curriculum.[4] And its strategic plan, built on the Policies of Catholic Schools authored by Cardinal Wuerl, prioritizes the school's "Catholic Identity."[5]

Rather, what separates Mary of Nazareth from other Catholic elementary schools is that it does not serve one Catholic parish—*it serves seven*. Mary of Nazareth exists because the pastors of seven area parishes, at Cardinal Hickey's request, came together to establish a regional Catholic elementary school, the first in the Archdiocese in thirty years. *See* Mary of Nazareth, History, *supra*. These seven parishes continue to support Mary of Nazareth today. *Id.*

If Mary of Nazareth were a typical Catholic school, it would simply be part of the parish it served and,

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[3] Mary of Nazareth, Mission & Philosophy, https://www.maryofnazareth.org/about/mission-and-philosophy/ (last visited Mar. 2, 2020).

[4] Mary of Nazareth, Academics, https://www.maryofnazareth.org/academics/ (last visited Mar. 2, 2020).

[5] Mary of Nazareth, Strategic Plan, https://www.maryofnazareth.org/about/strategic-plan/ (last visited Mar. 2, 2020).

thus, an "integrated auxiliary" of the Archdiocese and a "religious employer" under the prior regulations. But because Mary of Nazareth has taken on a broader mission—*at the request of its archbishop*—it has a different organizational structure and was not deemed a "religious employer." As a result, the school is subject to the Mandate's crippling fines.

b. The exemption irrationally discriminates among Catholic social service ministries.

What is true of Catholic schools is also true of Catholic social service ministries. If Section 6033(a) of the tax code is used to identify exempt "religious employers," Catholic Charities of Erie will get an exemption but Catholic Charities of Pittsburgh will not, even though the two are indistinguishable in most every respect. This is simply because the former is a department within the diocese while the latter is separately incorporated. See Br. of Petitioners at 55, 58, *Zubik v. Burwell* (Jan. 4, 2016) (14-1418).

Catholic Charities of Pittsburgh is every bit as Catholic as its peer to the north. It serves as "the primary social service agency of the Diocese of Pittsburgh." Catholic Charities of Pittsburgh, Identity, Vision, Mission and Guiding Principles, http://www.ccpgh.org/page.aspx?pid=354 (last visited Mar. 2, 2020). Its mission is shaped by "the Gospel values and social teachings of the Catholic Church." *Id.* It works to "foster effective partnerships" among the Catholic faithful, "including mobilizing the resources of the parishes of the Diocese of Pittsburgh." *Id.* And although it is not a subsidiary of the diocese, Bishop David Zubik is still at the helm, serving as the Chair of its Member's Board. Catholic Charities of Pittsburg, Staff & Board, https://www.ccpgh.org/page.aspx?pid=351 (last visited Mar. 2, 2020).

The fact that Catholic Charities of Pittsburgh is incorporated separately in no way suggests that it has diluted its Catholic identity or its relationship to its bishop. But that is what the prior regulations presumed by making Section 6033(a) the proxy for a religious exemption. If the Third Circuit's decision is allowed to stand, Catholic Charities of Pittsburgh and similar ministries nationwide will be pressured to abandon their chosen corporate status to try to squeeze themselves into this cramped exemption.

2. The Section 6033(a) exemption irrationally discriminates against evangelical ministries whose independence from church control is key to their religious mission.

The exemption's effect on other ministries is just as pernicious. While some ministries incorporate separately simply for practical reasons, others are independent of church control as a matter of religious principle. For example, Westminster Theological Seminary (a petitioner in *East Texas Baptist University v. Burwell* (No. 15-35) (July 9, 2015), consolidated with *Zubik*) exists because its founders broke denominational ties in order to preserve their doctrinal integrity. Other evangelical nondenominational or parachurch ministries like Reaching Souls International (a petitioner in *Southern Nazarene University v. Burwell* (No. 15-119) (July 27, 2015), consolidated with *Zubik*) have discerned that they, too, better serve God by working alongside churches while remaining independent of them.

The "efficient administration of the internal revenue laws" may necessitate the filing of annual informational tax returns by independent seminaries and missions organizations. *See* 26 U.S.C. § 6033(a)(3). But to deny that Westminster Seminary and Reaching

Souls are "religious employers," and to deny them an exemption from the Mandate, simply because they have followed their religious convictions in this way is highly discriminatory.

a. Westminster Theological Seminary is independent from church control as a matter of principle.

Westminster Theological Seminary is a prime example of a religious institution that severed institutional ties to preserve its religious identity. Westminster is a "nondenominational seminary in the Presbyterian tradition." Br. of Petitioners at 26, *E. Tex. Baptist Univ. v. Burwell* (No. 15-35) (Jan. 4, 2016). Its trustees must be elders in a Presbyterian church, and its faculty must assent to the Westminster Confession of Faith, a foundational document in the Presbyterian tradition. *Id.* Yet, "[f]or historical and theological reasons, Westminster is independent of any one church or denomination and, therefore, does not qualify as an 'integrated auxiliar[y]' under the special IRS rule for seminaries." *Id.*

These "historical and theological reasons" are instructive. Westminster's history began with Princeton Theological Seminary, which was founded by the Presbyterian Church in the USA ("PCUSA") in 1812. Westminster Theological Seminary, History, https://www.wts.edu/history/ (last visited Mar. 2, 2020). Princeton Seminary had long been a strong defender of biblical Christianity and a champion of Reformed Christian scholarship. *Id.* But in 1929, led by a radical overhaul within the PCUSA, Princeton Seminary appointed new leaders who "declared that the belief in the infallibility of holy Scripture, the virgin birth, the bodily resurrection of our Lord, and the miracles of Jesus Christ [are] non-essential to the Christian Faith." Edwin H. Rian, *The Presbyterian Conflict*

(1992), at "Chapter 3: The Reorganization of Princeton Theological Seminary," *available at* https://opc.org/books/conflict/ (last visited Mar. 2, 2020).

In the wake of this revolution, four Princeton Seminary professors resigned and established Westminster Theological Seminary "to carry on and perpetuate the policies and traditions of Princeton Seminary as that institution existed prior to its reorganization by the General Assembly of the [PCUSA]." *Id.*, at "Chapter 4. Westminster Theological Seminary." The PCUSA did not take kindly to Westminster and told members they would "suffer discipline" if they associated with Westminster's independent missions board. *Id.*

This history continues to loom large at Westminster and guides its conviction that it must remain "independent of ecclesiastical control" in order to preserve its founding mission and its fidelity to Reformed Christianity. *Id.*

The terms of the "religious employer" exemption would reward Westminster if it abandoned its independence and submitted itself to a denomination, even if this meant compromising its theological convictions.[6] Ironically, it is *because* Westminster's founders

[6] As such, the "religious employer" exemption, reinvigorated by the decision below, violates an important public policy rooted in the First Amendment. Courts must avoid adopting or endorsing structures that "risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring). This may "cause a religious group to conform its beliefs and practices" to "the prevailing secular understanding" out of "fear of liability"—a "dange[r] that the First Amendment was designed to guard against." *Id.*; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious

put their convictions ahead of their careers that, under the prior regulations, Westminster was denied status as a "religious employer."

b. The calling of Reaching Souls International is to work alongside, not within, evangelical churches.

Reaching Souls International ("Reaching Souls") is likewise unambiguously religious and yet falls outside the narrow definition of a "religious employer" in the prior regulations.

Reaching Souls is a Christian missions organization founded in 1986 by a Southern Baptist minister and evangelist. Br. for Appellees at 8, *Sebelius v. Reaching Souls*, 794 F.3d 1151 (10th Cir. 2015) (No. 14-6028). Its work, which focuses on southern Africa, Cuba, and India, is to train and equip local people to share the Gospel, plant churches, and raise up other local leaders. Reaching Souls Int'l, Mission, https://reachingsouls.org/about-us/ (last visited Mar. 2, 2020).

Though Reaching Souls was founded by a Southern Baptist and adheres to the core beliefs of the Southern Baptist Convention, it is not formally affiliated with that denomination. Br. for Appellees at 16, *Sebelius v. Reaching Souls*, 794 F.3d 1151 (10th Cir. 2015) (No. 14-6028). In this way, Reaching Souls is like many

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organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." (footnote omitted)).

evangelical Christian ministries, which, for religious and historical reasons, typically do not have the sort of close financial and administrative ties to a particular church that the Section 6033(a) exemption requires. They are, rather, parachurch ministries—groups that work alongside churches by developing programs to address specific social issues or serve particular needs in the Christian community.

Since at least the nineteenth century, American evangelicals have favored nondenominational organizations as an efficient way to accomplish these goals and to foster cooperation among members of different churches that share common religious convictions.[7] The terms of the Section 6033(a) exemption essentially punish this choice. To qualify as a "religious employer" under the prior regulations, parachurch ministries like Reaching Souls would have to give up their calling to work alongside churches in their efforts to promote interfaith cooperation.

3. The exemption irrationally discriminates against ministries that raise their own financial support.

Congress has determined that administering the internal revenue laws does not require a church or an "integrated auxiliary" of a church to file an informational tax return. 26 U.S.C. § 6033(a), (a)(3)(A)(i). With the underlying purpose of Section 6033(a) in mind, Treasury has defined an "integrated auxiliary" as an

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[7] *See, e.g.*, Michael S. Hamilton, "Evangelical Entrepreneurs: the Parachurch Phenomenon," *Christianity Today*, Oct. 1, 2006, *available at* http://www.christianitytoday.com/ch/2006/issue92/6.33.html; *see also* George Marsden, "The Evangelical Denomination," in *Evangelicalism and Modern America* vii, xiv-xv (George Marsden ed., 1984).

entity that is "internally supported," and one mark of such an entity is whether it receives most of its support from its church or does its own fundraising. 26 C.F.R. § 1.6033-2(h)(1)(iii), (h)(4)(ii).

Because the prior regulations imported this distinction into the Mandate context, whether a ministry qualifies for the "religious employer" exemption may turn on so insignificant a detail as whether its fundraising campaign is run out of its own office or out of the church it is affiliated with.

This Court has seen this sort of fifty-percent rule before. In *Larson v. Valente*, the Court held that a rule that discriminates among religious groups based on how they raise their support "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." 456 U.S. 228, 246 (1982). Such a rule "must be invalidated unless it is justified by a compelling governmental interest" that is "closely fitted to further that interest." *Id.* at 247.

4. The exemption irrationally discriminates against ministries whose activities are not "exclusively religious."

Finally, the Section 6033(a) exemption may hinge on whether an employer's activities are judged to be "exclusively religious." 26 U.S.C. § 6033(a)(3)(A)(iii). This requirement may be useful under some circumstances to decide whether a ministry must submit an informational tax return.[8] But it makes no sense in the context of the Mandate, as it denies an exemption to

[8] *But see Lutheran Soc. Servs. of Minn. v. United States*, 758 F.2d 1283, 1289 (8th Cir. 1985) ("exclusively religious" test for integrated auxiliary was "contrary to Congress'[s] clear intent").

ministries that are (merely) "predominantly" or "very" religious. It also raises clear constitutional concerns. *Cf. Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (McConnell, J.) (state law that "g[ave] scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities" was unconstitutional).

B. This arbitrary religious classification system belies any claim to a compelling interest in forcing the Mandate on nonexempt ministries.

To survive strict scrutiny, the government must prove that enforcing the Mandate against nonexempt ministries like Mary of Nazareth Catholic Elementary School, Catholic Charities of Pittsburgh, Westminster Theological Seminary, and Reaching Souls International advances interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). To meet this burden, the government must do more than recite "broadly formulated interests"; rather, it must provide a justification for not "granting specific exemptions to particular religious claimants." *Hobby Lobby*, 573 U.S. at 726–27 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)) (internal quotation marks omitted).

And the government may not rely on a hunch about how a ministry's corporate structure or fundraising practices correlate to its religious mission and hiring practices. Agencies may not "act on hunches or wild guesses," especially in this constitutionally sensitive area. *See Ethyl Corp.*, 541 F.2d at 28. Nor may agencies

draw "categorical conclusion[s]" without reasoned explanation. *See Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 718 F.3d 974, 978 (D.C. Cir. 2013).

The prior regulations conceded that the government has no compelling interest in forcing the Mandate on religious groups that "are more likely than other employers to employ people of the same faith." 78 Fed. Reg. at 39,874. But using Section 6033(a) as a proxy to identify such employers was not sound. There is nothing rational, let alone compelling, about forcing a Catholic school to open its health plan to CASC services just because the school serves seven parishes instead of just one. Nor is it rational, let alone compelling, to refuse to exempt an evangelical ministry simply because it wants to advance its mission outside of traditional church structures rather than within them.

II. Denying an exemption to religious ministries cannot survive strict scrutiny both because the Mandate deprives tens of millions of the right to CASC coverage through their employers and because the government has other policy tools at its disposal.

Under the Third Circuit's decision invalidating the Final Rule, the Mandate will continue to be enforced against ministries like Mary of Nazareth Catholic Elementary School, even while the government has voluntarily left "tens of millions" without the assurance of free CASC coverage from their employers. *See Hobby Lobby*, 573 U.S. at 700 (quotation omitted). This makes it impossible for the government to prove a compelling interest. It also suggests that the government has other means at its disposal to ensure women have access to CASC services. One of those means,

Title X funding for family planning services, deserves special mention. The government has now retooled Title X to expand contraceptive access for women employed by ministries that object to the Mandate. Using Title X in this way is both less restrictive of religious exercise and more effective at accomplishing the government's goals.

A. The ACA's secular exemptions leave tens of millions outside the Mandate.

The government cannot insist that religious ministries be subjected to the Mandate (including the accommodation) when huge swaths of employees are beyond its reach for wholly secular reasons. In *Hobby Lobby*, this Court noted that the Mandate does not apply to tens of millions of people, 573 U.S. at 700, and this remains the case today.

First, despite the government's original claim that the exemption for grandfathered plans would quickly phase down, the number of these plans remains high. In 2018, twenty percent of firms that offer health benefits had grandfathered plans, and twenty-four million people were enrolled in these plans. Kaiser Family Found., Employer Health Benefits 2018 Annual Survey 9, 209 (2018), https://perma.cc/XM2A-JK2W.

Second, the ACA's small-business exemption covers 96% of employer firms, which together employ about 26% of all workers, or 33 million people. *See* 26 U.S.C. § 4980H(c)(2) (firms with fewer than 50 full-time employees need not provide their employees with health coverage); U.S. Census Bureau, 2016 SUSB Annual Data Tables by Establishment Industry, dataset for "U.S. and states, NAICS sectors, small employment

sizes less than 500," https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html.[9]

Taken together, because of the grandfathered-plan exemption and the small-business exemption, tens of millions of American workers have no assurance that their employers will provide them or their family members with free CASC coverage.

B. Given the secular exemptions to the Mandate and other policy tools available to the government, refusing to exempt religious ministries cannot survive strict scrutiny.

The ACA's willingness to leave tens of millions without guaranteed access to CASC services through employer-sponsored plans for *secular* reasons means that imposing the Mandate on *religious* groups cannot satisfy strict scrutiny. The government recognized this in the Final Rule and broadened the religious exemption. The decision below invalidating the Final Rule and re-narrowing that exemption cannot stand.

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[9] In 2016, of the 5.95 million firms across the United States, 5.7 million employed fewer than 50 people. In total, these small businesses employ about 33.4 million people, or about 26% of the estimated 126.8 million U.S. workers. *See* U.S. Census Bureau, *supra*; *see also* Sean Lowry, The Affordable Care Act and Small Businesses: Economic Issues, at 9 (Cong. Research Serv. Jan. 15, 2015), *available at* https://fas.org/sgp/crs/misc/R43181.pdf (relying on same dataset and deriving similar statistics for 2011).

1. The Mandate's secular exemptions leave "appreciable damage to [the government's] supposedly vital interest[s]."

Congress's decision to leave tens of millions without guaranteed access to free CASC services through their employers means that the Mandate does not advance a compelling interest. A law "cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

The existence of the grandfathered-plan exemption and the small-employer exemption suggests that the government in each case found policy interests that took precedence over its articulated interests in public health and gender equality. With the small-employer exemption, the desire to expand access to CASC coverage yielded to a desire to promote small business. The grandfathered-plan exemption likely reflects a desire to make good on President Obama's promise that "[i]f you like your health care plan, you can keep your health care plan." *See* Elizabeth Weeks Leonard, *Can You Really Keep Your Health Plan? The Limits of Grandfathering Under the Affordable Care Act*, 36 J. Corp. L. 753, 754 (2011). But more practically, it gives an out to companies that want to "avoi[d] the inconvenience of amending an existing plan." *Hobby Lobby*, 573 U.S. at 727.

Perhaps these were legitimate policy choices for Congress to make. But surely, neither is more important than the commitment to religious liberty reflected in the First Amendment and RFRA, a commitment that is one of the most distinctive aspects of the American project.

On the other hand, perhaps the government felt that these exemptions did not injure its interests at all. That would make sense, as the government knew when it was designing these exemptions that almost all women had access to contraceptives before the Mandate went into effect. According to the Institute of Medicine (IOM) report, 99% of women who have ever had sex and 89% of currently sexually-active women use contraceptives. IOM, Clinical Preventive Services for Women: Closing the Gaps, at 103 (2011) ("IOM Report") (citing William D. Mosher & Jo Jones, U.S. Dep't of Health & Human Servs., Use of Contraception in the United States: 1982-2008, 5, 9 (2010)).

The government also created these exemptions knowing that the IOM Report was unable to show any real correlation between cost and access to contraceptives. Only one paragraph in the entire report attempts to make this correlation, but the studies it relies on do not connect the dots. *Id.* at 109. The first study explores the connection between cost and access to preventive care generally, but it doesn't focus on contraception, and collected data only from low income populations. *Id.*; *see* Helen V. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 428–29 (2013). The second also says nothing about contraceptive access, as it studied women aged 65-69 enrolled in Medicare. IOM Report at 109; Alvaré, *supra*, at 429. Nothing in the report shows that women enrolled in an employer-sponsored health plan forgo contraception when it is not free.

Perhaps the government prioritized economic growth and political promises over religious liberty. Or maybe it accepted that the alleged connection between free CASC services and public health is unproven. Either

way, the government now recognizes that these two massive exemptions make it impossible to justify overriding the religious objections of ministries like the Little Sisters of the Poor.

2. The government can advance its interests in other ways, as it's now doing by expanding access to CASC services through Title X.

The Mandate's secular exemptions are also relevant to RFRA's least-restrictive-means requirement, which this Court has described as "exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. To survive strict scrutiny, the government would need to prove that forcing nonexempt religious ministries to comply with the Mandate is "'actually necessary' to achieve its interest." *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011)). It cannot make that showing.

As this Court observed in *Hobby Lobby*, "[t]he most straightforward way of [achieving the Mandate's purpose] would be for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 573 U.S. at 728. In the Final Rule, the government identified several federal programs that could do just that. One of those, Title X, deserves special mention because the government has now retooled that program to do as the Court suggested.

Title X is the National Family Planning Program administered by the Department of Health and Human Services (HHS). Enacted in 1970, Title X authorizes HHS "to make grants to and enter into contracts . . . to assist in the establishment and

operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). Title X is "the only federal program dedicated solely to supporting the delivery of family planning and related preventive health care." HHS, Office of Population Affairs, Title X Family Planning Annual Report, 2018 National Summary, at ES-1 (Aug. 2019), *available at* https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2018-national-summary.pdf. In fiscal year 2018, it received over $286 million in federal funding. *Id.* "Presently, the Title X program funds approximately 90 public health departments and community health, family planning, and other private nonprofit agencies through grants, supporting delivery of family planning services at almost 4,000 service sites." 84 Fed. Reg. 7714, 7720 (Mar. 4, 2019).

Congress instructed HHS to give "priority" to "low-income families" in awarding Title X grants, but gave the Secretary of HHS broad discretion to define "low-income family" "in accordance with such criteria as he may prescribe" to ensure that "economic status" is not a barrier to accessing family planning services. *See* 42 U.S.C. § 300a-4(c). Accordingly, under HHS regulations, "low-income family" is generally defined by reference to the federal Poverty Guidelines, but also includes members of higher-income families if HHS finds that they "are unable, for good reasons, to pay for family planning services." 42 C.F.R. § 59.2.

In 2000, HHS exercised its discretion and found "good reason" to define low-income family to include "unemancipated minors who wish to receive [family planning] services on a confidential basis." 42 C.F.R. § 59.2; *see* 84 Fed. Reg. at 7734. Given this policy and interpretive choice, there was no reason why HHS

could not also find "good reason" to open Title X to women employed by ministries with religious objections to the Mandate.

HHS has now taken that step. On March 4, 2019, it finalized a rule, *see* 84 Fed. Reg. at 7734, which provides:

> For the purpose of considering payment for contraceptive services only, where a woman has health insurance coverage through an employer that does not provide the contraceptive services sought by the woman because the employer has a sincerely held religious or moral objection to providing such coverage, the project director may consider her insurance coverage status as a good reason why she is unable to pay for contraceptive services.

42 C.F.R. § 59.2.

With policy tools like Title X at hand, it was never "actually necessary" for the government to hijack ministries' health plans in order to expand access to CASC services. *Brown*, 564 U.S. at 799. And Title X is not only less restrictive of religious exercise—it's a more effective means of achieving the government's goals.

According to The Guttmacher Institute,[10] Title X is better than traditional health insurance at "helping

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[10] The Guttmacher Institute is the former research affiliate of Planned Parenthood and focuses on "advancing sexual and reproductive health and rights in the United States and globally." The Guttmacher Institute, About Us, https://www.guttmacher.org/about (last visited Mar. 3, 2020). The IOM relied on Guttmacher's research and advice throughout its 2011 report, *see* IOM Report at 62, 108, 109, and that report served as the basis

clients obtain—and quickly begin using—a contraceptive method best suited to them." *See* Rachel Benson Gold, *Going the Extra Mile: The Difference Title X Makes*, 15 Guttmacher Pol'y Rev. 13, 13-14 (2012), *available at* https://www.guttmacher.org/sites/default/files/article_files/gpr150213.pdf. Title X removes obstacles to contraceptive access because funded clinics are "more likely . . . to provide contraceptives on-site, rather than giving women a prescription that must be filled at a pharmacy." *Id.* at 14. This saves women from having to "make two trips . . . to get the contraceptives she needs," which can be especially important "for a woman who is juggling the demands of school, family, or work." *Id.* At least when it comes to contraceptives, Guttmacher believes Title X-funded clinics are superior to other women's healthcare providers. *See id.*

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for the Mandate, *see Hobby Lobby*, 573 U.S. at 742-43 (Ginsburg, J., dissenting).

CONCLUSION

For the foregoing reasons, *amicus* The Catholic Benefits Association respectfully submits that the decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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