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In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,
Petitioners,
v.
SYLVIA BURWELL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

BRIEF FOR *AMICI CURIAE* DOMINICAN SISTERS OF MARY, MOTHER OF THE EUCHARIST; SISTERS OF LIFE; AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Dominican Sisters of Mary, Mother of the Eucharist is a Roman Catholic community of women religious based in Ann Arbor, Michigan. The community was founded in the Dominican tradition to spread the witness of religious life in accord with Saint John Paul II's vision for a New Evangelization. The Dominican Sisters profess the vows of poverty, chastity and obedience, along with a contemplative emphasis on Eucharistic adoration and Marian devotion, for the salvation of souls and the building of the Church throughout the world. Women religious have been an integral part of the history of Catholic education in the United States. The Dominican Sisters seek to continue the tradition of educating generations of young people in their Faith and most of all, to bring youth into deeper relationship with Christ through a faith formation that includes liturgical, doctrinal, spiritual and moral dimensions.

Sisters of Life is a Roman Catholic community of contemplative and active women religious. John Cardinal O'Connor founded The Sisters of Life in 1991 for the protection and enhancement of the sacredness of every human life. In addition to the traditional vows of poverty, chastity, and obedience, The Sisters of Life are consecrated under a special fourth vow to protect and enhance the sacredness of human life. The Sisters of Life community includes 80 Sisters from around the

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[1] Counsel for all parties have submitted blanket consent to the filing of amicus briefs in this case. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

world, who minister to pregnant women through hospitality, practical assistance, spiritual retreats, and healing. In addition, The Sisters of Life promote Roman Catholic teaching about the value of life in churches and communities through pro-life activities and a wide variety of educational programs.

Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. In pursuit of these constitutional principles, JEP has filed *amicus curiae* briefs in numerous cases before the federal courts of appeals and the Supreme Court, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

SUMMARY OF ARGUMENT

Amici write to highlight the arbitrary nature of the decision by the Department of Health and Human Services (HHS) to base the availability of religious exemptions to the HHS contraceptive mandate ("mandate" or "contraceptive mandate") not on factors that go to an employer's religious character, but on its federal tax filing requirements. The HHS mandate relies on categories set forth in Internal Revenue Code[2] § 6033 to distinguish between religious organizations. But the history and application of section 6033 show that the classification was solely intended to facilitate administration of the tax laws, not to draw a line between religious institutions whose free exercise was fully protected and those who received less consideration. In short, the availability of an exemption to the mandate should turn on an organization's claim to religious exercise rights, not its tax filing obligations.

By selecting section 6033, HHS created a discriminatory gerrymander that wanders far from its regulatory justification while utterly failing to respect the profound and immutable religious objections of the Petitioners and the religious *amici*. HHS's decision to gerrymander the exemption in this way was intentional; it knew that in significant cases, virtually identical religious groups would be treated differently based on nothing more than their classification under tax law.

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[2] Unless otherwise specified, any reference to "Code" in this brief refers to the Internal Revenue Code, which is found at Title 26 of the United States Code.

If HHS had been serious about creating an exemption that took religious objections seriously, it could have modeled its exemption after one from employment law. Title VII of the Civil Rights Act of 1964 provides a tried-and-true mechanism for protecting both employee and employer civil rights, and includes a religious exemption much more suitable than that of section 6033. The Title VII exemption, unlike the gerrymandered one concocted by HHS, captures religious orders like *amici* and Petitioners. That definition has served as the model for other religious exemptions in employment statutes and regulations, and better reflects the likelihood that a religious organization may hire employees who share the tenets of its faith. It is a simple and more effective alternative to the flawed and ineffectual exemption HHS devised for the invasive contraceptive mandate.

ARGUMENT

When HHS proposed the contraceptive mandate, the regulation triggered thousands of comments pointing out the serious risks to religious freedom if the government were to force employers opposed to contraception or abortion to provide contraceptive or abortifacient drugs or services. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

The initial version of the rule, which contemplated adding preventive services but made no mention of contraception, included no exemptions for religious groups. After the scope of the subsequent contraceptive mandate triggered serious First Amendment and Religious Freedom Restoration Act (RFRA) concerns, however, HHS chose a tripartite scheme: Houses of worship and some affiliated entities would be entirely exempt from the mandate, while, in sharp contrast, all other religious organizations would have to settle for a so-called "accommodation." All other employers would be required to follow the rule regardless of religious objection.[3]

Amici challenge the distinction between the first two categories. In its current absurd form, the religious exemption treats nearly-identical religious entities differently based on their tax return filing obligations under Internal Revenue Code § 6033. But the

[3] This Court held in *Burwell v. Hobby Lobby Stores, Inc.* that even for-profit religious employers (that by definition could not fit within the not-for-profit categories of section 6033) enjoy religious freedom protection under RFRA and therefore must be relieved from complying with the contraceptive mandate. 134 S. Ct. 2751, 2768-69 (2014).

distinction that section 6033 draws between filers and non-filers is only relevant to efficient administration of the tax laws. It has no other significance or meaning. Section 6033 is therefore an entirely unsuitable provision for defining the limits of a religious exemption. And, as it turns out, the government deliberately chose to deploy section 6033 as the basis for the exemption because it was more concerned about which religious objectors it could pull into the contraceptive mandate than with drawing an evidence-based exemption that took seriously the objectors' sincere beliefs.

I. The Government Wrongly Conditioned the Religious Exemption on Return Filing Requirements Under I.R.C. § 6033

The arbitrary division of religious institutions into more- and less-protected castes is at the heart of this case. Had HHS chosen to group the Little Sisters of the Poor with churches and integrated auxiliaries that have similar religious objections, the Sisters would have received a full exemption from the contraceptive mandate and would not now be faced with choosing between violating a fundamental tenet of their religious faith or facing crushing fines. Ultimately, however, HHS officials made a momentous decision to distinguish between groups of religious organizations, even those with similar or identical religious beliefs and employment practices, giving some a full exemption from the rule but only allowing others a mere "accommodation" that would still force these groups to play an important role in providing contraceptives. Moreover, the regulators distinguished between the two classes by importing a distinction from

tax law that has no relation to the religious freedom concerns that it purports to "accommodate."

Exempted organizations include only "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," as those terms are used in clauses (i) and (iii) of § 6033(a)(3)(A) of the Code, and organized and operated as nonprofit entities. 45 C.F.R. § 147.131(a) (citing I.R.C. §§ 6033(a)(3)(A)(i) & (iii)). Merely because they fall into a different category for tax filing purposes, religious organizations like Petitioners are offered an "accommodation" that in actuality does not address their religious objections to facilitating the provision of contraceptives and abortifacients to their employees and dependents. While differentiating between religious organizations may make sense for administration of the tax laws, section 6033 is not suitable for determining which religious employers will have more free religious exercise than others.

A. I.R.C. § 6033 Prescribes Purely Informational Return Filing Requirements for Tax-Exempt Organizations

Throughout the long history of taxation in the United States, the tax-writing committees of Congress have generally tried to avoid entangling the Internal Revenue Service in First Amendment religious considerations, imposing on religious organizations only what Congress believed to be the minimum necessary tax and reporting burdens.

With the HHS contraceptive mandate, by contrast, an administrative agency of the government has chosen to demand that the Little Sisters provide their female employees and their employees' dependents (including minor dependents) contraceptives and abortifacients or authorize someone else to do so, while entirely exempting other religious organizations. It bases this crucial distinction on a completely irrelevant fact: Section 6033 requires the Little Sisters to file with the Internal Revenue Service an annual return of income and expenses and other information relevant to its tax exemption but does not require churches and certain affiliates to do so. As the following history makes clear, however, section 6033 provides no logically or legally defensible basis for distinguishing among religious institutions to determine the degree of protection their religious freedom merits. The history shows, rather, that the provision is aimed solely at *collecting information* that enables the Internal Revenue Service to confirm whether tax-exempt organizations are operating in accordance with the terms of their tax-exempt status.

When Congress first imposed an income tax on corporate entities, it specifically exempted from all taxation – and filing requirements – all "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes[.]" Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on rehearing,* 158 U.S. 601 (1895)); *see also* Revenue Act of 1909, ch. 6, § 38, 36 Stat. 11, 113 (1909). After the Sixteenth Amendment was ratified, the Revenue

Act of 1913 preserved the exemption. Revenue Act of 1913, ch. 16, 38 Stat. 114, 172 (1913).

It was not until the 1943 Revenue Act that tax-exempt organizations were required to file any sort of information returns, and even then the requirement did not apply to "religious organization[s]" and "organization[s] . . . operated, supervised, or controlled by or in connection with a religious organization." Revenue Act of 1943, ch. 63, § 117, 58 Stat. 21, 37 (1944). At that moment in tax history, then, there was no difference in the return filing requirements between churches and other religious organizations.

Over time, it became clear that some tax-exempt organizations were engaging in income-producing activity unrelated to their exempt purpose, and thus competing at an unfair advantage against taxable entities. So in 1950, Congress added the unrelated business income tax (UBIT) provisions to the Code, requiring otherwise tax-exempt organizations, including religious institutions, to file income tax returns and pay taxes on their unrelated business taxable income. Revenue Act of 1950, ch. 994, 64 Stat. 906, 948 (1950). These UBIT returns were entirely separate from the information returns filed to report on nontaxable exempt operations. "Churches" were excluded from the UBIT return requirement, but the statute did not define "church." Thus, although non-church religious organizations now had to file UBIT returns, the broad category of religious organizations as a whole remained exempt from filing information returns.

In 1969, in response to the increasing complexity and sophistication of tax-exempt entities and actual or perceived abuses of their tax status, the Tax Reform Act of 1969 (the "1969 Act") made major changes to the taxation of otherwise tax-exempt organizations. Tax Reform Act of 1969, tit. I, § 101, 83 Stat. 487, 494-96 (1969). Among them was a narrowing of the information return filing exemption for religious organizations. Now it applied only to "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order."[4] *Id.* at 520.

The purpose of the expanded return filing requirement remained purely informational. The statutory language, which is still in effect, makes this explicit:

> . . . [E]very organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information *for the purpose of carrying out the internal revenue laws* as the Secretary may by forms or regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Secretary may from time to time prescribe[.]

I.R.C. § 6033(a)(1) (emphasis added).

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[4] These statutory criteria remain today in clauses (i) and (iii) of I.R.C. § 6033(a)(3)(A) and constitute the sole basis for exemption from the mandate.

The General Explanation of the Tax Reform Act of 1969 (known as the 1969 Blue Book) also summarized the statute's purpose as providing the government "with the information needed to enforce the tax laws." Staff of the Joint Committee on Internal Revenue Taxation, 91st Cong., General Explanation of the Tax Reform Act of 1969 52-53 (Comm. print 1970) ("1969 Blue Book"), *available at* https://www.jct.gov/publications.html?func=startdown&id=2406 (last accessed Jan. 9, 2016). The two deficiencies of the prior law identified in the 1969 Blue Book were quite specific: "more information is needed on a more current basis from more organizations and that this information should be made more readily available to the public, including State officials." *Id.*

The 1969 Blue Book noted the new legislation's narrow information return exemption for certain types of church-related organizations, observing that "[i]n addition to these [exempt] categories, the Treasury Department may exempt other types of organizations from the filing requirements if it concludes that the information is not of significant value." 1969 Blue Book at 53. This discretionary authority of the Treasury Department was codified in I.R.C. § 6033(a)(3)(B), which provides that the Treasury Secretary may relieve any organization from filing an information return "where he determines that such filing is not necessary to the efficient administration of the internal revenue laws."

In fact, pursuant to this discretionary authority, the Treasury Department has exempted certain other religious organizations from information return filing because it determined the information was not

necessary for administration of the tax laws.[5] In just one of the anomalies created by HHS's restrictive criteria for the mandate exemption, these religious organizations are just as legally exempt from information return filing as statutorily exempt church-related organizations, but are not eligible for an exemption from the contraceptive mandate solely because their filing exemption is *discretionary* under section 6033(a)(3)(B) rather than *statutory* under section 6033(a)(3)(A)(i) and (iii). Even the extensive 1969 Act statutory changes, however, were not uniform in their treatment of church-related organizations. They varied based upon congressional views about sound tax policy and the Treasury Department's need for information. Accordingly, although church-related organizations remained exempt from filing information returns under the narrower exemptions in section 6033(a), Congress revoked the general religious organization exemption from filing UBIT returns for *all* religious organizations, even church-related organizations. Congress took this step because it

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[5] These organizations include, in general terms, (i) mission societies sponsored by or affiliated with a church and primarily acting in or towards foreign countries, (ii) below-college-level educational institutions affiliated with a church or operated by a religious order, and (iii) organizations operated, supervised, or controlled by church-related organizations and that are engaged exclusively in financing, funding, or managing funds for such organizations, or that maintain retirement insurance plans primarily for such organizations where more than half of the covered individuals are directly employed by those organizations, or more than 50 percent of the assets are contributed by, or held for the benefit of, employees of those organizations. *See* Treas. Reg. § 1.6033-6(b)(2)(iii), (iv); Rev. Proc. 96-10, 1996-1 C.B. 577.

believed that it was inappropriate even for church-related organizations to be exempt from UBIT when

> exempt organizations not subject to the unrelated business income tax—such as churches, social clubs, fraternal beneficiary societies, etc.—began to engage in substantial commercial activity. For example, numerous business activities of churches were brought to the attention of the Congress. Some churches are engaged in operating publishing houses, hotels, factories, radio and TV stations, parking lots, newspapers, bakeries, restaurants, etc.

1969 Blue Book 66-67. The development of section 6033(a)(3)'s exemptions from otherwise applicable information filing requirements, especially in conjunction with the imposition of UBIT filing requirements regardless of the type of religious organization, makes clear that the sole purpose of return filing is to provide the Internal Revenue Service with the information it needs to administer and enforce the tax laws, nothing more.

Generally speaking, today every exempt organization is required by section 6033(a)(1) to file an annual return of income and expenses and other information the Internal Revenue Service needs to determine whether the organization continues to qualify for the tax exemption and meets other tax-related requirements. Section 6033(a)(3)(A) specifies only which organizations remain statutorily exempt from that general rule.

B. I.R.C. § 6033 Does Not Establish Relevant Classifications of Religious Exercise

HHS uses the lines drawn by I.R.C. § 6033(a)(3)(A) to distinguish between religious groups that are entirely exempt from the contraceptive mandate and those which it will only "accommodate." But the differences that place organizations in one category or another have no relation to the mandate's asserted purpose.

The courts of appeal erroneously assumed that section 6033's filing classifications were relevant to some purpose other than mere tax information collection. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1199-1200 (10th Cir. 2015) (section 6033 and regulations "award benefits to some religious organizations . . . based on articulable criteria that other religious organizations do not meet"); *Geneva College v. Burwell*, 778 F.3d 422, 443 (3d Cir. 2015) (declaring section 6033 "a bright line that was already statutorily codified and frequently applied"); *Priests for Life v. Dept. of Health & Human Serv.*, 772 F.3d 229, 272-73 (D.C. Cir. 2014) (describing distinction as "familiar in tax law" but apparently confusing it with substantive tax-exempt status); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014) ("[R]eligious employers . . . have long enjoyed advantages (notably tax advantages) over other entities without these advantages being thought to violate the establishment clause. The establishment clause does not require the government to equalize the burdens (or the benefits) that laws of general applicability impose on religious institutions." (citations omitted)), *vacated and remanded* 135 S. Ct. 1528 (2015).

The church/non-church distinction that *does* exist in tax law is hardly as deep or significant as these decisions assume. It is also irrelevant. Whether an organization is a "church" for purposes of section 6033 (and elsewhere in the tax code) or a religious organization like the religious *amici* and Petitioners is defined by its structure and the manner in which it accomplishes its religious activities, not the shared religious commitments between the organization and its employees. As the Tax Court has stated, "[t]o classify a religious organization as a church under the Internal Revenue Code, we should look to its religious purposes *and, particularly, the means by which its religious purposes are accomplished.*" *Found. of Human Understanding v. Comm'r*, 88 T.C. 1341, 1357 (1987) (emphasis added) (*citing Chapman v. Comm'r*, 48 T.C. 358, 367 (1961) (Tannenwald, J., concurring)), *acq. in part*, 1987-2 C.B. 1 (1987). "At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. When bringing people together for worship is only an incidental part of the activities of a religious organization, those limited activities are insufficient to label the entire organization a church." *Id.* (internal citations and quotations omitted) (citing *Amer. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980)). These principles are informally termed the "associational test" for church status. *See also Chapman*, 48 T.C. at 361, 363 (tax commissioner "[did] not dispute the fact, nor could he, that this is a religious organization . . . whose purpose and method of operation are both laudatory and worthy of public support," but "though every church may be a religious organization, every religious organization is not per se a church."). The Internal Revenue Service has also

published a longer set of factors that it believes relate strongly to whether a given religious organization is a "church" for purposes of the Code. These factors are: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers. *See Found. of Human Understanding*, 88 T.C. at 1357-58.

Under either set of criteria, organizations that accomplish religious goals through something other than associational worship, such as the Little Sisters of the Poor or the religious *amici*, cannot qualify as churches regardless of the strength or degree of religious commonality between the organizations and their employees. Yet HHS's stated reason for limiting the final version of the mandate exemption to "churches" and related organizations was that the employees of such organizations are more likely than other religious organizations to share religious objections to contraception. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). It is notable that among the factors cited by both the IRS and the courts to identify a church for purposes of section 6033, *none* of them identify shared religiosity with employees

as a factor that would distinguish it from other religious organizations. In any event, the final version of the exemption *eliminated* the requirement that religious organizations eligible for the exemption primarily employ people who share their religious beliefs. *Id.*

Moreover, after fighting a losing battle in the courts for ten years, the Treasury Department *thirty years ago* abandoned the position that the activities of an "integrated auxiliary" of a church, one of the entities identified in section 6033(a)(3)(A) and exempted under the contraceptive mandate, must be "exclusively religious." *See, e.g.*, *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283 (8th Cir. 1985) (striking down "exclusively religious" requirement). Indeed, such church auxiliaries often have no purpose relating to religious teaching or ceremonies, and may be engaged in the same types of community service activities and have the same types of religiously-motivated members as the Petitioners, yet such auxiliaries qualify under section 6033(a)(3)(A)(i) and the Petitioners do not. In the face of these similarities, and despite the fact that religious considerations were the reason for the contraceptive mandate exemption in the first place, HHS has stubbornly continued to base eligibility for the exemption on whether an organization must file annual returns of income or other information with the IRS.

Congress has modified the exemptions from information return filing over the years, and may further modify them in the future. *See generally* Memorandum from Senate Finance Committee Staff to Senator Charles Grassley (Jan. 6, 2011) (discussing

benefits of narrower church filing exemption), *available at* http://religiouspolicycommission.org/content/sfc-staff-memo-to-grassley (last accessed Jan. 9, 2016). Should the availability of the religious exemption from the contraceptive mandate be held hostage to future changes Congress may make to section 6033 for tax administration reasons?

A "bright line" is only as valid as the criteria that separate one side from the other. HHS cannot simply conjure up a distinction made for a tax law purpose which has no relation to its own purposes; HHS must justify the distinction on its own terms. It cannot. The filing of an annual information return has everything to do with administration of the tax laws and nothing to do with religious exercise.

II. The Government Used I.R.C. § 6033 to Gerrymander the Religious Exemption While Forgoing a Less Restrictive Means Modeled After the Title VII Religious Exemption

The government's choice to define a religious exemption to the contraceptive mandate using section 6033 makes so little sense on its own merits that its motives are immediately open to question. This Court has frequently encountered situations where a facially-neutral legal classification is so ill-suited to its stated purpose that the Court will look behind it, particularly where there is a strong possibility that the government's classification was based on an improper motive. The poor fit of the exemption[6] to the mandate

[6] The Court has said in the context of a less sensitive First Amendment freedom, the protection of commercial speech, that "the flaw in the Government's case is more fundamental: The

falls well within these boundaries, much like the sprawling, salamander-like political districts attributed to Massachusetts Governor Elbridge Gerry that originally gave rise to the term "gerrymander." *See Vieth v. Jubelirer*, 541 U.S. 267, 274-75 (2004); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object. . . . [T]he ordinances when considered together disclose an object remote from [] legitimate concerns. The design of these laws accomplishes instead a 'religious gerrymander,' an impermissible attempt to target petitioners and their religious practices." (internal citations omitted)).

Concerns about gerrymandered exemptions are not merely speculative. Internal government documents obtained through the Freedom of Information Act (FOIA) indicate that the government *deliberately* drew the exemption in a way that would differentiate between the spiritual leadership of the Catholic Church and certain not-for-profit entities that it leads, a position directly antagonistic to the church-autonomy interests that the government occasionally claims to respect. Moreover, the government's representative

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operation of [the statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173, 190 (1999). In that case, one law banned advertising of casinos, and another one encouraged tribal casino gambling. The resulting havoc was considerably less troubling than that wreaked by the HHS mandate. As the Court noted in *Hobby Lobby*, the ACA itself, and the contraceptive mandate in particular, is riddled with exceptions and exemptions. 134 S. Ct. at 2763-64.

admitted in a deposition that HHS had "no evidence" to justify using section 6033 to differentiate between different types of religious employers.

Tellingly, the government ignored a far more suitable template for a religious exemption. Title VII of the Civil Rights Act of 1964 sets out a sensible religious exemption that respects the rights of religious groups to free religious exercise and autonomy. Instead of adopting this widely-accepted approach, the government crafted an absurdly narrow exemption that ultimately operates at the expense of the people it purports to help.

A. Poorly-Fitting Classifications Can Reveal Hidden Motives

As this Court has held in other areas of law, the government can reveal its motivations by adopting a classification that fails to properly fit the stated justification or is ineffective at achieving the stated ends. *See* David M. Treiman, *Equal Protection and Fundamental Rights: A Judicial Shell Game*, 15 Tulsa L. Rev. 183, 187 (1979). This is particularly worrisome in areas of law where governments may attempt to hide attempts to regulate constitutionally-protected activity behind rights-neutral justifications. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 241 (1976) (collecting cases under Equal Protection Clause); *United States v. Eichman*, 496 U.S. 310, 315 (1990) (though not including an "explicit content-based limitation" on speech, examining governmental interest "related 'to the suppression of free expression' and concerned with the content of such expression." (internal citation omitted)).

Sometimes laws that fail to effectively accomplish their facial purpose can indicate that the government is "singling out an unpopular minority" for special negative treatment, while "[d]ramatically underinclusive classifications suggest that the asserted purpose may really be a pretext for some other, perhaps illegitimate purpose." Treiman at 192; *Church of the Lukumi Babalu Aye*, 508 U.S at 535-36 (as the only conduct subject to ordinances was Santeria religious practice, "[i]t suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern."). This Court has found intentional discrimination where the "net result of [a] gerrymander [was] that few if any" acts were prohibited other than the religious exercise. *Id.* at 536-37. There, "careful drafting" ensured that animal killings that were "no more necessary or humane in almost all other circumstances [would go] unpunished." *Id.* at 536-37. Similarly, this Court found "significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends." *Id.* at 538. In such cases, "[n]o reason for [such a disparity] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility" to those affected. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

For these reasons, religious exemptions – such as Title VII's exemption for religious employers – tend to be broad. Such exemptions apply to many religious persons who have no religious objection to the application of a particular law, but the overbreadth is desirable because it avoids governmental overreach and disentangles government officials – particularly

courts – from invasive inquiries into the activities and beliefs of religious groups. *Cf. Thomas v. Review Bd. of Indiana Emp. Security Div.*, 450 U.S. 707, 715-16 (1981) (refusing to insert Supreme Court into factual dispute regarding religious convictions); *cf. also Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp. Opp. Comm'n*, 132 S. Ct. 694, 706 (2012) (government interference with church ministerial appointments violates both the Free Exercise and the Establishment Clauses).

The exemption to the contraceptive mandate has none of these virtues.[7] Rather, it exempts numerous churches and religious orders that object to providing and facilitating contraceptive coverage that are practically identical to non-exempt objectors like religious *amici* and the Petitioners. As explained above, tax law does not draw as deep a distinction between church and non-church entities as the courts below thought. Moreover, there is often a very close religious

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[7] In an unseemly turn, the section 6033-based exemption has pitted religious groups against one another, with some religious organizations even arguing *against exemptions for other religious entities* and demanding that a final mandate "be binding on all group health plans and health insurance issuers with *no religious exemption*." Group Health Plans and Health Ins. Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, amended interim final rules with request for comments, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (emphasis added); *see also* Appx. C, Redacted Emails from Sister Carol Keehan, White House, and HHS Officials, Mar. 13, 2012, at App. 22-26 (arguing that of the "two arms" of the Catholic Church – the churches themselves and their service ministries – one ought to receive an "exemption" and the other a lesser consideration)", *available at* https://www.scribd.com/doc/294857740/Zubik-et-al-v-Burwell-Appendix-C (last accessed Jan. 9, 2016).

bond and common belief system between non-church religious organizations and their members and employees. The religious *amici* have the same rights of free exercise as the bishops who oversee their activities or the churches that follow them. Like the exempted Roman Catholic churches in their communities, these sisters are religious groups with defined religious missions, they carry out their religious activities in ways too numerous to count, they submit to the same spiritual authorities, and they too object to being forced to facilitate the provision of contraceptives.[8]

No legitimate reason could possibly underlie disparate treatment of such similar entities. But the Court need not rely solely on the flimsiness of HHS's legal justifications to discover its motive. Hard evidence demonstrates that high-ranking government officials knew precisely what they were doing.

B. The Government Knew That the Exemption Would Disproportionately Affect Certain Religious Groups

Government documents obtained through FOIA show that White House health care policy officials were focused on the return filing requirements for particular religious entities. The reason for high-level interest in

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[8] *Amici* do not question that some employees of non-church religious organizations do not share the religious beliefs of their employer. But if the proportion of employees who share the religious views of their non-church religious organization is the reason for refusing to grant the employer an exemption, religious groups that *do* require employees to be co-religionists deserve a full exemption. The differential treatment imposed by relying on section 6033 makes no attempt to track this employment distinction.

such a relatively minor tax filing requirement, of course, was to limit the reach of any exemption to the contraceptive mandate.[9]

A July 19, 2012 email[10] from White House health policy official Jeanne Lambrew to White House health policy official Ellen Montz and IRS Commissioner

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[9] The current version of the mandate exemption is not the first exemption proposed by HHS. The 2010 "preventive services" mandate contained no religious exemption because it contained no contraceptive mandate. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010). In 2011, HHS imposed the contraceptive mandate along with a four-prong exemption. The fourth prong of that exemption was identical to the current exemption, i.e., it restricted the exempt entities to those that fit into the two return filing categories from section 6033, while adding three other criteria. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623, 46,626 (Aug. 3, 2011). In 2013, HHS imposed the single-prong exemption that eliminated the three other prongs and relied solely on the irrelevant section 6033 classification. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873-74, 39,896 (July 2, 2013).

[10] A House of Representatives oversight committee obtained partially-redacted copies of the emails attached as Appendix A. *See* Letter from Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform, to Ms. Kathryn Ruemmler, Counsel to the President (Oct. 22, 2013), available at http://oversight.house.gov/wp-content/uploads/2014/05/2013-10-22-DEI-_-Jordan-to-Ruemmler-WH-IRS-communications-and-equities-due-11-5.pdf (last accessed Jan. 9, 2016); Redacted Emails Between White House Officials and IRS Officials, July 18-23, 2012, http://issa.house.gov/wp-content/uploads/2013/10/Hall-Ingram-WH.pdf (last accessed Jan. 9, 2016).

Sarah Ingram inquired, "do we feel at this point we can say that we believe that replacing the four-prong test [for a mandate exemption] with the fourth prong will not expand the number of workers in health plans that are exempt from contraception coverage? What more needs to be done to make such a determination?" Appx. A, Unredacted Emails Between White House Officials and IRS Officials, July 18-23, 2012, at App. 15, *available at* https://www.scribd.com/doc/294857492/Zubik-et-al-v-Burwell-Appendix-A (last accessed Jan. 9, 2016). Ingram replied,

> Not sure what you are looking for on your question since I don't think it is possible to say that zero additional people would fall into the reg rule. If you are looking for a quantification of the delta between using prongs 1-4 and using only prong 4, my sense anecdotally is that the delta is more than zero but I don't think we would have any way of quantifying it for you.

App. 14-15. In other words, these officials were trying to figure out how changing the gerrymandered section 6033-based exemption would affect the overall number of women guaranteed contraceptives under their employers' health plans. They had no information to support their assumptions.

A July 18, 2012 email from Montz requested information from Ingram about the different filing requirements for the United States Conference of Catholic Bishops (USCCB) and several entities it leads. *See* App. 16-18. On the following day, Ingram sent a longer email to Montz and other White House officials explaining that "[t]he large, well known 'Catholic' universities – e.g., Georgetown, Notre Dame – do not

appear to be part of [a 2011 private IRS Group Ruling on the tax status of numerous Catholic subordinate entities]. They also file returns." App. 12. In so doing, Ingram confirmed to high-ranking government officials that these particular Catholic entities would not fit within the section 6033-based exemption.

The July 19 email from Ingram contains another revealing exchange. Montz had originally asked whether certain "schools are automatically exempt from filing," that is, exempt from the contraceptive mandate. Ingram replied:

> No. Only schools below-college-level that are "affiliated" with a church or operated by a religious order. These schools, while exempt from filing, would not meet the reg's religious employer test unless they are a church or integrated auxiliary of a church.

App. 12. Lambrew followed up the next day, on July 20, 2012, with questions about the filing requirements of Catholic Charities, which were apparently answered in a separate email that was not included in the FOIA release. App. 10-11.

Taken together, these emails[11] confirm that that the government crafted the mandate exemption to guarantee that entities like the religious *amici*, nuns like the Little Sisters of the Poor, religious schools of all types, and the other Petitioners in this case would be treated differently from religious authorities that lead them.[12]

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[11] A further set of emails reveals a request from Lambrew (most of which is redacted) followed by staff at HHS's Centers for Medicare & Medicaid Services trying to obtain insurance plan coverage information about Catholic universities. Appx. B, Redacted Emails Between White House Officials and IRS and HHS Officials, Oct. 12-13, 2011, at App. 19-21, *available at* https://www.scribd.com/doc/294857623/Zubik-et-al-v-Burwell-Appendix-B (last accessed Jan. 9, 2016). And an email forwarded from HHS Secretary Sebelius to White House officials indicates that HHS was desperately seeking to justify the disparate treatment resulting from the section 6033-based exemption. Appx. C, Redacted Emails from Sister Carol Keehan, White House, and HHS Officials, Mar. 13, 2012, at 22-26 (arguing that of the "two arms" of the Catholic Church – the churches themselves and their service ministries – one ought to receive an "exemption" and the other a lesser consideration), *available at* https://www.scribd.com/doc/294857740/Zubik-et-al-v-Burwell-Appendix-C (last accessed Jan. 9, 2016).

[12] Ironically, the first version of the exemption was supposedly designed to respect "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. But only two months later, the government argued to this Court that there was no such "unique relationship," and that First Amendment's Establishment Clause and Free Exercise Clauses gave churches no greater autonomy in choosing their ministers than to a labor union. Trans. of Oral Arg. at 37-38, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 10-553, Oct. 5, 2011, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf (last accessed Jan. 9, 2016). This Court rejected

Indeed, the government waited until February 6, 2013, more than a year after this Court's rebuke in *Hosanna-Tabor*, to introduce a rule that did not condition eligibility for an exemption on the organization's teaching, employment, and service activities. Coverage of Certain Preventive Services Under the Affordable Care Act, Proposed Rules, 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013) (replacing four-prong exemption with current exemption).

Ever since the beginning of this litigation, the government has advanced weak alternative rationalizations for drawing the exemption along section 6033 lines. In its responses to more than 400,000 comments on the regulation announcing the exemption, the government opined:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39,874. With such categorical and imprecise statements, it is no wonder that in one challenge to the contraceptive mandate, Gary M. Cohen, the corporate representative of HHS (designated as a deponent under Fed. R. Civ. P. 30(b)(6)), gave testimony that eviscerated the

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that extraordinary argument in an opinion issued on January 11, 2012. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 132 S. Ct. 694, 706 (2012).

government's sole factual justification for adopting section 6033. In his April 16, 2013 deposition, Cohen had to admit that HHS had "no evidence" about the sole reason advanced for refusing to extend the exemption to other religious groups:

> Q. And why would -- What was the evidentiary basis for the conclusion that individuals who work for entities like ArchCare and Catholic Health Services of Long Island are more likely not to object to the use of contraceptives and therefore are more likely to use contraceptives?
>
> A. I think that conclusion was based on just logic and common sense on the one hand and, secondly, on the evidence that a very large majority -- I've seen figures up to 95 percent of sexually active women in the United States use contraceptives at one point or another.
>
> Q. So there was no evidence particular to those types of institutions?
>
> A. No, I don't believe so.

Dep. of Gary M. Cohen, Dkt. 52-1, at 33-34, *The Roman Catholic Archdiocese of New York v. Sebelius*, 2:13-cv-1459 (E.D.N.Y. Apr. 16, 2013) (JA 1111-12); *see also id.* at 58-59.

In short, HHS was more concerned with which religious groups were exempt than in evidence-based policymaking. The government did not want to be seen to be targeting certain groups for discrimination, so it tried to conceal its intentions by invoking an irrelevant (and facially innocuous) tax return filing requirement. HHS chose to deploy section 6033 not as an evidence-

based boundary around legitimate religious objections, but to maximize forced contraceptive coverage. Such blind regulatory maximalism cannot survive any level of scrutiny, least of all the strict scrutiny required under RFRA.

C. HHS Ignored the More Suitable Approach to Religious Organizations Already Codified in Title VII

HHS's classification gymnastics are especially striking because they were unnecessary. The regulation could have easily modeled its religious exemption after the longstanding exemption in Title VII, which strikes a sensible balance between employee and employer interests and does not pose the threats to church autonomy raised by the contraceptive mandate.

The Little Sisters are subject to the provisions of the Affordable Care Act (ACA) not because they are *taxpayers*, but because they are *employers*. And federal law already provides guidance on the proper application of employment laws to religious employers. Long before the ACA became law, Title VII of the Civil Rights Act of 1964 already provided an example of how federal agencies could respect religious organizations' objections to government mandates, and did so in a way that is far more respectful of free religious exercise and the range of religious devotion in the United States.

Recognizing the unique attributes of religious devotion and expression, Title VII of the Civil Rights Act of 1964 specifically exempts religious employers from antidiscrimination laws that apply to secular employers. These provisions allow religious employers

to hire only people who share their religious beliefs without being subject to the penalties that apply to non-religious employers. 42 U.S.C. § 2000e-1. The law defines broadly which religious employers fit within this exemption:

> . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Id. This exemption would clearly cover all the Petitioners in these cases, as well as religious *amici*.

It is unsurprising that employment law would include broad religious exemptions. Employment law has the potential to interfere directly with these institutions' religious exercise by placing the government between all religious institutions – not just Christian "churches" – and the employees who carry out their mission. *See Hosanna-Tabor*, 132 S. Ct. at 705-07 (applying employment discrimination law to churches "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."); *Conlon v. Intervarsity Christian Fellowship / USA*, 777 F.3d 829, 833-34 (6th Cir. 2015) (ministerial exception applied to evangelical campus mission); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 309-10 (4th Cir. 2004) (ministerial exception applied to home for the elderly).

Indeed, other employment laws track Title VII's definitions of religious organizations. The Americans with Disabilities Act, for example, similarly protects the ability of "a religious corporation, association, educational institution, or society" to hire employees who share its beliefs, 42 U.S.C. § 12113(d)(1), as do regulations of federal contractors and subcontractors, 48 C.F.R. § 22.807(b)(7), 41 C.F.R. § 60-1.5(a)(5), and recipients of Small Business Association assistance. 13 C.F.R. § 113.3-1(h).

Viewed in light of these other exemptions, the contraceptive mandate's choice of section 6033 to classify religious groups is patently absurd. Religious employers like the Little Sisters of the Poor, the other Petitioners, and the religious *amici* are expressly permitted by Title VII to hire only people who share their beliefs, but contraceptive mandate penalties still can drive these employers out of existence.

Just as incomprehensible is HHS' explanation for limiting exemptions to houses of worship and related auxiliaries under section 6033 because they "are more likely than other employers to employ people of the same faith who share the same objection[.]" 78 Fed. Reg. at 39,874. As discussed above, HHS had "no evidence" for this assertion. But even if it were correct, it would make no sense for the exemption to track *tax law* – and specifically the language dealing with *return filing requirements* – rather than the employment laws that deal with hiring people of shared faith in the first place.[13]

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[13] Unsurprisingly, HHS's zeal to impose a contraceptive mandate did not extend to protecting religious objectors. After the ACA directed HHS's Health Resources and Services Administration (HRSA) to

CONCLUSION

The contraceptive mandate is premised on the view that pregnancy is an adverse health condition to be prevented, and if not prevented, "cured." The religious

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study which services should be included in a women's "preventive services" mandate, HRSA commissioned the Institute of Medicine (IOM) to convene an expert committee for that purpose. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gap*, 1-2 (2011) ("IOM Report"), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last accessed Jan. 9, 2016). HHS specifically limited IOM's review in several important ways: (1) IOM could only consider services applicable to females aged 10 to 65 years; (2) IOM had to ignore cost-effectiveness; and (3) IOM had to ignore community-based prevention activities. *See id.* at 2-3.The committee had "barely six months" in which to research and issue its final report. IOM Report at 232 (dissent of Dr. Anthony Lo Sasso).

Within two weeks of IOM's July 19, 2011 recommendation that HHS "consider[] "the full range" of federally-approved contraceptive methods for inclusion in the mandate, *id.* at 109-10, HHS had finalized a regulation adopting and imposing those recommendations. HRSA adopted the report's recommendation in guidance published on its website, U.S. Dept. of Health & Hum. Svcs., *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last accessed Jan. 9, 2016), and HHS followed with a regulation adopting that recommendation. Group Health Plans & Health Ins. Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623-24 (Aug. 3, 2011). One committee member dissented, complaining that "the lack of time prevented a serious and systematic review of evidence" and that IOM's timeframe had been "unrealistic." IOM Report at 232 (dissent of Dr. Anthony Lo Sasso). As a result, "evidence that use of the services in question leads to lower rates of disability or disease and increased rates of well-being is generally absent[]" from the IOM Report. *Id.* at 232. The committee's lack of transparency indicated that the process was "largely subject to the preferences of the committee's composition." *Id.* at 232-33.

amici operate from a different premise: Pregnancy is the first stage of a new human life, created in the image of God.

The contraceptive mandate threatens the Petitioners – nuns, bishops, priests, monks, religious schools, and other religious institutions – with fines that are more than a substantial burden; they are a death sentence. Yet the only basis that HHS provides for denying these groups the respect their religious convictions deserve is a tax reporting classification having *nothing* to do with the relationship between employers and their employees, and certainly nothing to with the contraceptive mandate.

Religious orders devote their financial resources to the accomplishment of their purpose – in the case of the Little Sisters of the Poor, care of the elderly; in the case of Sisters of Life, care of pregnant women and their newborns; in the case of the Dominican Sisters, education of children – and to the food, clothing and shelter of the religious women engaged in the mission. The government's failure to acknowledge and respect these religious orders' adherence to a fundamental teaching of the faith to which they have dedicated their lives would deprive American communities of far more than just the services they provide.

HHS selected and applied irrelevant tax-law criteria in determining which employers are entitled to a religious exemption. Rather than pull irrelevant classifications from a completely unrelated set of laws, HHS could have and should have taken the approach already codified in Title VII and adopted in other areas of federal law.

The lower courts should be reversed.

Respectfully submitted,

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APPENDIX A

Unredacted Emails Between White House Officials and IRS Officials, July 18-23, 2012

From: Fish David L
Sent: Monday, July 23, 2012 10:08 AM
To: Brown Susan D; Richardson Virginia G
Subject: FW: questions

Just talked to Sarah and she doctored my answer.

From: Ingram Sarah H
Sent: Monday, July 23, 2012 11:05 AM
To: Lambrew, Jeanne; Montz, Ellen
Cc: Fish David L; Ingram Sarah H; Livingston Catherine E
Subject: FW: questions

Folks –

hope this helps. Let us know if there are more questions. Specific examples help us focus on the particular rule, but let us know.

– David and Sarah

From: Fish David L
Sent: Monday, July 23, 2012 9:58 AM
To: Ingram Sarah H
Cc: Livingston Catherine E; Brown Susan D;

Richardson Virginia G; Marks Nancy J
Subject: FW: questions

Proposed response. I was in the process of confirming if anything else was out there and not sure there is.

From: Fish David L
Sent: Monday, July 23, 2012 8:50 AM
To: Richardson Virginia G; Brown Susan D
Subject: FW: questions

Short answer: Not really any other material. The language of the regulation itself provides an exception for services provided at a nominal charge or an insubstantial portion of the cost. Note, if the "external support" is solely charitable contributions and not these kinds of services, then one would not reach the 50% part of the rule and the entity would be OK. Your question refers to external but it matters what kind of external. So, for example, colleges and hospitals would have a hard time being OK due to service payments and tuition payments (obviously also for services). However, soup kitchens do not ordinarily have any sort of services payment and could be OK even if they receive lots of outside charitable contributions and grants.

In addition, certain organizations can avoid the internal support last altoge ther and only have to meet the affiliation test – men's and women's organizations, seminaries, mission societies and youth groups. Treas. Reg. 1.6033-2(h)(5).

Long answer. The language in the integrated auxiliary regulations was borrowed from another In ternal Revenue Code provision, 3121(w). That provision gives

an election for churches and church -controlled organizations to opt out of social security coverage if they are opposed to such taxes for religious reasons. The relevant part of the Joint Commi ttee Explanation provides as follows: (Note that there are important differences between 3121(w) and 1.6033 -2(h), one being a 25 rather than 50 percent support test).

In addition to elections by churches, the Act allows an election to treat employees of certain church-controlled tax-exempt organizations similarly to self-employed individuals. However, many church-controlled organizations (including church -controlled universities and religious hospitals) provide services to the general public which are similar in nature to those provided by other, secular institutions. Allowing an election in these cases would result in differing treatment for employees of religious and secular organizations performing essentially similar functions (e.g., n urses in religious hospitals as opposed to nurses in secular facilities). Further, where an organization sells its services to the general public, concerns regarding the separation of church and state become less pressing.

To meet the concerns above, the Act therefore does not allow an election to church-controlled organizations which offer goods, services, or facilities for sale to the general public (other than those offered on an incidental basis or for a nominal charge) and which normally receive more than 25 percent of their support from governmental sources, from sales or similar receipts, or from both such sources. (Because an election is not allowed with respect to services performed in an unrelated trade or business, these tra des or businesses are excluded from the computation.)

The Congress believed that these rules provide a fair, objective test for determining those organizations entitled to make an election without questioning the religious connection of any particular organization.

***

The term qualified church-controlled organization means any church-controlled tax-exempt organization described in Code section 501(c)(3), other than an organization which both (1) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public (e.g., to individuals who are not members of the church), other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities, and also (2) normally receives more than 25 percent of its support from either (a) governmental sources or (b) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilit ies in activities which are not unrelated trades or businesses, or from (a) and (b) combined.

An otherwise qualified organization is ineligible to make an election as a qualified church-controlled organization only if both conditions (1) and (2) in the preceding paragraph exist. Thus, the typical seminary, religious retreat center, or burial society would generally qualify to make an election, regardless of its funding sources, because it does not offer goods, services, or facilities for sale to the general public. A church-run orphanage or old-age home would qualify, even if it is open to the general public, if not more than 25 percent of its support was derived from the receipts of admissions, sales of merchandise, performance of

ser vices, or furnishing of facilities (in other than unrelated trades or businesses) or from governmental sources. However, where both conditions (1) and (2) exist, the organization would not be eligible to make an election. Congress specifically intended that church-run universities (other than religious seminaries) and hospitals are not eligible to make an election, if both conditions (1) and (2) exist.

From: Lambrew, Jeanne [mailto:Jeanne_M _Lambrew @who.eop.gov)
Sent: Monday, July 23, 2012 7:42 AM
To: Fish David L; Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

Good morning, just one follow up.

Has there been a case or any elaboration on the point you make below about "services for sale"? There is some question about whether a non-profit that gets 75% of its support externally but does not charge any receipt any amount could qualify as an integrated auxiliary and thus not file a 990. I am looking for some reference or citation if there is one beyond the examples and reg text that you sent.

Thanks.

From: Fish David L [mailto:David.L.Fish@irs.gov]
Sent: Friday, July 20, 2012 2:53 PM
To: Lambrew, Jeanne; Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

I went back and looked at the Notice of Proposed Rulemaking and thought it might be helpful to reproduce some of it h ere to give a flavor for what the regulations were getting at.

Therefore, under the proposed amendments, a church affiliated organization that does not offer admissions, goods, services, or facilities for sale to the general public is an " integrated auxiliary of a church" and is not required to file an annual information return. A church affiliated organization that does offer admissions, goods, services, or facilities for sale to the general public is an "integrated auxiliary of a church" only if 50 percent or less of its support comes from a combination of a government sources, public solicitation of contributions and receipts from its sales (except for receipts from an unrelated trade or business).

The IRS developed the support calculations containe d in the proposed amendments based on its conclusion that Congress intended that organizations receiving a majority of their support from public and government sources, as opposed to those receiving a majority of their support from church sources, should f ile annual information returns in order that the public have a means of inspecting the returns of these organizations. The annual information return also was intended to serve as a means by which the IRS could examine, if necessary, those organizations receiving substantial non-church support.

First, I didn't see the word fee in the reg except for in the example. Is it fair to say that any sort of charge to a third payer for a good or service, unless incidental, qualifies as a fee?

The regulation does not use the term fee. We were using it as a shorthand. I think the concept in the regulation of "services ... for sale" comprehends any kind of gross receipt or payment in exchange for services rendered, whether from the service recipient or a third party. (subject to the "nominal" language.) This is consistent with the retirement home and hospital examples in the regulations.

Second, in the following, does "public solicitation" include seeking a grant from a private foundation?

Yes

From: Lambrew, Jeanne [mailto:Jeanne_M_Lambrew@who.eop.gov]
Sent: Friday, July 20, 2012 12:51 PM
To: Fish David L; Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

Thank you.

Just two more questions (hopefully):

First, I didn't see the word fee in the reg except for in the example. Is it fair to say that any sort of charge to a third payer for a good or service, unless incidental, qualifies as a fee?

Second, in the following, does "public solicitation" include seeking a grant from a private foundation?

(2) offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public and not more than 50 percent of its support comes from a combination of government sources,

public solicitation of contributions, and receipts other than those from an unrelated trade or business.

Thanks again.

From: Fish David L [mailto:David.L.Fish@irs.gov]
Sent: Friday, July 20, 2012 12:48 PM
To: Lambrew, Jeanne; Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

This goes to 1.6033-2. If it is easier, I can cut and paste -2(h) and send it.

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=486e8b9a46f7bef71acd263434fcfefb&rgn=div8&view=text&node=26:13.0.1.1.1.0.5.57&idno=26

From: Lambrew, Jeanne [mailto:Jeanne_M_Lambrew@who.eop.gov]
Sent: Friday, July 20, 2012 12:30 PM
To: Fish David L; Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

Do you mind sending me a link to the reg?

Thanks.

From: Fish David L [mailto:David.L.Fish@irs.gov]
Sent: Friday, July 20, 2012 12:23 PM
To: Ingram Sarah H; Lambrew, Jeanne; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

That is correct.

From: Ingram Sarah H
Sent: Friday, July 20, 2012 12:19 PM
To: Lambrew, Jeanne; Montz, Ellen
Cc: Livingston Catherine E; Fish David L
Subject: RE: questions

I'll let David confirm, but 6033-2(h)(4) indicates that if there is any fee-for-service then you go to how-much (>50%) and the how-much paragraph includes support from government sources, public solicitations for contributions and more normal-looking fees for goods and services. So you don't need 50% of fee for service, just enough to flip you into the 50% question..

From: Lambrew, Jeanne [mailto:Jeanne_M_Lambrew@who.eop.gov]
Sent: Friday, July 20, 2012 12:13 PM
To: Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E; Fish David L
Subject: RE: questions

Good. Thanks.

So to take a stab at saying it back: the fact that they have some sort of billing structure that public programs pay technically means that they offer services for sale to the general public?

From: Ingram Sarah H [mailto:Sarah.H.Ingram@irs.gov]
Sent: Friday, July 20, 2012 12:10 PM
To: Lambrew, Jeanne; Montz, Ellen

Cc: Livingston Catherine E; Fish David L
Subject: RE: questions

If they are getting large medicaid reimbursements then those services fit the bill, so to speak.

From: Lambrew, Jeanne [mailto:Jeanne_M_Lambrew@who.eop.gov]
Sent: Friday, July 20, 2012 12:08 PM
To: Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E; Fish David L
Subject: RE: questions

Thanks. David, thank you for the information on Catholic Charities.

I am still hoping to understand whether the 50 percent rule is moot if the organization does not offer goods and services for sale to the general public. Do we assume that organizations like Catholic Charities do offe r goods and services for sale? Does any fee for any service mean it meets this test?

Thanks again.

From: Ingram Sarah H [mailto:Sarah.H.Ingram@irs.gov]
Sent: Friday, July 20, 2012 11:55 AM
To: Lambrew, Jeanne; Montz, Ellen
Cc: Livingston Catherine E; Fish David L
Subject: Re: questions

I am afraid it is another it-depends answer but look for an email from david in the next few minutes with why. Your question assumes that they never have the fee

income and that is not always true. Law and examples coming from david.

This message was sent from Blackberry

From: Lambrew, Jeanne [mailto:Jeanne_M_Lambrew@who.epo.gov]
Sent: Friday, July 20, 2012 09:47 AM
To: Ingram Sarah H; Montz, Ellen <Ellen_J_Montz@who.eop.gov>
Cc: Livingston Catherine E
Subject: RE: questions

Thanks. One more.

It looks like Rev. Proc 2001-15, 2011-3, IRB 322 says that an organization is assumed to be internally supported unless it both meets the 50 percent test and "offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public...." The question is: Catholic Charities does not meet the "for sale" prong of the test, so since it fails to meet that, why isn't is considered an integrated auxiliary?

This is time sensitive – possible to get an answer by noon? Thanks.

From: Ingram Sarah H [mailto:Sarah.H.Ingram@irs.gov]
Sent: Thursday, July 19, 2012 7:40 PM
To: Lambrew, Jeanne; Montz, Ellen
Cc: Livingston Catherine E; Ingram Sarah H
Subject: RE: questions

I have tried to collect the 6033 questions to ensure you have what I have from the team. I realize that there have been interim calls and that Treasury OTP is handling the church plan questions. Jeanne's latest questions are at the end.

Can you help us out quickly with the below three questions on non-filers of 990s:

1. Are schools automatically exempt from filing? See the USCCB memo and the private letter ruling below

> No. Only schools below-college-level that are "affiliated" with a church or operated by a religious order. These schools, while exempt from filing, would not meet the reg's religious employer test unless they are a church or integrated auxiliary of a church.
>
> Colleges would generally be required to file Forms 990. See, e.g. http://tfcny.fdncenter.org/990_pdf_archive/356/3560_71917/356071917_200806_990.pdf
>
> (The large, well known "Catholic" universities – e.g., Georgetown, Notre Dame –do not appear to be part of the Catholic group ruling. They also file returns.)

2. Would a free standing groups of schools like the Networ k of Sacred Hearts file 990s? See link below.

> Each entity would have to be evaluated separately to determine whether it had an exemption from filing. These schools appear to qualify under the exception for schools below college level affiliated with a church or operated by a religious order. Again, these schools, while

> they could be exempt from filing, would not meet the religious employer test unless they are a church or integrated auxiliary of a church.

3. The USCCB letter refers to "certain church-affiliated organizations that finance, fund, or manage church assets or maintain church retirement insurance programs, and organizations controlled by religious orders that finance, fund, or manage assets ...." What does that mean? Can you give an example of this type of organization?

> Very generally, these organizations, under the control of the church (not Goldman's or Fidelity), manage the church's investment portfolio or retirement fund that covers the ministers and employees. As noted in the USCCB letter, these organizations qualify for an exemption from filing only if they meet the test for "integrated auxiliary."

http://old.usccb.org/ogc/group-ruling-2011-memo.pdf

http://www.tax26.com/laws/irsprivateletter/17948/

http://sofie.org/

****

(4) First, I wanted to follow up on the third question. We found the following document and are still trying to figure out if an accountant or fund manager that gets more than half of its revenue from churches would be exempt under the fourth prong as a non-filer of a 990?

http://www.unclefed.com/Tax-Bulls/1996/RP96-10.PDF

> Having churches as clients does not determine the issue. You have to start with the concept of being a church itself (clearly not) or an integrated auxiliary of a church. For integrated auxilliary it has to be exempt itself and then be affiliated and then be internally supported. So if an accountant just has lots of church clients he would be a vendor of services but not exempt, not affiliated and, even if he met the first two prongs unlikely to meet the support rule if he is affiliated with one but providing services (and getting revenue) from a variety of other clients.

(5) Second, assuming that the answer is no, do we feel at this point we can say that we believe that replacing the four - prong test with the fourth prong will not expand the number of workers in health plans that are exempt from contraception coverage? What more needs to be done to make such a determination?

I apologize because I am missing something – I have always seen prongs 1-3 as limiters on the broader pool that could meet prong 4 (26 USC sec. 6033(a)3)(A)(i) and (iii)). Especially prong 3 (primarily serves persons who shares its tenets). The soup kitchen that is in the tax-exemption group ruling, for example, that is most likely an integrated auxilliary of a church (tax-exempt; affiliated; funded by the church) for purposes of 6033, does not limit the persons it services.

Not sure what you are looking for on your question since I don't think it is possible to say that zero additional people would fall into the reg rule. If you are looking for a quantification of the delta between using prongs 1 -4 and using only prong 4, my sense anecdotally is that the delta is more than zero but I

don't think we would have any way of quantifying it for you.

From: Lambrew, Jeanne [mailto:Jeanne_M_Lambrew@who.eop.gov]
Sent: Thursday, July 19, 2012 5:50 PM
To: Ingram Sarah H; Montz, Ellen
Cc: Livingston Catherine E
Subject: RE: questions

HI, I have two follow up questions.

First, I wanted to follow up on the third question. We found the following document and are still trying to figure out if an accountant or fund manager that gets more than half of its revenue from churches would be exempt under the fourth prong as a non-filer of a 990?

http://www.unclefed.com/Tax-Bulls/1996/RP96-10.PDF

Second, assuming that the answer is no, do we feel at this point we can say that we believe that replacing the four -prong test with the fourth prong will not expand the number of workers in health plans that are exempt from contraception coverage? What more needs to be done to make such a determination?

Thanks.

From: Ingram Sarah H [mailto:Sarah.H.Ingram@irs.gov]
Sent: Wednesday, July 18, 2012 7:23 PM
To: Montz, Ellen
Cc: Lambrew, Jeanne; Ingram Sarah H; Livingston

Catherine E
Subject: RE: questions

Sorry I just saw this. Will also see what the specialists can add in the am. Maybe the comments below are helpful in the meantime ... or not.

From: Montz, Ellen [mailto:Ellen J Montz@who.eop.gov]
Sent: Wednesday, July 18, 2012 5:33 PM
To: Livingston Catherine E; Ingram Sarah H
Cc: Lambrew, Jeanne
Subject: FW: questions

HI Cathy and Sarah,

Can you help out quickly with the below three questions on non -filers of 990s:

1. Are schools automatically exempt from filing? See the USCCB memo and the private letter ruling below

> Below-college-level schools that are "affiliated" with a church or operated by a religious order generally don't have to file. If they are not "affiliated" then likely also not "integrated auxilliary". Colleges - it will depend on whether they are integrated auxilliaries of a church and then they may not meet the internal support test. As USCC attachment discusses, just because an entity is in a group ruling (for tax exemption) doesn't mean they are exempted from the requirement to file a 990. The CC group ruling has a wide variety of entities from churches to all kinds of schools to a printing/publications org to soup kitchens, elder

care, catholic charities units, etc. Once the parent is exempt, the rules for tucking other entities under their exemption protective wing is fairly flexible – then each one has to run through the question of the 990.

2. Would a free standing groups of schools like the Network of Sacred Hearts file 990s? See link below.

Cannot tell from the web site whether they are affiliated or whether they are run by a religious order. Sounds like they probably are but cannot tell.

3. The USCCB letter refers to "certain church-affiliated organizations that finance, fund, or manage church assets or maintain church retirement insurance programs, and organizations controlled by religious orders that finance, fund, or manage assets ...." What does that mean? Can you give an example of this type of organization?

Better specificity tomorrow, but think about a unit under the church's wing (not Goldman's or Fidelity) that manages the church's real estate and investments portfolio or manages the retirement fund that covers the ministers and employees – these "inhouse" activities are inwardlooking in role but often separated for reasons of liability or to attract the right skills/talent. Don't want the minister doing it but may want a specialist unit if a reasonable portfolio of assets. Occasionally, an entity will really NOT be affiliated but just has a lot of church orgs i n its client list – not the same.

http://old.usccb.org/ogc/group-ruling-2011-memo.pdf

http://www.tax26.com/laws/irsprivateletter/17948/

http://sofie.org/

Thank you,
Ellen

APPENDIX B

Redacted Emails Between White House Officials and IRS and HHS Officials, Oct. 12-13, 2011

From: Mayhew, James A. (CMS/CCIIO)
To: Campbell, Lisa M. (CMS/CCIIO); Ahlstrom, Alexis K. (CMS/CCIIO); Imes, Robert A. (CMS/CCIIO)
Subject: RE: follow-Up Meeting on Prevention Reg
Date: Thursday, October 13, 2011 8:49:20 AM

And to answer jean's question, (b)(5) [redacted]

-----Original Message -----
From: Campbell, Lisa M. (CMS/CCIIO)
Sent: Thursday, October 13, 2011 8:45 AM
To: Ahlstrom, Alexis K. (CMS/CCIIO); Imes, Robert A. (CMS/CCIIO); Mayhew, James A. (CMS/CCIIO)
Subject: Re: Follow-Up Meeting on Prevention Reg

Hi Alexis,
We can reach out to our contacts at Aetna and United.
Lisa

-----Original Message -----
From: Ahlstrom, Alexis K. (CMS/CCIIO)
Sent: Wednesday, October 12, 2011 10:34 PM
To: Imes, Robert A. (CMS/CCIIO); Mayhew, James A.

(CMS/CCIIO); Campbell, Lisa M. (CMS/CCIIO)
Subject: FW: Follow-Up Meeting on Prevention Reg

See last question on what student health plans at catholic universities cover today. Can we reach out to our sources at Aetna and Nationwide to see if they can answer the question? Thanks

---

From: Fenn, Sarah (b)(6) [redacted]eop.gov]
Sent: Wednesday, October 12, 2011 4:50 PM
To: Lambrew, Jeanne; Dotzel, Peggy (HHS/OGC); Turner, Amy - EBSA: Catherine.E.Livingston@irscounsel.treas.gov; helen.morrison@do.treas.gov; Peggy.Dotzel@hhs.gov; Ahlstrom, Alexis K. (CMS/CCIIO); Croley, Steve; Small, Anne
Cc: Sekhar, Sonia; Lee, Katina - EBSA; Montz, Ellen; Borzi, Phyllis - EBSA; mark.iwry@do.treas.gov
Subject: RE: Follow-Up Meeting on Prevention Reg

+ Steve and Annie

From: Lambrew, Jeanne
Sent: Wednesday, October 12, 2011 4:48 PM
To: Dotzel, Peggy (HHS/OGC); Turner, Amy - EBSA; Catherine.E.Livingston@irscounsel.treas.gov; helen.morrison@do.treas.gov; Peggy.Dotzel@hhs.gov; Ahlstrom, Alexis K. (CMS/CCIIO); Fenn, Sarah
Cc: Sekhar, Sonia; Lee, Katina - EBSA; Montz, Ellen; Borzi, Phyllis - EBSA; mark.iwry@do.treas.gov
Subject: RE: Follow-Up Meeting on Prevention Reg

Hi all, thanks for the time yesterday.

This group plus the policy folks will hopefully meet on Monday, but two additional legal questions for you.

First, (b)(5) [redacted]

Second, (b)(5) [redacted]

Thanks.

APPENDIX C

Redacted Emails from Sister Carol Keehan, White House, and HHS Officials, Mar. 13, 2012

(b)(5)/deliberative unless otherwise marked

KGS2 (HHS/IOS)

From: Hash, Michael (HHS/OHR)
Sent: Tuesday, March 13, 2012 4:55 PM
To: (b)(6)Cecilia Munoz eop.gov; KGS2 (HHS/IOS)
Subject: Re: FW: Language

[redacted]

From: Munoz, Cecilia [mailto: (b)(6) [redacted] eop.gov]
Sent: Tuesday, March 13, 2012 04:32 PM
To: KGS2 (HHS/IOS); Hash, Michael (HHS/OHR)
Subject: Re: FW: Language

Nice! Any new insights?

From: KGS2 (HHS/IOS) [mailto:KGS2@hhs.gov]
Sent: Tuesday, March 13, 2012 04:30 PM
To: Munoz, Cecilia; Hash, Michael (HHS/OHR)

<Michael. Hash@hhs.gov>
Subject: Re: FW: Language

Good meeting with the Association of Jesuit Colleges – lovely leader

---

From: Munoz, Cecilia [mail to: (b)(6) eop.gov]
Sent: Tuesday, March 13, 2012 1:01 PM
To: KGS2 (HHS/IOS); Hash, Michael (HHS/OHR)
Subject: Re: FW: Language

Agree. I also got a lesson on the difference between an apostolic and evangelical mission from her, which I found really interesting, but it's not exactly the kind of language we can use. If it's ok with you, will share with Nick and Jeanne, who are conspiring with your team on outreach materials.

I will really enjoy the day when we have this issue behind us (if it ever comes.)

_____

Cecilia Muñoz
Director, Domestic Policy Council
The White House
(b)(6)/personal privacy information

From: KGS2 (HHS/IOS) [mailto:KGS2@hhs.gov]
Sent: Tuesday, March 13, 2012 12:57 PM
To: Munoz, Cecilia; Hash, Michael (HHS/OHR)
Subject: FW: FW: Language

FYI: Sister Carol sent me what she had already sent to the Bishops and has been sharing. I will put together

some language but I think this could be helpful if translated a bit out of cannon law and into English.

On Tue, Mar 13, 2012 at 12:34 PM, Sr. Carol Keehan <srcarolk@chausa.org> wrote:

From: Sr. Carol Keehan
Sent: Tuesday, March 13, 2012 12:13 PM
To: Kathleen Sebelius com'
Subject: Language

The major issue for most was the fact that as first written, the mandate appeared to put the government in a position of saying what ministries of the Church were actually Church ministries and the others were secular organizations. The Catholic Church code of canon law explicitly states that the local Bishop determines that a ministry is Catholic.

The best way to understand is that there are two arms of the Church one is evangelical and the other apostolic or service oriented. Both are essential parts of the Church, in fact the current Pope in some of his writings has said that the works of charity could be said to be as much a responsibility of the Church as the acts of worship.

There are many definitions for what is a Church ministry in federal law especially in the tax code. I thought the area of the 990 reporting requirement might be a fruitful place to start. Churches are not required to file a 990 but ministries of the Church often recognized because they are in the Catholic Directory,

which the Bishop controls, do have to file a 990. Both are seen as works of the Church but with different missions in the Church. This has always been accepted by hospitals, universities etc. The problem with the way the original mandate was written was that unintentionally, it appeared to say that many ministries that had for centuries considered themselves ministries of the Church were now being told they were not ministries of the Church. Clearly that was not what the administration intended.

This is what I sent to the Cardinals:

" As the accommodation seems to be working out, it appears that there will be two kinds of exemptions. One for religious entities that are primarily evangelical and one for religious entities that are primarily apostolic. The evangelical being the ones that meet the four part test and the others, works that the Church considers ministries, such as CC, CRS and hospitals among others. The Church is the recognizing authority, there would be no test or certification by a government agency required. The first type of exemption would have no obligation to provide contraception or sterilization and their employees would not be offered it. The second would have no obligation to provide or refer for contraception or sterilization but their employees would be offered it by another mechanism at no cost to the employer. This would be done for those who have traditional insurance or who are self-insured, although the mechanism might be different.

In some ways this resembles the IRS regulations and distinctions of different types of Church organizations.

Churches, for instance meet one test and do not have to file a 990 and other Catholic organizations like hospitals do have to file a 990 even though the IRS considers them as Church ministries."

I hope this is some help. I am in the office today until 2:30 then on my cell until about 3:30 then fly to Chicago but available there after 6:30 pm and all day tomorrow on my cell. Thanks for all you work on this. If I hear anything, I will let you know. Sr Carol

Sr. Carol Keehan, D.C.
President/CEO
The Catholic Health Association
of the United States
1875 Eye St. NW, Ste. 1000
Washington DC, 20006-5409
202-721-6015

srcarolk@chausa.org