

No. 14-12696

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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ETERNAL WORD TELEVISION NETWORK, INC.,  
Plaintiff-Appellant,  
STATE OF ALABAMA,  
Plaintiff,  
v.

SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S.  
DEPARTMENT OF HEALTH AND HUMAN SERVICES, SECRETARY OF THE U.S.  
DEPARTMENT OF LABOR, U.S. DEPARTMENT OF LABOR, SECRETARY OF THE U.S.  
DEPARTMENT OF THE TREASURY, U.S. DEPARTMENT OF THE TREASURY,  
Defendants-Appellees.

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On Appeal from the United States District Court  
for the Southern District of Alabama, No. 1:13-cv-00521-CG-C

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**MOTION OF *AMICI CURIAE* CARMELITE SISTERS OF THE MOST  
SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY  
OF ALMA, MICHIGAN, AND AVE MARIA UNIVERSITY FOR LEAVE TO  
FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned attorney for *amici curiae* Carmelite Sisters of the Most Sacred Heart of Los Angeles, Religious Sisters of Mercy of Alma, Michigan, and Ave Maria University, certifies that, in addition to those persons and entities identified in the briefs previously filed in this matter, the following persons or entities may have an interest in the outcome of this case:

1. Ave Maria University
2. Carmelite Sisters of the Most Sacred Heart of Los Angeles
3. Gibson, Dunn & Crutcher LLP
4. Hungar, Thomas G.
5. Religious Sisters of Mercy of Alma, Michigan

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel states that Carmelite Sisters of the Most Sacred Heart of Los Angeles, Religious Sisters of Mercy of Alma, Michigan, and Ave Maria University have no parent corporations and do not issue stock.

Dated: May 16, 2016

/s/ Thomas G. Hungar

THOMAS G. HUNGAR

*Counsel for Amici Curiae*

**MOTION OF *AMICI CURIAE* CARMELITE SISTERS OF THE MOST SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY OF ALMA, MICHIGAN, AND AVE MARIA UNIVERSITY FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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Pursuant to 11th Circuit Rule 35-6, *amici curiae* Carmelite Sisters of the Most Sacred Heart of Los Angeles, Religious Sisters of Mercy of Alma, Michigan, and Ave Maria University respectfully seek leave to file the accompanying brief in support of rehearing en banc in this matter. In support of this request and in demonstration of good cause, *amici* state as follows:

1. *Amici* Carmelite Sisters of the Most Sacred Heart of Los Angeles (“Carmelite Sisters”), Religious Sisters of Mercy of Alma, Michigan (“Religious Sisters”), and Ave Maria University are Catholic non-profits that, following the authoritative teaching of the Catholic Church, believe that use of artificial contraception is a grave moral evil. Although *amici* are religious nonprofit organizations that enjoy the same corporate and religious status as any Catholic diocese, they are not considered “religious employers” exempt from the contraception mandate promulgated by the Department of Health and Human Services (HHS) because the government does not consider their expressions of belief to be “exclusively religious activit[y].” 26 U.S.C. § 6033(a)(3)(A)(iii); *see* 45 C.F.R. § 147.131(a) (“[A] ‘religious employer’ is an organization . . . referred to in section 6033(A)(3)(A)(i) or (iii) of the Internal Revenue Code[.]”).

Accordingly, *amici* are subject to the same regulations as petitioner Eternal Word Television Network, Inc. (“EWTN”). In light of their strong interest in defending religious freedom, the Religious Sisters and Carmelite Sisters have submitted briefs supporting the petition for certiorari in *Little Sisters of the Poor v. Burwell*, No. 15-105, and all three *amici* filed briefs supporting the petitioners in *Zubik v. Burwell*, No. 14-1418.

2. *Amici* are particularly concerned about the predicament of EWTN, which is a critical source of news, other media, and spiritual enrichment for Catholics in the United States. HHS’s regulations put EWTN’s very existence at stake, by forcing it either to violate its religious beliefs by participating in the provision of contraception to its employees or to pay crippling monetary penalties for refusing to comply with the contraception mandate.

3. *Amici* believe that their brief will assist the Court in deciding whether to review the important question whether HHS’s mandate and accommodation violates the Free Exercise and Establishment Clauses of the First Amendment.

Dated: May 16, 2016

/s/ Thomas G. Hungar  
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### **CERTIFICATE OF SERVICE**

I, Thomas G. Hungar, hereby certify that on this 16th day of May, 2016, a true and correct copy of the foregoing Motion of *Amici Curiae* Carmelite Sisters of the Most Sacred Heart of Los Angeles, Religious Sisters of Mercy of Alma, Michigan, and Ave Maria University for Leave to File Brief in Support of Petition for Rehearing En Banc was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record. I further certify that on the same date I have caused four copies of the foregoing motion to be delivered to the Clerk of the Court.

Dated: May 16, 2016

/s/ Thomas G. Hungar  
THOMAS G. HUNGAR

*Counsel for Amici Curiae*

No. 14-12696

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IN SUPPORT OF PETITIONER**

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1. Ave Maria University
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Dated: May 16, 2016

/s/ Thomas G. Hungar  
THOMAS G. HUNGAR

*Counsel for Amici Curiae*

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## STATEMENT OF THE ISSUE

Whether the government's "accommodation" of religious non-profit organizations subject to the contraception mandate, 45 C.F.R. § 147.131, violates the Religious Freedom Restoration Act (RFRA) and the First Amendment.

## STATEMENT OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are religious non-profit organizations that express their love for and devotion to God through physical acts of charity, compassion, and education. *Amici* are also passionate defenders of religious liberty who oppose efforts to coerce religious believers into complicity with sin. As religious non-profits, *amici* are subject to the contraception mandate and so-called "accommodation" promulgated by the Department of Health and Human Services (HHS), and thus have an interest in preserving religious freedom. *Amici* submit this brief to highlight the fatal constitutional flaws of the mandate and accommodation and to encourage this Court to rehear the case en banc.

**Carmelite Sisters of the Most Sacred Heart of Los Angeles ("Carmelite Sisters")**: The Carmelite Sisters manage and staff three health care facilities for the elderly, two child care centers, and a spiritual retreat center. They also staff two parochial schools in Miami and Coral Gables, Florida. The Carmelite Sisters'

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<sup>1</sup> No counsel for a party authored any portion of this brief, and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

basic mission is to “promote a deeper spiritual life of God’s people through health care, education and spiritual retreats,” and these facilities and centers are the physical expression of their prayers and worship.

**Religious Sisters of Mercy of Alma, Michigan (“Religious Sisters”):** The Religious Sisters operate two health care clinics, and the sisters also teach and work for various dioceses around the country. The Religious Sisters are dedicated to providing comprehensive health care, understood by the Religious Sisters as the care of the entire person (spiritual, intellectual, physical, and emotional).

**Ave Maria University (“AMU”):** Based near Naples, Florida, AMU was founded in 2003 in fidelity to Christ and His Church in response to the call of Vatican II for greater lay witness in contemporary society. AMU exists to further teaching, research, and learning at the undergraduate and graduate levels in the abiding tradition of Catholic thought. AMU is a Catholic, liberal arts institution devoted to Mary the Mother of God, inspired by St. John Paul II and Blessed Teresa of Calcutta, and dedicated to the formation of joyful, intentional followers of Jesus Christ through Word and Sacrament, scholarship and service.

The Religious Sisters and Carmelite Sisters filed an *amicus curiae* brief supporting the petition for certiorari in *Little Sisters of the Poor v. Burwell*, No. 15-105 (U.S.), and all three *amici* filed briefs supporting the petitioners in *Zubik v. Burwell*, No. 14-1418 (U.S.), in which the Supreme Court declined to decide

whether HHS's regulations violate RFRA. *Amici* are concerned about the fate of petitioner Eternal Word Television Network, Inc. ("EWTN"), a valued source of news and spiritual enrichment for Catholic communities worldwide.

### **ARGUMENT**

If the Supreme Court ultimately holds that HHS's regulations do not violate RFRA, the First Amendment will be all that stands between countless religious non-profit organizations and financial ruin. Here, EWTN raised a substantial constitutional challenge to HHS's contraception mandate and "accommodation" under the Free Exercise and Establishment Clauses, but the panel majority erroneously rejected those claims in six short paragraphs, adopting a new, restrictive view of the Religion Clauses that conflicts with binding precedent of the Eleventh Circuit and the Supreme Court. *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 14-12696, 2016 WL 659222, at \*28-30 (11th Cir. Feb. 18, 2016). The Court should thus rehear the case en banc to give EWTN's constitutional claims fuller consideration and correct the panel's ruling on these "question[s] of exceptional importance." Fed. R. App. P. 35(a).

The accommodation arbitrarily discriminates between religious non-profits like petitioner and *amici*, which remain subject to the contraception mandate, and "churches" and their "integrated auxiliaries," which are altogether exempt from the mandate. By so doing, the accommodation violates the well-established principle

that, “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). And for much the same reason, the accommodation violates the Establishment Clause’s prohibition of laws that draw “explicit and deliberate distinctions between different religious organizations.” *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982). Because the Establishment Clause prohibits governmental favoritism toward particular religious institutions, provisions like the accommodation—which exempts religious organizations that allegedly hire mostly co-religionists but not those that allegedly engage in ecumenical hiring practices—are unconstitutional because they draw distinctions among religious entities on the “basis of the [perceived] ‘pervasiveness or intensity’ of their religious beliefs.” *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2010) (O’Scannlain, J., concurring) (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008)).

If these bedrock constitutional principles are not upheld, EWTN and countless other religious non-profits will be subjected to crushing penalties that will force them to shutter their ministries and retreat from the public sphere, allowing only “churches” and their “integrated auxiliaries” to operate public ministries. Squeezing religious non-profits like EWTN and *amici* out of public life would greatly diminish the vibrant diversity of religious expression that presently

exists within the broad-based religious non-profit community. The government has no right to use its coercive power to modify the nature or form of religious expression, and this Court should give full effect to the limits that the First Amendment places on such coercion.

Furthermore, the Supreme Court is unlikely to decide these important constitutional questions anytime soon. In *Zubik*, the Court limited its grant of certiorari to the question whether HHS's "accommodation" of religious non-profits violates RFRA. *See* 136 S. Ct. 444 (2015). In addition to declining to decide that question, the Court's decision left open the question whether the accommodation violates the Religion Clauses of the First Amendment. It is thus all the more imperative that this Court rehear petitioner's claims under the Religion Clauses and correct the panel's misapplication of controlling First Amendment precedent.

#### **I. THE ACCOMMODATION VIOLATES THE FREE EXERCISE CLAUSE.**

The panel majority rejected the plaintiffs' free-exercise claim on the theory that the contraception mandate and accommodation satisfy rational-basis review, which applies to neutral and generally applicable laws burdening religion. *Eternal Word*, 2016 WL 659222, at \*28-29; *see, e.g., GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1255 n.21 (11th Cir. 2012). In so holding, the panel overlooked the government's discriminatory treatment of religious non-profits like petitioner and violated the Supreme Court's mandate to apply strict scrutiny to all laws that draw

“explicit and deliberate distinctions between different religious organizations.”

*Larson*, 456 U.S. at 247 n.23.

**A. The Accommodation Is Not Neutral Because It Subjects Certain Religious Organizations To Disparate And Discriminatory Treatment.**

“The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (opinion of Goldberg, J.). The “touchstone” of analysis under the Free Exercise Clause is therefore the rule that government generally must treat religion with neutrality. *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005). Even when there is no showing of “invidious intent in enacting a law,” “unequal treatment [of religious groups] is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16, 1239 (11th Cir. 2004).

The accommodation plainly contravenes this neutrality principle because it explicitly discriminates among religious organizations, denying full exemption from the contraception mandate to those groups that the government arbitrarily deems insufficiently “religious.” 45 C.F.R. § 147.131(a). Specifically, “churches” and “their integrated auxiliaries” are exempt from the contraceptive mandate, while



other religious organizations—many of which engage in the same activities, share the same religious convictions, and provide health benefits in the same ways—are not. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii); 45 C.F.R. § 147.131(a). For example, a Catholic diocese is exempt from the mandate even if it operates a child care center or assisted living facility, but a Catholic religious institute of nuns operating the same types of facilities is not. Similarly, a church that hires numerous staff members who do not share the church’s religious objection to abortion would be exempt from the mandate, while a non-profit religious media organization that hires predominantly employees of the same faith who share its objection to abortion would not. As a result, only churches and their integrated auxiliaries may follow their religious convictions without incurring harsh financial penalties when providing health care to their employees.

HHS thus explicitly privileges the religious exercise of some religious organizations over the religious exercise of other religious organizations (including petitioner and *amici*) that express their religious beliefs through activities the government does not consider “exclusively religious.” 26 U.S.C. § 6033(a)(3)(A)(iii). This discriminatory classification of religious entities into favored and non-favored classes is unambiguously non-neutral.

Although the panel majority correctly observed that non-neutral laws burdening religion must satisfy strict scrutiny, it mistakenly held that the

contraception mandate and the accommodation are neutral because they “distinguish among [religious] organizations on the basis of their tax status,” in that churches (unlike other non-profit entities) are exempt from the requirement to file information returns. *Eternal Word*, 2016 WL 659222, at \*29. That rationale is wholly unpersuasive, however, because the duty to file information returns does not impose a “religious hardship” and thus poses no free-exercise problem. *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion). By contrast, the accommodation imposes ruinous financial penalties on disfavored religious entities on the basis of a minor and irrelevant distinction in the Tax Code that HHS asserts is correlated with religious zeal. Accordingly, the accommodation does precisely what the Free Exercise Clause forbids the government to do. *See Larson*, 456 U.S. at 247 n.23 (a law that makes “explicit and deliberate distinctions between different religious organizations” is “not . . . a facially neutral statute”).

The government’s decision to exempt churches and their integrated auxiliaries from the mandate altogether—rather than subjecting them to the so-called accommodation—also dooms the regulations because “in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason”’ under the Free Exercise Clause. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)); *see also*

*Bowen*, 476 U.S. at 708 (plurality opinion) (“If a state creates . . . a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent.”); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (discriminatory application of city ordinance against one religious group violated First Amendment because other religious groups were exempt). The panel majority’s insistence in this case that the contraception mandate and accommodation are neutral thus cannot be reconciled with its repeated acknowledgment that HHS’s regulations expressly discriminate among religious groups. *See Eternal Word*, 2016 WL 659222, at \*3-4, \*24-25, \*29.

#### **B. The Accommodation Cannot Satisfy Strict Scrutiny.**

Because the regulations are not neutral, they “must undergo the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. Strict scrutiny requires the government “to show there is a compelling governmental interest and that the law is narrowly tailored.” *GeorgiaCarry.Org*, 687 F.3d at 1255 n.21. Although the panel majority declined to say whether the accommodation survives strict scrutiny for free-exercise purposes, the panel held that it passes muster under RFRA’s identical standard. *See Eternal Word*, 2016 WL 659222, at \*19-29. This, too, was error.

Regardless of whether the government has a compelling interest in ensuring access to contraception, it has no compelling interest in requiring religious non-

profits to participate in providing contraception. Indeed, by exempting churches and their auxiliaries from the contraception mandate, HHS has effectively conceded that it has no compelling interest in requiring those organizations to provide contraceptive coverage. 47 C.F.R. § 147.131(a). Yet HHS purports to have such an interest in requiring religious non-profits that hold precisely the same religious beliefs to implement the mandate through the accommodation, on the ground that churches and their auxiliaries “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). HHS’s reliance on this assumed difference in hiring practices is especially puzzling in light of its decision to abandon the requirement that a “religious employer” “primarily employ[] persons who share its religious tenets.” *Compare* 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012), *with* 78 Fed. Reg. at 39,873-74; *see also* 80 Fed. Reg. 41,318, 41325 (July 14, 2015) (“Hiring coreligionists is not itself a determinative factor as to whether an organization should be accommodated or exempted from the contraception requirements.”). Indeed, a review of the administrative record revealed no comments suggesting that houses of worship or their auxiliaries hire only employees of the same faith or even that they hire a greater proportion of such employees than do religious non-profits.

Perhaps recognizing the flimsiness of this argument for denying the exemption to religious non-profits, HHS invokes “the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship, such as the special treatment given to those organizations in the [Tax] Code.” 80 Fed. Reg. 41,318, 41,325 (July 14, 2015). But HHS’s alleged respect for the Tax Code’s supposedly “longstanding” tradition of treating churches differently from religious non-profits is no defense. As an initial matter, the Tax Code’s separate treatment of churches and other religious organizations relates only to the filing of information returns, not the substantive mandates of the Code, so it provides no colorable justification for the dramatic difference in substantive burdens mandated by the regulations.

Moreover, this minor distinction dates only to the Tax Reform Act of 1969; the pre-1969 version of the Tax Code did not require “religious organizations and certain of their affiliates, schools and colleges” to file information returns. *See* Staff of the Joint Committee on Internal Revenue Taxation, *General Explanation of the Tax Reform Act of 1969* 52 (1970). And there is no indication in the legislative history of the Tax Reform Act that Congress viewed the religious beliefs of non-profit organizations as less important or legitimate. Congress concluded in 1969 that the information filing requirement, which “provide[s] the [IRS] with the information needed to enforce the tax laws[,]” should be expanded.

*Id.* at 52-53. The House thus initially proposed a bill providing that “every [tax]-exempt organization . . . must file an annual information return[.]” Conf. Rep. No. 91-782, Statement of the Managers on the Part of the House, 1969 U.S.C.C.A.N. 2391, 2400 (Dec. 22, 1969). However, “in view of the traditional separation of church and state,” the Senate “Committee agreed to exempt churches from the requirement of filing annual information returns,” 115 Cong. Rec. 32,148 (Senate Committee Report) (1969), and thus included an amendment to the House bill exempting “churches and their integrated auxiliary organizations and associations or conventions of churches” from the new information filing requirement, 1969 U.S.C.C.A.N. at 2400. The “conference substitute follow[ed] the Senate amendment except that it also exempt[ed] from the filing requirement any religious order with respect to its exclusively religious activities (but not including any educational, charitable, or other exempt activities . . . ) [.]” *Id.* at 2401. Far from expressing a view about the orthodoxy of non-profit religious organizations, Congress simply recognized that it would violate the tradition of respecting church autonomy to require churches to disclose financial information to the government.

Moreover, even if the distinctions in the Tax Code were relevant (which they are not), the preservation of an inapposite regulatory “tradition” is not a compelling government interest that would justify requiring religious organizations to violate their faith. That is especially true here, where the Tax Code does not embody any

“tradition” of imposing substantial burdens on religious exercise. Accordingly, this Court should reject HHS’s *post hoc* attempt to concoct a compelling governmental interest by pointing to irrelevant distinctions in the Tax Code. HHS’s shifting rationale for the “accommodation” reveals that it has no compelling interest in forcing religious non-profits to implement the contraception mandate. And in light of the government’s recent concession in *Zubik* that the accommodation *could* be altered for many employers to eliminate their involvement in providing contraceptive coverage, it is evident that the accommodation is not narrowly tailored, either. Supp. U.S. Br. 14-17, *Zubik* (No. 14-1418). The “accommodation” therefore fails to withstand strict scrutiny and must be struck down under the Free Exercise Clause.

## **II. THE ACCOMMODATION VIOLATES THE ESTABLISHMENT CLAUSE.**

Contrary to the panel majority’s holding, the HHS regulations also violate the Establishment Clause because they have the effect of conferring an advantage on those religious organizations that HHS perceives to be more intensely religious—*i.e.*, organizations that supposedly engage primarily in worship and prayer and predominantly hire people who share their religious convictions—while disadvantaging those organizations that engage in broader religious ministries.

The Supreme Court has disavowed legal distinctions based on the government’s perception of whether an entity 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.” *Ibid*.

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 11, *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”). The government’s argument prevailed; the Ninth Circuit majority held 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.” *Spencer*, 633 F.3d at 728 (O’Scannlain, J., concurring) (quotation marks and citation omitted); *see 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 Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (“an exemption solely for ‘pervasively sectarian’ schools would itself raise First Amendment concerns—discriminating between kinds of religious schools”).

Here, the “pervasiveness or intensity” of belief—as manifested in an organization’s hiring practices—is the asserted basis for the distinction between churches and other entities. This distinction is unnecessary, as HHS could have drawn a clear, constitutional boundary around the exemption by granting it only to organizations with sincere religious objections. Faced with such an obviously constitutional alternative, this Court should not hesitate to invalidate a regulatory regime that countenances arbitrary discrimination.

### CONCLUSION

The Court should grant the petition for rehearing en banc and reverse the judgment of the District Court.

Dated: May 16, 2016

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and 11th Circuit Rule 35-6 because the brief, exclusive of the cover page, certificate of interested persons and corporate disclosure statement, table of contents, table of citations, certificate of service, and this certificate, is no longer than 15 pages and is printed in a 14-point proportionally spaced typeface.

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**CERTIFICATE OF SERVICE**

I, Thomas G. Hungar, hereby certify that on this 16th day of May, 2016, a true and correct copy of the foregoing Brief of *Amici Curiae* Carmelite Sisters of the Most Sacred Heart of Los Angeles, Religious Sisters of Mercy of Alma, Michigan, and Ave Maria University in Support of Petitioner was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record. I further certify that on the same date I have caused seven copies of the foregoing brief to be delivered to the Clerk of the Court.

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