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Brief of Law Professors Bruce P. Frohnen, Robert P. George, Alan J. Meese, Michael P. Moreland, Nathan B. Oman, Michael Stokes Paulsen, Rodney K. Smith, Steven D. Smith, and O. Carter Snead as Amici Curiae in Support of the Petitioners

Nathan B. Oman
William & Mary Law School, nboman@wm.edu

John D. Adams

Matthew A. Fitzgerald

No. 15-105

IN THE
Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF LAW PROFESSORS BRUCE P. FROHNEN, ROBERT P. GEORGE, ALAN J. MEESE, MICHAEL P. MORELAND, NATHAN B. OMAN, MICHAEL STOKES PAULSEN, RODNEY K. SMITH, STEVEN D. SMITH, AND O. CARTER SNEAD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JOHN D. ADAMS
Counsel of Record
MATTHEW A. FITZGERALD
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(804) 775-4744
jadams@mcguirewoods.com

Attorneys for Amici Curiae

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STATEMENT OF INTEREST[1]

Amici are professors of law or jurisprudence teaching at universities in the United States, with a professional interest in the law governing religious freedom and its development in the courts:

Bruce P. Frohnen. Professor of Law, Ohio Northern University.

Robert P. George. McCormick Professor of Jurisprudence, Princeton University.

Alan J. Meese. Ball Professor of Law, The College of William & Mary.

Michael P. Moreland. Professor of Law, Villanova University Law School.

Nathan B. Oman. Tazwell Taylor Research Professor & Professor of Law, The College of William & Mary.

Michael Stokes Paulsen. Distinguished University Chair & Professor of Law, University of St. Thomas, Minneapolis, Minnesota.

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* Sup. Ct. R. 37. Counsel for both parties have consented to the filing of this brief, and their consents have been filed with this Court. No counsel for either party authored the brief in whole or in part, and neither party nor their counsel made any monetary contribution intended to fund the brief's preparation or submission.

Rodney K. Smith. Professor of Practice, Sandra Day O'Conner College of Law, Arizona State University.

Steven D. Smith. Warren Distinguished Professor of Law, Co-Executive Director, Institute for Law & Religion, and Co-Executive Director, Institute for Law & Philosophy, University of San Diego.

O. Carter Snead. William P. and Hazel B. White Director, Center for Ethics and Culture, and Professor of Law, University of Notre Dame.

SUMMARY OF ARGUMENT

Suppose a federal law required government officials to enter a Catholic church and use church property to distribute contraceptives and abortifacients over church's objection. Such a law would surely burden the church's religion, even if the government paid for the objectionable medications and compensated the church for the use of its resources. By commandeering church property, such a law would force the church to be complicit in activity to which it has serious religious objections.

That is what the government has done in this case. The Little Sisters of the Poor are an order of Catholic nuns who object to being forced to participate in the distribution to their employees of contraceptives and abortifacients.[2] The government insists that regulations of the Department of Health and Human Services (HHS) relieve the nuns of the obligation to pay for these drugs. However, the government still commandeers health care plans created and controlled by the nuns and uses them to distribute contraceptives and abortifacients. State and federal law treat these health care plans as the property of the Little Sisters of the Poor. The nuns thus make the unremarkable claim that the government substantially burdens their religion when it uses their property in ways that they find religiously offensive.

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[2] Petitioners include other religious organizations and their health care plans who are similarly situated to the Little Sisters of the Poor. For convenience and clarity, however, this brief refers only to the Little Sisters of the Poor.

The courts below in this and similar cases, however, have fundamentally misunderstood the nature of the burden created by the Department's regulations. They thus frustrate Congressional policy requiring the government to justify its actions in such cases.

Specifically, the lower court focused on the fact that the Little Sisters of the Poor are not financially liable for contraception and that the paperwork requirements created by the Department's regulations are minimal. No one, however, claims that the nuns are being forced to directly purchase contraception, nor is their religion burdened because they have to fill out additional forms. Such arguments miss the basic issue in this case.

The Department's regulations exercise sweeping authority over religious institutions. Given that many religious believers object to all or some of the drugs included in the contraceptive mandate, dozens of lawsuits challenging those regulations have been filed. Hundreds of other institutions must also object to the Department's regulations. The petition for certiorari should be granted so that this Court can resolve this "important question of federal law."

ARGUMENT

By commandeering the health care plan created, controlled, and owned by Petitioners, the Department's regulations force them to participate in distributing religiously objectionable medications.

I. The Department's regulations burden Petitioners' religion by commandeering their property and using it to distribute contraceptives and abortifacients.

The burden imposed by the Department's regulations can best be understood though analogies. Suppose that there was a law that required the nuns of the Little Sisters of the Poor to distribute contraceptives personally to their employees. The government would pay for the contraceptives and compensate the nuns for their time and expenses, so there would be no financial complicity in the distribution of the medications. Furthermore, the nuns would be free to voice their religious objections while distributing the contraceptives and the government would take steps to insure that anyone receiving contraceptives from the nuns understood their religious objections. Such a law would clearly place a substantial burden on the nuns' religious exercise. Yet it would impose no financial burden on the nuns, and handing out the contraceptives could be done very easily, requiring far less effort than other regulatory requirements with which Petitioners must comply.

Now imagine that the law, rather than requiring that the nuns personally distribute the contraceptives, allowed a government official to enter the nuns' facilities and use their medicine carts and other equipment to distribute contraceptives. Again, the law would fully compensate the Little Sisters of the Poor for their financial costs. Again, the nuns would be free to follow the medicine carts through their facility denouncing contraception and abortion, and the government could take steps to make clear

that the Little Sisters of the Poor object to the provision of contraceptives with the nuns' property. Such a law would represent far more than a "*de minimis*" burden on the nuns' religion. Rather, it would directly burden the nuns' religious exercise in the same way as the first hypothetical law, namely by making them an involuntary party to the distribution of medications to which they have serious and sincere religious objections. The fact that this hypothetical law is directed at the nuns' property rather than at their bodies does not change the fact that they would be forced to be complicit in what they sincerely regard as sinful behavior.

The Department's regulations are analogous to this second law. It is true that the Little Sisters of the Poor have no financial liability for the purchase of contraceptives, but they are not claiming that their religious exercise is burdened because they must purchase contraceptives. Rather, the Little Sisters of the Poor have created a health care plan, a plan that they control and that is their property. The government, in pursuit of its goals, is seeking to use the nuns' plan to distribute contraceptives. For the government to do this constitutes a burden on Petitioners' religion, a burden that the court below failed to grasp or properly consider.

A. State and federal law treat employer-provided health care plans as property of the employers, created and controlled by them.

Health insurance plans do not spring into existence *ex nihilo*, nor are they creations of the government. *Cf. Lockheed Corp. v. Spink*, 517 U.S.

882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."). Rather, they are devices of employers designed to provide employees with certain benefits as part of their compensation. The health care plan of the Little Sisters of the Poor exists only because the Little Sisters of the Poor created it.

As a matter of state law, employer-provided health insurance is a contract between the employer and the insurance provider to which the employee is generally treated as a third-party beneficiary. *See, e.g., Southwest Health Plan, Inc. v. Sparkman*, 921 S.W.2d 355 (Tex. App. 1996) (holding that an employee was a third party beneficiary of a contract between the employer and its health insurance company); *but see Cahill v. Eastern Benefit Systems, Inc.*, 603 N.E.2d 788, 792 (Ill. App. Ct. 1992) (holding that an employee could not sue as a third-party beneficiary of a contract between an employer and the insurance company providing benefits to the employer's employees).

In the case of self-insurance by the employer, the relationship between the employer and the third party administrator (TPA) is also contractual. *See, e.g., Multi-Craft Contractors Inc., v. Perico Ltd.*, 239 S.W.3d 33 (Ark. Ct. App. 2006) (deciding a dispute between a self-insured employer and its third-party administrator as a matter of contract law). Once they are executed, contracts are, of course, a form of personal property. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS Ch. 15 Introductory Note (AM. LAW

INST. 1981) (noting that the law of assignment in contract "is part of the larger subject of transfer of intangible property.").

To be sure, insurance contracts are a very heavily regulated form of property. *See* Timothy S. Jost & Mark A. Hall, *The Role of State Regulation in Consumer Driven Health Care*, 31 AM. J. L. & MED. 395, 399 (2005) ("Health insurance is one of the most heavily regulated industries in the United States."). Petitioners, however, are not challenging the authority of the government to regulate employer-provided health insurance in general.[3] Rather, they are challenging the lawfulness of the way in which the government has chosen to exercise that power in this particular case. The fact that property is generally subject to government regulation does not alter the fundamental fact that it remains the property of its owner.

In other contexts, federal law treats employer-provided health care plans as property of the employer. For example, they may be assumed in bankruptcy and are treated as property of the employer's bankruptcy estate. *See* 11 U.S.C. §365 (2012) (setting forth the trustee in bankruptcy's power to assume executory contracts). Although the Employee Retirement Income Security Act (ERISA), the main federal statute governing employer-

[3] There are, however, complex questions in this case over the precise nature and scope of the government's power to regulate Petitioners' health care plans under ERISA and the ACA. *See* Petition for Certiorari at 11-13.

provided insurance, does not govern Petitioners' health care plan, this Court's ERISA cases illustrate that health care plans are the creatures of their creators, namely employers. This Court has noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans." *Curtiss-Wright Corporation v. Schoonejongen*, 514 U.S. 73, 78 (1995). This is true even though ERISA imposes on plan administrators fiduciary duties to plan beneficiaries. [4] "ERISA's fiduciary duty requirement simply is not implicated where [an employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Likewise, this Court has said that "decisions regarding the form or structure of a plan are generally settlor [i.e. employer] functions." *Beck v. Pace Int'l Union*, 551 U.S. 96, 101-102 (2007) (internal citations and quotations omitted). In short, federal law treats employer-provided health care plans as the creation and creature of the employer.

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[4] It is worth noting that in ERISA argot, "plan administrators" and "third party administrators" are not the same thing. "Plan administrators" are generally the employers who set up the plans. "Third party administrators," in contrast, are mere agents hired by the plan administrators to process claims and perform other clerical functions on behalf of employers.

B. The regulations use Petitioners' health care plans to distribute contraceptives and abortifacients to which they have religious objections.

There are many ways in which the government could ensure that Petitioners' employees have access to contraception without cost sharing, as required by the Affordable Care Act (ACA). However, as the D.C. Circuit explained, what the Department's regulations seek to do here is make obtaining contraception "seamless from the beneficiaries' perspective." *Priests for Life v. Dept. of Health & Human Serv's*, 772 F.3d 229, 245 (D.C. Cir. 2014). This "seamlessness," however, is achieved only because the government uses the religious objectors' plans to distribute contraceptives. Under the regulations, the TPA, an agent hired by the Little Sisters of the Poor and fireable by them, would process claims of employees to contraception and insure that the religiously offensive medications are distributed through Petitioners' plan. *See* 26 C.F.R. §54.9815-2713AT(b)(2) (2015). The only reason that the TPA has a relationship with Petitioners' employees or access to the information necessary to provide them with contraception is because the TPA administers the Little Sisters of the Poor's health care plan. Thus, contrary to the suggestions of lower courts in similar cases, it is not true that "the acts that violate their faith are the acts of third parties." *See East Texas Baptist University v. Burwell*, 2015 WL 3852811, at *5 (5th Cir. 2015). In this context, the TPA is not some remote stranger, a third-party unconnected with petitioners. Rather the TPA is the nuns' agent, administering the nuns' plan.

The various attempts of the government to accommodate the religious objections of Petitioners' do nothing to eliminate these concerns. True, the government claims to relieve the Little Sisters of the Poor of financial complicity. It is a non sequitur, however, to argue that because there is no financial burden, there is no burden of any kind. *See Thomas v. Review Board*, 450 U.S. 707 (1981) (holding that the government violated the Free Exercise clause when it punished someone for refusing religiously objectionable but paid employment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same). Likewise, the employees would be notified in various ways that the Little Sisters of the Poor are not paying for contraceptives, *See* 26 C.F.R. §54.9815-2713A(d) (2015) ("The notice [from the TPA to employees] must specify that the eligible organization does not administer or fund contraceptive benefits"), but this does not change the fact that it is the nuns' plan that is being used to purvey contraceptives to which they object. It is this use of their property that constitutes a burden on Petitioners' religion.

II. The Court should grant certiorari because the lower courts have misunderstood the nature of the burden created by the Department's regulations.

By misunderstanding the nature of the burden on religion created by the Department's regulations, the lower courts threaten to deprive potentially hundreds of religious organizations of the protection afforded to them by Congress in the Religious Freedom Restoration Act (RFRA). Certiorari is thus warranted in this case because there is an "an

important question of federal law that… should be settled by this Court." Sup. Ct. R. 10(c).

A. The lower courts mistakenly conceptualized the burden.

The Tenth Circuit in this case misunderstood the burden placed on the religious exercise of the Little Sisters of the Poor by the Department's regulations. Its analysis focused on two issues. The first was the fact that if the Little Sisters of the Poor were to invoke the Department's regulations, the government would assume the financial costs of providing contraception to their employees. *See* Pet. App. 48a. ("The accommodation relieves the Plaintiffs from complying with the Mandate and guarantees that they will not have to … pay for … contraceptive coverage.").

The second was that filling out the paperwork required by the Department's regulations imposed only a *de minimis* administrative burden. *Id.* at 48a ("[T]hese *de minimis* administrative tasks do not substantially burden religious exercise for purposes of RFRA"). Other lower courts faced with similar challenges to the Departments regulations have characterized the burdens imposed on religious objectors in similar terms. *See, e.g., Priests for Life*, 772 F.3d at 249 ("A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization"). This approach, however, is misconceived.

1. It is irrelevant that Petitioners are not financially liable.

First, the fact that the government shoulders the financial costs of providing contraception to Petitioners' employees is both unexceptional and irrelevant. The Office of Management and Budget estimates that in 2015 the federal government will spend $1.1 trillion on the health care of American citizens. Office of Management & Budget, *Table 15.1 – Total Outlays for Health Programs: 1962-2020* available at: https://www.whitehouse.gov/omb/budget/Historicals/.

These subsidies take the form of everything from financial support for basic medical research to paying directly for the medical procedures of millions of citizens. Through the Department's regulations, the government has opted to spend part of its health care budget on contraception. There is nothing unusual about this. It is also irrelevant to this case.

One obviously cannot claim that one's religious freedom is burdened when others behave in ways that one finds religiously objectionable. As this Court observed in *Bowen v. Roy*, for example, religious freedom "simply cannot be understood to require that the Government conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Contrary to the suggestion by the lower court, however, challengers to the Department's regulations do not question this principle. *See* Pet. App. 91a

("Plaintiffs sincerely oppose contraception, but their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA."); *Priests for Life*, 772 F.3d at 246 ("They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors."). The Little Sisters of the Poor are not claiming that their religion is burdened because the government pays for contraception to which they object. Nor are they claiming that their religion is burdened because their employees might use medications at government expense that the nuns believe to be sinful. In short, they are not trying to keep the government from providing contraception to their employees, nor are they seeking to limit their employees' ability to obtain or use contraception at no expense.

As long-time observers of this kind of litigation, we suspect that both the government and the lower courts feel exasperated that having been relieved of the obligation to purchase contraceptives, the Little Sisters of the Poor and other objectors have the temerity to challenge the Department's regulations.[5]

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[5] Writing for the Seventh Circuit, for example, Judge Posner rather shockingly suggested that the plaintiff, a Christian liberal arts college, was lying when it claimed that it would have no RFRA objection to the Department's regulations if the College's health care plan was not used to distribute abortifacients. *See Wheaton College v. Burwell*, 2015 WL 3988356, *6 ("At oral argument Wheaton's lawyer said that his client has no objection to the government's using the college's insurers to provide emergency-contraceptive coverage as long as *(cont'd)*

Such impatience, however, is neither warranted nor a sound basis for legal analysis. The fact that the government has avoided violating RFRA by forcing the Little Sisters of the Poor to pay for contraceptives does not leave HHS free to violate RFRA by commandeering the nuns' health care plans. *See Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751, 2775 (2014) ("By requiring [religious objectors] … to *arrange* for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs" (emphasis added)).

2. It is irrelevant that the paperwork required is "de minimis."

The Tenth Circuit and other lower courts have also emphasized that the Department's regulations require only that objectors fill out a simple form. *See* Pet. App. 48a ("[T]hese *de minimis* administrative tasks do not substantially burden religious exercise for purposes of RFRA"). Doing so would take at most a few minutes and is far less onerous than other regulations with which the Little Sisters of the Poor must comply. *Compare Priests for Life*, 772 F.3d at

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it's not 'using' Wheaton's contract with the insurers …. We wonder."). Elsewhere, in the opinion Judge Posner suggested that the plaintiff's real goal was to make it more difficult for students to obtain abortifacients. *See id.* at *5 ("But it seeks to make that access more difficult"). These asides were irrelevant to the legal questions Judge Posner was addressing, but they do reveal an unfortunate unwillingness to consider the nature of the religious burdens created by the Department's regulations. It also speaks to the need for this Court to grant certiorari in order to analyze these nationally important issues.

237 ("All Plaintiffs must do to opt out is to express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state."). This argument also misunderstands the nature of the religious burden in this case. What is objectionable about the Department's regulations is not that they require religious institutions to fill out additional paperwork. Rather, those regulations create a burden by forcing religious institutions to participate in the delivery of medications to which they have sincere and grievous religious objections by commandeering their property.

B. Widespread religious objections to the regulations make a grant of certiorari proper.

The nuns claim that through forced complicity in the delivery of contraceptives and abortifacients, the government will "substantially burden [their] religious exercises." *See* 42 U.S.C. §2000bb-1(a) (2012). They are not alone in this belief. The Department chose only to exempt "churches" from the ACA's contraceptive mandate, but hundreds of organizations that fail to qualify as "churches" nevertheless have grave religious objections to forced complicity in the delivery of contraception or abortifacients.

To give a single example, the Catholic Church has well-articulated and long-standing religious objections to both contraception and abortifacients. *See* JOHN PAUL II, *EVANGELIUM VITAE* (1995)

(articulating the Catholic Church's opposition to abortion); PAUL VII, *HUMANAE VITAE* (1968) (articulating the Catholic Church's opposition to artificial birth control). It is reasonable to suppose that some Catholic organizations will challenge any law that requires that they be complicit in providing such drugs. There are hundreds of Catholic religious orders, primary and secondary schools, colleges and universities, and social service organizations in the United States. *See generally* THE OFFICIAL CATHOLIC DIRECTORY ANNO DOMINI 2015 (2015). Perhaps the most compelling evidence that the Little Sisters of the Poor raise "an important question of federal law that… should be settled by this Court," Sup. Ct. R. 10(c), is that the Department's regulations have been repeatedly challenged in the lower courts by both Catholic organizations and non-Catholic organizations. *See* Becket Fund for Religious Liberty, *HHS Information Central*, http://www.becketfund.org/hhsinformationcentral/ (tracking all of the litigation challenging the contraception mandate).

Unless this Court grants the Little Sisters of the Poor's petition for a writ of certiorari, their ability and the ability of those similarly situated to challenge the Department's regulations will be at an end. This is true, even though the court below failed to understand the nature of the burden created by those regulations and despite the fact that the government has not been required to explain why it is necessary to threaten these nuns with millions of dollars in fines to achieve its objectives or even precisely what its objectives in crafting this particular regulatory mechanism might be. Several

other circuit courts have also blessed the Department's regulations. *See Wheaton College v. Burwell*, 2015 WL 3988356 (7th Cir. July 1, 2015), *East Texas Baptist v. Burwell*, 2015 WL 3852811 (5th Cir. June 22, 2015, *Geneva College v. Health & Human Services Secretary*, 778 F.3d 422 (3d Cir. 2015), *Priests for Life v. Department of Health & Human Services*, 772 F.3d 229 (D.C. Cir. 2014). Unless this Court grants certiorari, it will be impossible for religious institutions in much of the country to have their religious objections properly considered, despite the clear Congressional mandate that courts weigh the interest in government regulation against the burdens those regulations impose on sincere religious beliefs.

CONCLUSION

For these reasons, *amici* respectfully believe that this case warrants a grant of certiorari.

Respectfully submitted,

JOHN D. ADAMS
Counsel of Record
MATTHEW A. FITZGERALD
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(804) 775-4744
jadams@mcguirewoods.com

Attorneys for Amici Curiae
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