

***LITTLE SISTERS OF THE POOR HOME
FOR THE AGED V. SEBELIUS:
RAMIFICATIONS FOR CHURCH PLANS
AND RELIGIOUS NONPROFITS***

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*The mandate for certain employers to provide contraceptive care as part of their employees' benefit plans established by the Patient Protection and Affordable Care Act (PPACA) and pertinent regulations has been controversial and highly litigated since its passage in 2010. One party to this litigation, the Little Sisters of the Poor, finds the contraceptive care mandate to be in conflict with their fundamental religious beliefs. The Little Sisters also find PPACA's exceptions to the contraceptive care mandate for religious nonprofits to be inadequate in preventing the government from requiring the Little Sisters to violate their beliefs. Currently, the Little Sisters are waiting for the Supreme Court to hear their appeal. When analyzing the Little Sisters' claim under the standard established by the Religious Freedom Restoration Act as interpreted by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court should find that the contraceptive care mandate constitutes an impermissible undue burden on the Little Sisters' constitutional right to freely exercise their religion. Even if the Court deciding these and similar cases would not find for the Little Sisters, it should consider the potentially damaging consequences of the government's position regarding PPACA. The government's enforcement of certain provisions of the Employment Retirement Income Security Act of 1974 (ERISA), specifically the contraceptive care mandate, is in direct conflict with other ERISA provisions. This enforcement is likely to have harmful effects*

* J.D. Candidate, 2016, University of Colorado Law School. I thank all of the law review members who put so much thought and care into the editing process, especially Jessica Pingleton. I am also thankful for all of the professors and attorneys whose advice inspired me to follow my passion and pursue this topic. Finally, I am especially grateful for the patience, support, and love of Tim and my parents, my greatest blessings.

on the regulation of “church plans” under ERISA and the broader legal landscape of employee benefit plans.

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INTRODUCTION

St. Jeanne Jugan began caring for the impoverished elderly as a young woman in nineteenth-century France, which led to her founding the Little Sisters of the Poor—a religious community of women whose sole purpose is to serve indigent elders as if they were serving Jesus Christ Himself.¹ The Little Sisters of the Poor established a presence in the United States in 1868, and have been serving Colorado’s elderly poor in homes for the aged since 1916.² Less than six months after Pope Benedict XVI canonized St. Jeanne Jugan on October 11, 2009, President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law, threatening the Little Sisters’ ability to continue operating their homes for the aged

1. See *Our History*, LITTLE SISTERS OF THE POOR, <http://www.littlesistersofthepoor.org/ourlife/our-history> [<http://perma.cc/33GR-X3WF>]; see also Complaint at 5, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. Dec. 27, 2013) (No. 13-CV-2611-WJM-BNB), 2013 WL 5331098.

2. See Complaint, *supra* note 1, at 5.

in a way that comports with their most fundamental religious beliefs.³

Ever since Congress enacted PPACA in the midst of a significant “partisan tussle,” the law has remained highly controversial and fiercely litigated.⁴ The part of PPACA that most concerns the Little Sisters of the Poor in Denver is the contraceptive care mandate.⁵ As members of the Roman Catholic faith, the Little Sisters of the Poor believe that they cannot comply with PPACA’s requirement to include contraceptive coverage in the healthcare plan that they provide to their employees without violating their religious beliefs.⁶

The federal government, anticipating religious objections to the contraceptive care mandate, crafted a narrow exception for a class of religious employers that does not include the Little Sisters of the Poor.⁷ The government also created an accommodation for religious nonprofit organizations that are not covered by the aforementioned exception.⁸ This accommodation, the mechanics of which are discussed in detail

3. See *Who Is St. Jeanne Jugan?*, LITTLE SISTERS OF THE POOR, <http://www.littlesistersofthepoor.org/stjeannejugan/biography> [<http://perma.cc/L2CD-ESFY>]; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21 U.S.C., 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C. (2012)) [hereinafter PPACA]. The theological nuances of the Roman Catholic doctrines in which the Little Sisters’ beliefs are grounded are beyond the scope of this Note. The following resources will provide more information for those interested: Brief of 67 Catholic Theologians and Ethicists as Amici Curiae in Support of Appellants and Requesting Reversal, *Little Sisters of the Poor Home for the Aged Denver, Co. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015) (Nos. 13–1540, 14–6026, 14–6028), 2014 WL 991197; POPE PAUL VI, *HUMANAE VITAE* (1968), http://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html [<http://perma.cc/B7M5-7FRC>]; *CATECHISM OF THE CATHOLIC CHURCH* ¶¶ 1753, 2270, 2370, 2284 (1993), http://www.vatican.va/archive/ENG0015/_INDEX.HTM [<http://perma.cc/Y3GR-LLZJ>].

4. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES (Mar. 23, 2010), <http://www.nytimes.com/2010/03/24/health/policy/24health.html> [<http://perma.cc/CU4F-EDYY>]; see Julie Rovner, *In Surprise Move, Supreme Court Takes on Fate of Obamacare Again*, NPR: SHOTS: HEALTH NEWS FROM NPR (Nov. 7, 2014, 2:46 PM), <http://www.npr.org/blogs/health/2014/11/07/362315906/in-surprise-move-supreme-court-takes-on-fate-of-obamacare-again> [<http://perma.cc/R7DC-RHLA>]. One hundred and twenty-five other religious nonprofit organizations have filed fifty-six similar lawsuits to date. *HHS Mandate Information Central*, BECKET FUND, <http://www.becketfund.org/hhsinformationcentral/> [<http://perma.cc/TDH4-LVL8>].

5. See PPACA discussion *infra* Section I.B.

6. See Complaint, *supra* note 1, at 2.

7. See PPACA discussion *infra* Section I.B.

8. See *infra* Section I.B.

below, allows the religious nonprofit to opt out of directly providing contraceptive coverage, but only after notifying the government of its religious objection to providing coverage.⁹ According to the government, this process allows religious nonprofits to opt out of providing the objectionable coverage while allowing for another entity to provide the coverage—all without requiring the nonprofit to violate any religious beliefs.¹⁰ Although the government requires no affirmative action from religious employers covered by the exception, it does require religious nonprofits who seek accommodation to participate in a process that ultimately incorporates contraceptive care into the written instrument that delineates the nonprofit's offered healthcare benefits.¹¹ While the Little Sisters of the Poor are eligible to seek this accommodation, they argue that pursuing the accommodation will force them to violate their religious beliefs by actively facilitating the provision of contraceptive care.¹²

The Little Sisters of the Poor filed a class action lawsuit challenging the contraceptive care mandate on September 24, 2013, which they lost at the trial level.¹³ In the wake of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*—which invalidated the contraceptive care mandate as it applied to closely held for-profit corporations with religious objections to the mandate—the Little Sisters lost their appeal at the Tenth Circuit Court of Appeals.¹⁴ The accommodation presents the Little Sisters with a Hobson's choice, “a situation in which you are supposed to make a choice but do not have a real choice because there is only one thing you can have or do.”¹⁵ Just like the plaintiffs in *Hobby Lobby Stores, Inc.*, the Little Sisters now face the “choice” of either (1) violating their religious beliefs by complying with the mandate or seeking the present accommodation, or (2) facing devastating financial consequences for not taking the first option.¹⁶ Like the trial

9. See *infra* Section I.B.

10. See *infra* Section I.B.

11. See *infra* Section I.B.

12. See Brief of Appellants at 24–25, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 794 F.3d 1151 (10th Cir. 2015) (No. 13-1540), 2014 WL 897456.

13. See Complaint, *supra* note 1, at 1.

14. 134 S. Ct. 2751 (2014).

15. *Hobson's choice*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/hobson's%20choice> [<http://perma.cc/2MMH-WK8A>].

16. See PPACA discussion *infra* Section I.B.

court, the Tenth Circuit disagreed with the Little Sisters' statement that both complying with the mandate and seeking the accommodation would gravely violate their religious tenets.¹⁷ The Little Sisters filed a petition for certiorari at the Supreme Court to appeal the Tenth Circuit's decision.¹⁸ The Supreme Court granted the petition in November 2015 and will hear the Little Sisters' case, as well as the cases of six similar plaintiffs also fighting the mandate.¹⁹

This Note addresses the merits of the Little Sisters' case. Part I describes the three statutes that are most central to the Little Sisters' claim under the Religious Freedom Restoration Act (RFRA): the Employee Retirement Income Security Act of 1974 (ERISA), PPACA, and RFRA itself. Part II analyzes the district court's and Tenth Circuit Court of Appeals' decisions in the Little Sisters' lawsuit and emphasizes the key issues to be decided by the Supreme Court. Finally, Part III contends that the Supreme Court must find that the contraceptive care mandate impermissibly imposes a substantial burden on the free exercise of religion in this case. Thus, the Court must invalidate the contraceptive care mandate as it applies to the Little Sisters of the Poor and similarly situated religious nonprofits, not necessarily because the freedom of religion should always trump access to contraceptive care, but because it constitutes a violation of RFRA.²⁰ However, even if the Supreme Court does not reach this result, it is important for courts and policy makers to carefully consider the damaging implications of the government's position in the Little Sisters' lawsuit. The outcome of this case, to the extent that it concerns the government's enforcement authority under ERISA, is likely to have significant effects upon the broader regulation landscape of employment-based healthcare. The consequences of selective and unpredictable ERISA enforcement, such as further unbridled governmental fiat in this area and increased

17. See discussion of the Tenth Circuit opinion *infra* Section II.C.

18. See Petition for Writ of Certiorari, Little Sisters of the Poor Home for the Aged v. Sebelius, No. 15-105, http://www.becketfund.org/wp-content/uploads/2015/07/2015-07-23-LSP-RSI-Petition_Final.pdf [<http://perma.cc/VM5N-EDWX>].

19. See Emma Green, *The Little Sisters of the Poor Are Headed to the Supreme Court*, ATLANTIC (Nov. 6, 2015), <http://www.theatlantic.com/politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729/> [<http://perma.cc/6L4P-BDXY>].

20. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (2012) [hereinafter RFRA].

costs surrounding employment-based benefits, have the potential to extremely limit both the scope and availability of benefits generally.²¹

I. THE STATUTORY LANDSCAPE OF THE LITTLE SISTERS OF THE POOR'S CASE

The Little Sisters contend that the federal government has placed them in a situation where they can either comply with the law at the expense of their religious beliefs, or else, obey the dictates of their conscience and suffer serious financial penalties as a result.²² Three statutes in particular lie at the heart of the Little Sisters' case: ERISA, PPACA, and RFRA.²³ When Congress incorporated PPACA into this scheme, it combined two statutes with irreconcilable policies and claims of congressional authority over benefit plans.²⁴ The Little Sisters' claims are rooted in both the incompatibility of PPACA and ERISA, and the RFRA problems arising from PPACA's application to certain religious employers. The complex statutory scheme created by ERISA's enactment, PPACA's incorporation into ERISA, and the interaction between both of these statutes and RFRA is outlined below.²⁵

A. *The Employee Retirement Income Security Act, Written Instruments, and Church Plans*

When Congress enacted ERISA in 1974, it intended ERISA to be a federal solution to problems surrounding employment benefit bargains.²⁶ These problems, such as relatively harsh rules governing when an employee's conduct would result in a

21. See generally Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., 31 U.S.C., and 42 U.S.C. (2012)) [hereinafter ERISA].

22. Complaint, *supra* note 1, at 4–5.

23. ERISA, *supra* note 21; PPACA, *supra* note 3; RFRA, *supra* note 20.

24. See discussion *infra* Section III.B.

25. This Note will provide only a brief overview of ERISA, focusing on the parts most relevant to the Little Sisters' claims.

26. Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1753–54 (2011). The term “benefit bargains” as used here refers to agreements reached between employers and employees regarding the scope of benefits, such as a pension or healthcare, that the employer will provide to its employees. *Id.*

forfeiture of benefits, often resulted in a financial boon for the employer at the expense of employee benefits.²⁷ ERISA provides various legal standards and rules in an attempt to balance the competing interests of employers and employees in benefit bargains.²⁸

ERISA relies heavily on the judiciary to flesh out the statute's flexible standards and to resolve matters of policy.²⁹ Courts have framed these matters of policy as a balance, where the interests of employers—centered around cost reduction—are on one side and the interests of employees—focused on benefit security—are on the other.³⁰ Over the decades that the judiciary has shaped and clarified ERISA, courts have generally favored the employer's interests in avoiding costs and uncertainty over the employee's interest in benefit security.³¹ For example, the Supreme Court has adopted and affirmed the settlor doctrine, which narrows the functional definition of "fiduciary" so that employers may amend benefit plans not only for the employees' best interests, but their own as well.³² Under the settlor doctrine, designing, amending, and terminating a benefit plan are settlor actions, not fiduciary actions, and do not trigger ERISA's fiduciary provisions.³³ The Court's adherence to principles like the settlor doctrine evidences its disposition to value the legitimate interests of both employers and employees in the benefit of their bargains concerning these plans and in avoiding unnecessary judicial interference in such bargains.³⁴ The Court's realist approach seeks to avoid the cost

27. See, e.g., *Menke v. Thompson*, 140 F.2d 786, 790 (8th Cir. 1944) (affirming the pension forfeiture of an employee who had continuously worked for the company for forty-six years because of the employee's involvement in a three-month strike).

28. Daniel M. Nimitz, *ERISA Plan Changes*, 75 DENV. U. L. REV. 891, 893 (1998).

29. Maher, *supra* note 26, at 1758–59.

30. *Id.* at 1759.

31. *Id.*

32. See *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79 (1995) (defining "person" as someone with the authority to amend a benefit plan within the meaning of ERISA to include "the Company").

33. See *id.* at 81–82; see also Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 424–26 (2000) (defining "fiduciary" under ERISA and explaining the settlor exception). This doctrine more accurately reflects the reality of benefit bargains, in which the employer may be acting more out of self-interest and less as the employees' fiduciary. Thus, it is realistic for the law to not impose fiduciary duties upon the employer under any and all circumstances.

34. Although it is based on a long line of precedent, the Court's approach

and unpredictability commonly associated with judicial interference in private disputes in order to prevent employers from making less generous bargains or revoking benefits entirely, thereby undermining the benefits ERISA was originally meant to protect.³⁵

Although ERISA was originally focused on pension bargains, it regulates “all workplace benefit bargains,” including employment-based healthcare.³⁶ Unlike its treatment of pension plans, ERISA does not attempt to regulate the content or distribution of welfare benefits or to create any entitlement to employer-based welfare benefits.³⁷ Rather, ERISA provides procedural requirements meant to regulate the establishment and administration of such plans.³⁸

Under ERISA, employment-based welfare plans are viewed as the result of bargains in which employers offer benefits and the employees negotiate the offer. Every welfare benefit plan subject to ERISA is required to be “established and maintained pursuant to a written instrument.”³⁹ Employers are presumed to fill the administrative role for welfare benefit plans, as well as the role of defining the final content and parameters of the plan.⁴⁰ If the employer is willing, it can designate an administrator to handle various administrative aspects of the plan as defined in the written instrument.⁴¹ A party may only be designated as a plan administrator by the specific terms of the plan’s written instrument.⁴² In addition, all ERISA-

concerning benefit plan bargains and ERISA protections of plan beneficiaries has received a fair share of criticism. *See, e.g.*, Muir, *supra* note 33, at 25–26 (criticizing the settlor doctrine).

35. Maher, *supra* note 26, at 1765; *see also* Nimtz, *supra* note 28, at 927.

36. Maher, *supra* note 26, at 1754; *see also* 29 U.S.C. § 1002(1) (2012).

37. *See Curtiss-Wright*, 514 U.S. at 78; *see also* Alison M. Sulentic, *Happiness and ERISA: Reflections on the Lessons of Aristotle’s Nicomachean Ethics for Sponsors of Employee Benefit Plans*, 5 EMP. RTS. & EMP. POL’Y J. 7, 30 (2001). The term “welfare benefits” as used here generally references employment-based healthcare and similar benefits to the exclusion of pension benefits.

38. Maher, *supra* note 26, at 1755.

39. *See* 29 U.S.C. §§ 1002(8), (16)(B); 29 U.S.C. § 1102(a)(1) (2012).

40. *See* 29 U.S.C. § 1002(16)(A)(ii).

41. *See id.* § 1002(16)(A)(i). Third party administrators, separate and distinct from the employer, who assist the plan sponsor with various specialized tasks, have become “dramatically” more prevalent in recent years, and their fiduciary status is extremely dependent on the nature of the duties they perform. LEE T. POLK, 1 ERISA PRACTICE AND LITIGATION § 7:17 (2015).

42. 29 U.S.C. § 1002(16)(A)(i) (defining an administrator as “the person specifically so designated by the terms of the instrument under which the plan is operated”).

regulated welfare benefit plans must explicitly set out in their written instruments a procedure for amending the plan and for identifying the parties who have the authority to do so.⁴³ Unless the sponsor explicitly cedes its freedom in the plan's written instrument, the sponsor is generally free to unilaterally amend the plan as long as the sponsor complies with the agreed-upon amendment procedures in the instrument.⁴⁴ The Supreme Court has determined that Congress did not bestow this flexibility to amend welfare benefit plans upon plan sponsors accidentally, but rather it did so intentionally to avoid adding costs and administrative complications to the creation and maintenance of welfare benefit plans.⁴⁵

Limited types of welfare benefit plans, such as church plans, are exempt from regulation under ERISA.⁴⁶ Unless a church plan irrevocably elects to subject itself to the requirements of ERISA, ERISA does not cover the plan.⁴⁷ The plan at issue in the Little Sisters' case is a church plan that has not elected to subject itself to regulation under ERISA.⁴⁸ Congress, mindful of the limitations imposed by the Free Exercise Clause of the First Amendment, intentionally carved out this exception for churches.⁴⁹ The statutory definition of the term "church plan" covers plans run by a variety of organizations and excludes plans run by religious groups in certain circumstances.⁵⁰ The two ways in which a plan may establish church plan status are described as follows:

The first is if the plan is established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches that is tax exempt

43. See 29 U.S.C. § 1102(b)(3).

44. *Inter-Modal Rail Emps. Ass'n v. Atchinson, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); see also James E. Holloway & Douglas K. Schneider, *ERISA, FASB, and Benefit Plan Amendments: A Section 402(b)(3) Violation as a Loss Contingency for a Plan Amendment*, 46 *DRAKE L. REV.* 97, 121 (1997). The term "sponsor" may be read here as synonymous with "employer."

45. *Inter-Modal*, 520 U.S. at 515–16.

46. See 29 U.S.C. §§ 1003(b), (b)(2) (2012).

47. 26 U.S.C. § 410(d) (2012).

48. Complaint, *supra* note 1, at 5. The "church" status that the Little Sisters of the Poor have under ERISA is distinct from the qualifications needed for a religious institution to qualify for the exception or the accommodation under PPACA.

49. David W. Powell et al., *Church and Governmental Plans*, 372–4th Tax Mgmt. (BNA) U.S. Income, at A-14 (2012).

50. See 29 U.S.C. §§ 1002(33)(A)–(D) (2012).

under [26 U.S.C. § 501]. Second, a plan that is not established and maintained by a church or a convention or association of churches also may be treated as a church plan if the plan covers persons who may be deemed employees of a church, or a convention or association of churches, and the plan is maintained by an organization that is controlled by or associated with a church or a convention or association of churches and that has as its principal function the administration of retirement or welfare benefits to church employees.⁵¹

Although the term “church” is not defined by either ERISA or the Internal Revenue Code, the Internal Revenue Service has developed a set of criteria to be used for tax purposes when determining whether an organization qualifies for “church status.”⁵² These numerous criteria include “a recognized creed and form of worship” and “a distinct religious history.”⁵³ A number of courts either have found these criteria to be useful or have adopted them outright when analyzing whether a plan qualifies for church plan status under ERISA.⁵⁴ With this criteria applied, the church plan exemption covers a relatively broad swath of organizations, whether the organization sponsoring the plan qualifies for “church” status or not.⁵⁵

The Little Sisters’ case elucidates how the regulatory framework and underlying policies of ERISA conflict with the government’s interpretation and enforcement of the PPACA’s contraceptive care mandate, which is further explained below.

B. The Contraceptive Care Mandate

PPACA amends the provisions of Part A of Title XXVII of the Public Health Service Act (the Act), which relate to group health plans and health insurance issuers.⁵⁶ PPACA made

51. Powell, *supra* note 49, at A-21.

52. *Id.* at A-21 to A-22.

53. *Id.*

54. *See, e.g.*, Lutheran Soc. Serv. of Minn. v. United States, 758 F.2d 1283, 1288 (8th Cir. 1985).

55. *See* Gen. Couns. Mem. 39007 (July 1, 1983) (plans established and maintained by two Catholic religious orders operating nursing homes and hospitals were church plans even though the orders were not considered to be churches themselves).

56. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).

these provisions of the Act applicable to group health plans and their associated health insurance issuers by incorporating the Act's provisions into ERISA and the Internal Revenue Code.⁵⁷ In an attempt to address the health concerns of women, PPACA extends the scope of coverage without increasing the financial burdens on women by requiring private group health plans to provide coverage without imposing any cost sharing requirements for (1) "evidence-based item services that have a rating of A or B in the current recommendations of the United States Preventive Services Task Force," and (2) "such additional preventative care and screenings" as found in the Health Resources and Services Administration (HRSA) guidelines.⁵⁸ Issues concerning the constitutionality of the still-controversial PPACA have reached the Supreme Court multiple times since the law's enactment in 2010.⁵⁹

PPACA itself lacks any definition for the term "preventative care," which allows governmental agencies to interpret this term expansively to the detriment of the critics of contraceptive care.⁶⁰ After Congress directed HRSA to develop guidelines for determining what "preventative care" group health plans were required to cover in section 300gg-13(a)(4) of PPACA, the Institute of Medicine (the Institute) released an

57. See 29 U.S.C. § 1185d(a)(1) (2012); 26 U.S.C. § 9815(a)(1) (2012). Concerning ERISA, in case the incorporated provisions of PHSa were ever to conflict with sections 1181–1183, 1185–1185d, and 1191–1191c, the statute requires that the PHSa provisions prevail. 29 U.S.C. § 1185(a)(2). However, it remains unclear which statutory provisions would prevail if PPACA were found to conflict with any other ERISA provisions.

58. 42 U.S.C. §§ 300gg-13(a)(1), (a)(4) (2012); see also Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 444–45 (2014). For a legally-focused critique of the government's claim that contraceptive care is beneficial to women's health, see Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379 (2013); for a philosophical critique, see POPE JOHN PAUL II, *EVANGELIUM VITAE* (1995), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jpii_enc_25031995_evangelium-vitae_en.html [<http://perma.cc/66HX-FQ2F>].

59. See, e.g., *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (granting an injunction pending appeal); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012).

60. See 42 U.S.C. §§ 300gg-13(a)(1), (a)(4). The Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to the Coverage of Preventative Services Under [PPACA] issued in 2010 noted that HRSA was to release the guidelines no later than August 1, 2011, and allowed for a comment period lasting through September 17, 2010. Interim Final Rules for Group Health Plans and Insurance Relating to [PPACA], 75 Fed. Reg. 41,726, 41,726, 41,731 (July 19, 2010).

advisory report on July 19, 2011, at the behest of the United States Department of Health and Human Services (HHS).⁶¹ The report recommended for consideration as a preventive service for women “the full range of Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”⁶² The FDA explains that some of its approved contraception methods may work by “preventing attachment (implantation)” of a fertilized egg to the womb.⁶³ HRSA adopted the language of the Institute’s report into the guidelines it issued on August 1, 2011, and thereby inserted a contraceptive care mandate into PPACA.⁶⁴

The first round of amendments to the interim final rules issued by the Department of the Treasury (DOT), the Department of Labor (DOL), and HHS adopted a very narrow exception to the contraceptive care mandate for religious employers.⁶⁵ This exception covers an organization that (1) has the purpose of inculcating religious values; (2) primarily employs people who share its religious tenets; (3) primarily serves people who share its religious tenets; and (4) qualifies for non-status under the Internal Revenue Code provisions concerning churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of religious orders.⁶⁶ While this exception would likely cover a healthcare plan like the one provided by a Catholic church for the Church’s employees, it failed to cover a multitude of religious organizations who employ and serve people of any faith, including homes for the elderly, universities, hospitals, schools, and social services, because

61. Alvaré, *supra* note 58, at 383; INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (July 2011), http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf [<http://perma.cc/SA8K-NVY3>] [hereinafter IOM REPORT].

62. IOM REPORT, *supra* note 61, at 3.

63. FOOD & DRUG ADMIN., BIRTH CONTROL: MEDICINES TO HELP YOU, <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> [<http://perma.cc/KE2F-RT2J>] (last updated Jan. 8, 2015).

64. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under [PPACA], 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); HEALTH RES. & SERVS. ADMIN., WOMEN’S PREVENTIVE SERVICES GUIDELINES, <http://www.hrsa.gov/womensguidelines/> [<http://perma.cc/R88H-HBBH>].

65. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under [PPACA], 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

66. *Id.*

these organizations do not satisfy the second and third requirements.⁶⁷ Many religious groups participated in the subsequent comment period and objected to the expansive scope of the contraceptive care mandate on several grounds, including legislative grounds rooted in RFRA.⁶⁸ DOT, DOL, and HHS (collectively, the “Departments”) received comments suggesting that they tie the religious exception to the contraceptive care mandate to the church plan exception under ERISA, because (1) this would cover a greater number of religious organizations, and (2) it would lead to more consistent and predictable ERISA enforcement if PPACA and ERISA shared the same definitions for similar kinds of religious institutions.⁶⁹ In spite of these objections, the Departments finalized the regulation in February 2012 without making any substantial changes to the initial religious exception.⁷⁰ Along with the final rules, the Departments announced a temporary enforcement safe harbor that would protect certain religious nonprofits objecting to the mandate on religious grounds until the first plan year beginning on or after August 1, 2013.⁷¹ Importantly, the Departments noted that “[n]othing in these final regulations precludes employers or others from expressing their opposition, if any, to the use of contraceptives.”⁷²

After HHS issued an Advanced Notice of Proposed Rulemaking concerning the contraceptive care mandate in March 2012, the three Departments issued a proposed rule nominally expanding the religious employer exemption by eliminating the first three prongs of the definition of a “religious employer.”⁷³ However, the Departments stressed that this apparent expansion of the religious employer

67. See Alvaré, *supra* note 58, at 384.

68. See *id.* Over 200,000 responses were received by the Departments during this comment period. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under [PPACA], 77 Fed. Reg. at 8726.

69. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under [PPACA], 77 Fed. Reg. at 8727–29.

70. See *id.*

71. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8458.

72. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under [PPACA], 77 Fed. Reg. at 8729 (Feb. 15, 2012).

73. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Mar. 21, 2012); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8461.

exception would not “expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules.”⁷⁴ It seems as though the Departments were trying to please the law’s critics and supporters alike by making a change in form, if not substance, to the exception. This proposed rule also included policies related to an accommodation for certain religious organizations that do not fall within the religious employer exception.⁷⁵ The accommodation would involve a “self-certification” process to be clarified later, while somehow “insulating [organizations seeking the accommodation] from contracting, arranging, paying, or referring for such coverage.”⁷⁶

The Departments issued the final contraceptive care mandate in July 2013; employers who fell outside the exceptions were informed they must comply with the mandate by January 1, 2014.⁷⁷ The finalized regulation made no substantive changes to the religious employer exception proposed in February 2013, leaving the exception as narrow as was intended by the 2012 final rules.⁷⁸ Also, the finalized regulation further clarified that the accommodation was available to qualifying religious organizations that fell outside of the scope of the religious employer exception.⁷⁹

Whereas religious employers within the scope of the exception were automatically exempt, religious organizations outside the scope of the exception were presumed to be subject to the contraceptive care mandate and must affirmatively seek accommodation in order to be exempt.⁸⁰ Prior to the first plan year when the accommodation would apply, an organization was required to complete the EBSA Form 700, a self-certification form asserting that it met the definition of an organization eligible for the accommodation.⁸¹ The religious

74. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8461.

75. *Id.*

76. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8462.

77. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

78. *See id.* at 39,874.

79. *Id.*

80. *See* Alvaré, *supra* note 58, at 384–87.

81. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,874; EBSA FORM 700—CERTIFICATION, <http://www.becketfund.org/wp-content/uploads/2014/01/preventiveserviceseligibleorganization>

organization was required to maintain the self-certification form on file and also to provide a copy to the plan's health insurance issuer or third-party administrator (TPA).⁸²

A TPA's receipt of the self-certification form triggers the TPA's legal obligations to make the required contraceptive care available to the religious organization's employees without requiring payment, separate enrollment, or cost sharing.⁸³ In order to incentivize TPAs to comply with the contraceptive care mandate, the government has made compliant TPAs eligible for federal payments that would completely cover the TPA's expenses related to contraception coverage under the accommodation, as well as additional payments totaling no less than ten percent of said costs.⁸⁴ Completion of the self-certification form makes the form "an instrument under which the plan is operated."⁸⁵ The 2013 final rules prohibit a self-certifying organization from directly or indirectly interfering with the TPA's arrangements related to contraceptive coverage and from directly or indirectly seeking to influence the TPA's decision of whether to make such arrangements.⁸⁶

In response to recent PPACA litigation, the Departments issued another set of interim final rules amending the July 2013 final rules that concerned the accommodation for religious nonprofits.⁸⁷ HHS deleted the "non-interference provision" from the regulation, explaining that the provision was meant to prohibit only generally unlawful behavior, such as "bribery, threats, or other forms of economic coercion," not to prohibit an organization's ability to lawfully communicate any objections to contraceptive care to the TPA.⁸⁸ Completing the EBSA Form

certificationform.pdf [<http://perma.cc/SFR2-Q3SC>].

82. See EBSA Form 700—CERTIFICATION, *supra* note 81.

83. See Loewentheil, *supra* note 58, at 446–47.

84. See 45 C.F.R. § 156.50(d)(3) (2013).

85. EBSA FORM 700—CERTIFICATION, *supra* note 81.

86. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,893. This provision is referred to as the "non-interference provision." Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014).

87. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,094 (allowing for public comments until Oct. 27, 2014); see generally *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (allowing the plaintiff to notify the Secretary of HHS in writing of the plaintiff's religious objections to contraceptive coverage, rather than completing the EBSA Form 700 or providing it to health insurance issuers or TPAs until a final disposition of appellate review is reached).

88. Coverage of Certain Preventive Services Under the Affordable Care Act,

700 and complying with the subsequent conditions of the process remains an option for organizations pursuing the accommodation.⁸⁹ The amendments track the Supreme Court's decision in *Wheaton College v. Burwell* by allowing organizations to notify HHS in writing of their religious objections, rather than completing the EBSA Form 700.⁹⁰ After HHS receives this notification, it sends a separate notice to the plan's TPA, which will trigger the TPA's obligations to provide contraceptive care and will become an instrument under which the plan is operated.⁹¹

The only notable difference between this version of the accommodation and the July 2013 version is that, instead of an organization sending a form triggering the TPA's legal obligation to provide contraceptive care directly to the TPA, the organization sends a notice to HHS, which then sends a separate notice to the plan's TPAs.⁹² Both versions require the organization to complete a form and purport to amend the plan's written instrument, thereby obliging a TPA to provide the exact care to which the organization objected in the first place.⁹³

As the law currently stands, employers with certain grandfathered plans, small employers with less than fifty full-time employees, and a narrow category of religious employers are exempted from the contraceptive care mandate.⁹⁴ An accommodation does exist for certain religious organizations that fall outside the scope of the religious employer exception, but it requires the religious organization's active participation

79 Fed. Reg. at 51,095.

89. *Id.* at 51,094.

90. *Id.* at 51,094–95. The Departments have provided a model notification that organizations are not required to use. DEP'T HEALTH & HUM. SERVS., INSTRUCTIONS FOR MODEL NOTICE (2014), <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Model-Notice-8-22-14.pdf> [<http://perma.cc/85UK-4LQ9>].

91. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,095.

92. *See id.*

93. *See id.*

94. *See* 45 C.F.R. § 147.140(a)(1) (2013) (exception for grandfathered plans); 26 U.S.C. § 4980H(c)(2)(A) (2012) (employers with less than fifty full-time employees are not required by PPACA to provide any sort of employment-based health benefits); 45 C.F.R. § 147.131(a) (2013) (exception for religious employers); *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763–64 (2014) (finding that, in addition to those exempted on religious grounds, a “great many employers” are currently exempt from the contraceptive care mandate).

in a process that forcibly amends the plan's written instrument and obliges the TPA to provide the disputed contraceptive coverage as a direct result of this participation.⁹⁵ An employer that does not comply with the contraceptive care mandate faces potentially "severe" financial penalties.⁹⁶ This is exactly the situation in which the Little Sisters have found themselves. Although they would likely qualify for the accommodation, participating in the accommodation would violate the Little Sisters' religious beliefs the same as complying with the contraceptive care mandate would.

Courts reviewing the issues central to the Little Sisters' case, which stem from the complex interaction of ERISA, PPACA, and the First Amendment, must make determinations within the framework established by RFRA, as explained in the next Section.

C. *The Religious Freedom Restoration Act*

In 1993, Congress enacted RFRA primarily in response to the Supreme Court's decision in *Employment Division v. Smith*.⁹⁷ The respondents in *Smith* argued that the Court should apply the balancing test set forth in *Sherbert v. Verner*, which required a compelling government interest to justify governmental actions that substantially burden religious practice.⁹⁸ In rejecting this argument, the Court reasoned that many laws of general applicability that prohibit conduct "thought to be religiously commanded" would be invalidated in an anarchical process if required to satisfy a burdensome compelling interest standard.⁹⁹ Furthermore, the Court in

95. See 45 C.F.R. § 147.131. In response to the Supreme Court's recent ruling in *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2751, the Departments have issued an advanced notice of proposed rulemaking meant to accommodate for-profit closely held corporations with religious objections to the contraceptive care mandate. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,094.

96. See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2757, 2762, 2775–76. Provisions imposing financial penalties on non-compliant employers include 26 U.S.C. §§ 4980D, 4980H and 29 U.S.C. §§ 1132, 1185d.

97. 494 U.S. 872 (1990); see also *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2761; Priscilla J. Smith, *Who Decides Conscience? RFRA's Catch-22*, 22 J.L. & POL'Y 727 (2014) (critiquing RFRA and arguing that the Court's reading of RFRA is overbroad).

98. *Smith*, 494 U.S. at 882–83 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

99. *Id.* at 888.

Smith emphasized the many other cases that held the scope of judicial inquiry should not include determinations of “the place of a particular belief in a religion or the plausibility of a religious claim.”¹⁰⁰

RFRA’s enactment reinstated the compelling interest test for constitutional free exercise challenges to these generally applicable laws.¹⁰¹ When making a RFRA claim, a plaintiff must assert a sincere religious belief.¹⁰² The Supreme Court has determined that the question RFRA puts forth is not whether the plaintiff’s beliefs are reasonable or philosophically flawed, but rather, whether a governmental action places a substantial burden on a religious exercise.¹⁰³ Just as the Court has respected a plaintiff’s own sincere choice over what constitutes his or her religious beliefs, so too should the Court respect a plaintiff’s determination of what constitutes a substantial burden on his or her religious exercise, especially if the plaintiff feels forced by the law in question to directly violate his or her religious beliefs.¹⁰⁴ Of course, a plaintiff’s ability to freely exercise his or her religious beliefs is not without limits in the face of certain competing interests. However, courts should carefully consider whether the competing interest is compelling enough to validate the law at issue, forcing a plaintiff to commit to a course of conduct at the potential expense of the plaintiff’s eternal well-being.

Once a plaintiff makes a prima facie case that the

100. *Id.* at 887; *see, e.g.*, *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969). This line of precedent exists in tension with the requirement that a Court examine whether a plaintiff making a RFRA claim has asserted a “sincere” belief. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2774 (avoiding the question because the sincerity of plaintiff’s beliefs were unchallenged); *see also Smith*, *supra* note 97, at 749–56 (asserting that courts cannot consider sincerity of belief without discriminating among more preferable and less preferable belief systems).

101. 42 U.S.C. § 2000bb-1 (2012) (allowing a governmental action to substantially burden a person’s exercise of religion only if the action is in furtherance of a compelling governmental interest and if the action is the least restrictive means for furthering such an interest). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that RFRA is only applicable to federal laws.

102. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2774.

103. *Id.* at 2778–79 (“[T]he federal courts have no business addressing []whether the religious belief asserted in a RFRA case is reasonable[].”). The Supreme Court leaves the responsibility of drawing the line between moral and immoral conduct to the plaintiff and attempts to determine only whether the line drawn reflects sincerity of belief.

104. *See id.*

government's action substantially burdens a religious exercise, the burden of proof shifts to the government.¹⁰⁵ In order to place a substantial burden on the free exercise of religion, the federal government must both show a compelling interest and demonstrate that the action causing the burden is the "least restrictive means of furthering" that interest.¹⁰⁶ Although RFRA referenced the First Amendment in its original definition of the term "exercise of religion," the current definition states that the meaning of "exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."¹⁰⁷ Congress clearly meant for RFRA to constitute a "broad protection of religious exercise, to the *maximum* extent permitted by the terms of this chapter and the Constitution."¹⁰⁸ In other words, Congress intended the enactment of RFRA to ensure that rights to free exercise of religion shall no longer be measured against a constitutional floor of minimum requirements, but rather they are allowed to expand towards a constitutional ceiling of maximum possibilities.

The complexity of the interaction of these three statutory frameworks have played a large part in the lower courts' wrongly deciding the Little Sisters' case by failing to find that the contraceptive care mandate and the inadequate accommodation impose a substantial burden on the Little Sisters' free exercise of religion.

II. *LITTLE SISTERS OF THE POOR V. SEBELIUS*

The Little Sisters' ongoing lawsuit, woven into the statutory framework detailed above, gives rise to important implications concerning both the Little Sisters' continued service to the indigent elderly, and the future effects the suit may have on the numerous Americans who either provide or

105. See Karen A. Jordan, *Free Exercise Jurisprudence and Theology in the Public Square*, 19 TRINITY L. REV. 187, 194 (2014).

106. 42 U.S.C. § 2000bb-1(b).

107. *Id.* § 2000bb-2(4) (1994) (original definition); *Id.* § 2000bb-2(4) (2012) (importing the definition of "religious exercise" from the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (West Supp. 2001) (codified as amended at 42 U.S.C. §§ 2000cc-1 to -5 (West Supp. 2001)); cf. *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) (noting religious exercise includes abstaining from conduct, as well as affirmatively taking action).

108. 42 U.S.C. § 2000cc-3(g) (2012) (emphasis added).

benefit from employment-based healthcare. The following Sections address the factual background of the case, the outcome at the District Court and the Tenth Circuit, and the aftermath leading up to the case's current state, awaiting a hearing before the Supreme Court.

A. *Facts*

Relevant parties to the lawsuit analyzed here include the Little Sisters of the Poor Home for the Aged, Denver, Colorado—a Colorado nonprofit corporation founded in 1916—and the Little Sisters of the Poor, Baltimore, Inc.—a Maryland nonprofit corporation founded in 1869.¹⁰⁹ Both of these homes for the elderly are controlled by, and associated with, the Little Sisters of the Poor—“an international Congregation of Catholic Sisters serving needy elderly people.”¹¹⁰ The Little Sisters have adopted the Christian Brothers Employee Benefit Trust (the Trust) to provide healthcare coverage for their employees and their employees' dependents, and each home for the elderly run by the Little Sisters employs more than fifty lay employees (not members of a religious order).¹¹¹

The Trust, a self-insured health plan, qualifies as a church plan and has not elected to subject itself to ERISA.¹¹² Therefore, the plan is exempted from regulation under ERISA.¹¹³ In accordance with Catholic teachings, the Trust provides coverage for certain chemical contraceptives if a physician prescribes them for medical purposes, which does not include contraceptive use.¹¹⁴ Also in accordance with Catholic teachings, the Trust does not “and has never provided coverage for, or access to, contraception, sterilization, abortifacients, and related education and counseling.”¹¹⁵ Christian Brothers Services—another plaintiff and a New Mexico nonprofit

109. Complaint, *supra* note 1, at 5.

110. *Id.* These three organizations are collectively referred to in this Note as “the Little Sisters.”

111. *See id.* at 6.

112. Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225, 1232 (D. Colo. 2013); *see also* 26 U.S.C. § 410(d) (2012) (election option for church plans).

113. *Little Sisters*, 6 F. Supp. 3d at 1232.

114. Complaint, *supra* note 1, at 8; *see Love and Sexuality*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/love-and-sexuality/index.cfm> [<http://perma.cc/EYV5-WDGC>].

115. Complaint, *supra* note 1, at 8.

corporation affiliated with a male religious order of the Catholic Church—administers the Trust. Thus, if the Little Sisters were to apply for the accommodation for religious nonprofits under the contraceptive coverage mandate, the PPACA would require the Christian Brothers Services to act as the Little Sisters' TPA and provide contraceptive care on their behalf.¹¹⁶

On September 24, 2013, after the enactment of PPACA and the issuance of the July 2013 final rules, but before the required compliance date of January 1, 2014, the Catholic employers filed a class action lawsuit against defendants, who were all “appointed officials of the [U.S.] government and its agencies charged with issuing and enforcing the regulations implementing [PPACA].”¹¹⁷ The plaintiffs in this suit challenged the legality of PPACA's contraceptive care mandate and the adequacy of the accommodation available to religious nonprofits falling outside of the religious employer exception.¹¹⁸ Included in the plaintiffs' sixteen original causes of action is an alleged violation of RFRA.¹¹⁹ The plaintiffs requested two forms of relief from the district court: (1) a preliminary injunction protecting the plaintiffs from penalties resulting from the plaintiffs' failure to provide or facilitate access to contraceptive care; and (2) a final declaration that the contraceptive care mandate violates RFRA, the First and Fifth Amendments, and the Administrative Procedure Act, thereby preventing the imposition of any penalties on the plaintiffs for not complying with the mandate.¹²⁰

B. The District Court's Decision

On December 27, 2013, the district court rendered its decision concerning the Little Sisters' Motion for Preliminary

116. *Id.* at 8–9.

117. *Little Sisters*, 6 F. Supp. 3d at 1232; *see also* Complaint, *supra* note 1, at 2. In order to participate in the Trust, an organization must be (1) “operated under the auspices of the Roman Catholic Church, in good standing thereof, and currently listed, or approved for listing in *The Official Catholic Directory*,” (2) tax-exempt under 26 U.S.C. § 501(c)(3); and (3) a nonprofit organization if the organization is a corporation. *See* Complaint, *supra* note 1, at 7.

118. Complaint, *supra* note 1, at 2.

119. *Little Sisters*, 6 F. Supp. 3d at 1232–33. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014), HHS conceded that RFRA applies to challenges to the contraceptive care mandate made by religious nonprofits.

120. *Little Sisters*, 6 F. Supp. 3d at 1233.

Injunction and the Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment (government's motion).¹²¹ First, the district court found that the Little Sisters and any TPAs will incur actual financial costs as a result of completing and reviewing the EBSA Form 700, and those costs constituted "an injury in fact for [the] purposes of standing."¹²² Therefore, the government's motion was denied to the extent that it sought dismissal based on lack of standing, and the district court reserved ruling on the remainder of the government's motion.¹²³

Turning to the Little Sisters' request for a preliminary injunction, the district court explained that the party seeking the injunction must demonstrate that all of the following factors weigh in its favor: (1) the party is "substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest."¹²⁴ Because the district court found that the Little Sisters failed to satisfy the second factor concerning irreparable injury, which is the "most important prerequisite" to issuing a preliminary injunction, the court's injunctive relief analysis did not reach the other three factors.¹²⁵

Whether the Little Sisters were able to prove that they would suffer irreparable injury turned on whether the Little Sisters were likely to suffer a RFRA violation if denied the injunction.¹²⁶ To determine the likelihood of a RFRA violation, the district court examined whether the plaintiffs had shown that they wished to engage in (1) a religious exercise (2) motivated by sincerity of belief (3) that is subject to a substantial burden imposed by the government.¹²⁷ The sincerity of the Little Sisters' religious belief was not disputed,

121. *See id.* at 1225, 1233–34.

122. *Id.* at 1236.

123. *Id.* at 1246.

124. *Id.* at 1236 (citing *Sierra Club v. Bostick*, 539 Fed. App'x. 885, 888 (10th Cir. 2013)).

125. *Id.* at 1236–37 (citing *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)).

126. *Id.* at 1237 (noting that the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013), found that showing a likely RFRA violation satisfies the irreparable injury prong).

127. *Id.* (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013)).

which placed only the third prong concerning the substantial burden at issue in this case.¹²⁸

While analyzing the substantial burden prong, the district court distinguished the situation of the Little Sisters from that of the plaintiffs in *Hobby Lobby Stores, Inc.*¹²⁹ The district court reasoned that the contraceptive care mandate “required the *Hobby Lobby* plaintiffs to either provide contraceptive coverage for their employees, or face fines ranging between \$26 million and \$475 million. This ‘Hobson’s choice’ was sufficient to establish a substantial burden on their religious beliefs.”¹³⁰ Because the Little Sisters could avoid the fines by complying with the procedures required to seek the accommodation for religious nonprofits, the district court found that the Little Sisters did not face the same Hobson’s choice as organizations that are ineligible for the accommodation, even though complying with the accommodation would violate the Little Sisters’ religious beliefs just as complying with the contraceptive care mandate would.¹³¹ Essentially, the district court disagreed with the Little Sisters as to what conduct would constitute a sin under Catholic doctrine and belief, and it used its judicial power to put an end to the disagreement.

The Little Sisters alleged that their religious beliefs include the tenet that *encouraging* the use of—let alone actually providing or making available—contraception, sterilization, abortion, and related education and counseling, is morally unacceptable.¹³² Accordingly, facilitating or authorizing the designation of the third party for the sole purpose of providing contraceptive care—even by merely completing or delivering a form triggering a third party’s obligation to provide such care—is just as morally unacceptable as providing or paying for contraceptive care themselves.¹³³ By encouraging or facilitating contraceptive care *itself*, the Little Sisters would violate their religious beliefs, regardless of whether contraceptive care is ultimately provided. The defendants’ response took issue with the Little Sisters’ “interpretation of how these religious beliefs will be impacted

128. *Id.*

129. *Id.*

130. *Id.* (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (citation omitted)).

131. *Id.* at 1237–38.

132. Complaint, *supra* note 1, at 11.

133. *Little Sisters*, 6 F. Supp. 3d at 1238–39.

by the [contraceptive care mandate].”¹³⁴ Here, it is undisputed that the Little Sisters sincerely believed that compliance with the accommodation procedures was morally unacceptable.¹³⁵ The defendants’ response does not dispute the Little Sisters’ sincerity of belief, but purports to argue with the Little Sisters on the philosophical matter of when an action conflicts with one’s belief as to what is moral.¹³⁶ In support of their position, the defendants argued that (1) seeking the accommodation means that the Little Sisters “need not contract, arrange, pay, or refer for contraceptive coverage,” and (2) because the Trust is a self-funded church plan, execution of the EBSA Form 700 “does not trigger, facilitate, or provide access to [contraceptive care].”¹³⁷

Although the district court acknowledged that it could not “question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party’s religious belief,” it reasoned that it could “analyze the challenged regulations to determine whether their implementation will cause the allegedly harmful act to in fact occur.”¹³⁸ First, the district court found that executing the EBSA Form 700 did not require the Little Sisters to “provide, participate in, contract or arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients,” even though completing the form is a crucial step in the process of getting a different entity to provide contraceptive care and amends the written instrument of the Little Sisters’ benefit plan to incorporate the provision of such care.¹³⁹ Accordingly, the court found that seeking the present accommodation did not constitute a substantial burden.¹⁴⁰ Second, the district court found that executing the EBSA Form 700 would not require the Little Sisters to “designate, authorize, or create a [TPA] that will provide their employees with access [to contraceptive care]” because the Little Sisters’ TPA is not subject to ERISA under the church plan exception, and did not constitute a substantial burden in this manner either.¹⁴¹ On this point, the defendants

134. *Id.* at 1239.

135. *Id.* at 1240.

136. *Id.* at 1239.

137. *Id.*

138. *Id.*

139. *See id.* at 1240.

140. *Id.*

141. *Id.* at 1240–41.

conceded that they could not, under the July 2013 final rules, either require a church plan TPA to actually fulfill the legal obligations triggered by the EBSA Form 700 or require a religious nonprofit seeking accommodation to designate a TPA that is willing to provide contraceptive care.¹⁴²

Third, the District Court addressed the Little Sisters' claim that executing the EBSA Form 700 "on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries," and that violates their religious beliefs.¹⁴³ The district court found that the Little Sisters were "read[ing] too much into the language of the [EBSA Form 700]," because "nothing on the face of the [EBSA Form 700] expressly authorizes the provision of contraceptive care, particularly with regard to church plans."¹⁴⁴ Because the government cannot require a church plan TPA to actually comply with the legal obligation triggered by the EBSA Form 700, and despite the fact that the main consequence of completing the form is to amend the plan's instrument to include the provision of contraceptive care, the district court found that the contraceptive care mandate did not constitute a substantial burden in this manner.¹⁴⁵

Thus, the district court found that the Little Sisters had failed to satisfy the third prong relating to a substantial burden.¹⁴⁶ Accordingly, the Little Sisters failed to demonstrate a likely RFRA violation and failed to satisfy the irreparable injury prong of the preliminary injunction analysis.¹⁴⁷ The district court's rationale relied heavily on the fact that the Little Sisters' TPA is a church plan and that nothing in the July 2013 final rules requires the Little Sisters to deliver the EBSA Form 700 to any TPA other than their current one, even though the Little Sisters contended from the beginning of the suit that completing the form and delivering it to any TPA would violate their beliefs, regardless of what action the TPA ultimately took. The court's reliance on this fact is shown by the court's finding that "[t]he purpose of Little Sisters and the

142. *See id.*

143. *See id.* at 1242–45.

144. *Id.* at 1243.

145. *Id.* at 1244–45.

146. *Id.* at 1245–46.

147. *Id.*

Trust executing and delivering the [EBSA Form 700] to their [TPA] is not to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries," even though the express purpose of the July 2013 final rules is to give female beneficiaries greater access to cost-free contraceptive care.¹⁴⁸ It should again be emphasized that the Little Sisters were challenging the validity of the then-current accommodation where arguably better alternatives had been directly suggested to the departments. The Little Sisters were not asking the court to declare that their right to free exercise of religion necessarily trumps an employee's right to access contraceptive care, and courts presiding over this case should defer determining this issue until a day when it is raised.

C. *The Aftermath and Appeal to the Tenth Circuit*

After the Little Sisters were denied a preliminary injunction at the district court, they immediately appealed to the Tenth Circuit.¹⁴⁹ In a very brief order filed on December 31, 2013, the Tenth Circuit denied a preliminary injunction.¹⁵⁰ The Little Sisters appealed to the Supreme Court that same day.¹⁵¹ Fewer than twenty-four hours before the Little Sisters would have been required to comply with the contraceptive care mandate, the Supreme Court granted a temporary stay protecting the Little Sisters from having the mandate enforced against them, which would have required the Little Sisters to either begin providing contraceptive care or to pursue the accommodation, until the Supreme Court could issue a decision on the preliminary injunction.¹⁵² On January 24, 2014, the

148. *Id.* at 1245; Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873 (July 2, 2013) (to be codified at DOT 26 C.F.R. pt. 54; DOL 29 C.F.R. pts. 2510 and 2590; HHS 45 C.F.R. pts. 147 and 156) ("The Departments [sic] aim to advance these compelling public health and gender equity interests by providing more women broad access to recommended preventive services, including contraceptive services, without cost sharing, while simultaneously [accommodating religious objections to contraceptive care].").

149. *See* Little Sisters of the Poor Home for the Aged v. Sebelius, No. 13-1540, 2013 U.S. App. LEXIS 25915 (10th Cir. Dec. 31, 2013).

150. *See id.*

151. *See* Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 893 (2013).

152. *See id.*

Supreme Court granted the Little Sisters an injunction pending appeal before the Tenth Circuit, which was very similar to the injunction the Court would later grant in *Wheaton College v. Burwell*.¹⁵³

After the Supreme Court granted preliminary injunctions to other plaintiffs like the Little Sisters and Wheaton College, HHS, DOL, and DOT issued a new set of interim final rules concerning the contraceptive care mandate.¹⁵⁴ As discussed above, this new version of the accommodation is not substantively different from the July 2013 version.¹⁵⁵ The new version attempts to add a layer of insulation between the religious nonprofit and the provision of contraceptive care, but retains the characteristics of (1) requiring a religious nonprofit to provide its objection and other information in writing to another party; (2) necessarily changing the plan's original instrument; and (3) triggering the obligations of a TPA to provide contraceptive care, even though the government is unable to force some ERISA-exempt TPAs from actually providing the care under current regulation.¹⁵⁶ In September 2013, both the plaintiffs and the defendants filed supplemental briefs on the new interim final rules requesting that the Tenth Circuit proceed with oral argument as originally planned.¹⁵⁷

On December 8, 2014, the Tenth Circuit Court of Appeals heard oral arguments in the Little Sisters' case along with two other similar appeals.¹⁵⁸ The appellate court, in pertinent part,

153. See *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014); see also *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

154. DOT Coverage of Preventative Health Services (Temporary), 26 C.F.R. § 54.9815 (2015); Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094 (Aug. 27, 2014) (to be codified at DOL 29 C.F.R. pt. 2510 and 2590; HHS 45 C.F.R. pt. 147).

155. This assumes that the deletion of the "non-interference provision" was not a substantive change from the original regulation.

156. See discussion *supra* Section I.B. By "triggering," this Note means that completing a written objection is the but-for cause to the other entity's providing the objectionable coverage.

157. See The Little Sisters of the Poor's Brief on the Interim Final Regulations at 15, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. Dec. 27, 2013) (No. 13-CV-2611-WJM-BNB), 2014 WL 4489994; Supplemental Brief for the Government at 14, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. Dec. 27, 2013) (No. 13-CV-2611-WJM-BNB), 2014 WL 4490080.

158. Kristen Wyatt, *Religious Groups Again Challenge Obamacare's Birth Control Mandate*, HUFFINGTON POST (Dec. 8, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/12/08/obamacare-birth-control-challenge_n_6291452.html [<http://perma.cc/A6XR-MLUD>]; *Reaching Souls Int'l, Inc. v. Sebelius*,

found that the Little Sisters had failed to show that the accommodation itself substantially burdened their free exercise of religion.¹⁵⁹ The court found that the accommodation's procedures were de minimis administrative burdens, and it was strongly persuaded by the government's lack of enforcement authority under ERISA to compel church plans to provide contraceptive care.¹⁶⁰ Subsequently, the court affirmed the district court's denial of the Little Sisters' request for a preliminary injunction without reaching the issues regarding the second and third prongs of the Little Sisters' RFRA claim.¹⁶¹ Nowhere in the majority opinion, nor in the dissent, does the court discuss how the current accommodation actually modifies the plan instrument in order to ensure the provision of contraceptive care.¹⁶²

The appellate court's reasoning behind this conclusion was similar to that of the district court. In distinguishing the Little Sisters' situation from that of the *Hobby Lobby* plaintiffs, the appellate court failed to recognize that the Little Sisters face a similarly burdensome Hobson's choice, despite the fact that they are eligible to seek an accommodation that is inadequate to prevent the harm at which it is directed.¹⁶³ The appellate court recognized that its role was not to impeach or critique the Little Sisters' beliefs, but then proceeded to explain why it thought the Little Sisters' belief regarding the morality of the accommodation was mistaken.¹⁶⁴ Pages of the majority's opinion and much of the dissent are dedicated to a

No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013), *rev'd*, 794 F.3d 1151 (10th Cir. 2015); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013), *rev'd*, 794 F.3d 1151 (10th Cir. 2015).

159. *See Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1195 (10th Cir. 2015).

160. *See id.* The dissenting opinion was also powerfully swayed by these arguments, and also found against the Little Sisters on these issues.

161. *See id.* at 1192, 1181.

162. The closest the court came to any such discussion was on pages 1193–94 of the majority opinion. *See id.* at 1193–94. When answering the plaintiff's argument that the accommodation amends their healthcare plans and requires their ongoing participation in the provision of contraceptive care, the court still found no substantial burden because the obligation to provide contraceptive care stems from federal law. *Id.* Accordingly the court concluded that the plaintiffs' opting out could not cause the provision of contraceptive care in such a way that would substantially burden their religion. This reasoning essentially impeaches the plaintiff's beliefs, which is problematic for reasons discussed previously.

163. *See id.* at 1160.

164. *See id.* at 1191, 1191 n.46.

philosophical discussion covering topics like the causal nature of actions like opting out of providing contraceptive coverage, and whether such actions can justifiably be considered immoral to a degree that significantly burdens religious practice.¹⁶⁵

Perhaps one reason why the court's reasoning seems so contradictory is because a RFRA challenge to a law meant to accommodate religious exercise is an issue of first impression in the Tenth Circuit.¹⁶⁶ Perhaps another is that the appellate court engaged in an oversimplified analysis concerning whether such a complicated administrative process could pose a serious question of morality for religious nonprofits like the Little Sisters. The appellate court mistakenly interpreted the plaintiffs' position as arguing that courts cannot question whether a law actually, significantly burdens the exercise of religion. It is undisputed that courts may do this; the only dispute is over the conclusion reached by the courts. The appellate court distinguished this case from that of *Thomas*, in which Mr. Thomas believed that he could not participate in the production of war materials.¹⁶⁷ The Tenth Circuit reasoned that Mr. Thomas's case would have been more similar to this one had he been required to produce farming materials but sincerely, and mistakenly, believed that he was producing war materials.¹⁶⁸ This comparison oversimplifies and misunderstands the Little Sisters' predicament because the question of whether, by causation, complicity, or some other mechanism related to the provision of contraceptive care, the accommodation constitutes a substantial burden on religion is a complicated one. The fact that there is a dissenting opinion, a disagreement amongst learned legal minds regarding a RFRA challenge to the accommodation's adequacy, weakens the majority's conclusion that the Little Sisters' belief regarding the immorality of the current accommodation is simply "erroneous."¹⁶⁹ Settling complex philosophical debates among plaintiffs and judges such as this one through judicial power is exactly the sort of practice the *Thomas* Court sought to forbid.

The appellate court also seems to accuse the plaintiffs in

165. See *id.* at 1178–84, 1208–15.

166. See *id.* at 1171–73.

167. See *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 715 (1981).

168. See *Little Sisters of the Poor Home for the Aged*, Denver, Colo., 794 F.3d at 1191 n.46.

169. See *id.* at 1191.

this case of attempting to “thwart their employees’ right to contraceptive coverage by refusing to provide [it]” and also objecting to the available accommodation.¹⁷⁰ Rather, the legal objections of religious nonprofits like the Little Sisters concern the adequacy of the current accommodation, which stands in the face of other suggested alternatives, such as expanding the exemption to cover church plans. The plaintiffs are not asking the courts to help them thwart anyone’s access to contraceptive care; they are merely objecting to *the way in which the government is requiring them to affirmatively participate* in the current scheme of providing such care.

When commenting on how the burden for church plans would be especially small because of the government’s lack of ERISA enforcement authority, the court stated that it would “not question the Departments’ interest in requiring [the plaintiffs] to opt out of the Mandate to avoid penalties for failure to provide contraceptive coverage.”¹⁷¹ In other words, the court refused to engage the assertion that the government’s requiring religious nonprofits like the Little Sisters to seek accommodation in a way that they believe violates their religious beliefs is a fruitless exercise of the government’s ability to compel citizens to act.

On July 23, 2015, the Little Sisters filed a petition for certiorari at the Supreme Court.¹⁷² The Supreme Court granted the petition and will hear the Little Sisters’ case along with the cases of six similar plaintiffs.¹⁷³ Regardless of whether the Supreme Court decides in favor of the Little Sisters—as would be right—this case raises important issues concerning religious exercise, possible instability in ERISA enforcement, and changes to the broader health benefit regulation landscape that are important for courts and policy makers to consider.

170. *See id.* at 1187.

171. *See id.* at 1190.

172. Electa Draper, *Denver’s Little Sisters of the Poor Appeal Contraception Case to Supreme Court*, DENV. POST (July 23, 2015), http://www.denverpost.com/news/ci_28528120/denvers-little-sisters-poor-appeal-supreme-court [http://perma.cc/833X-KRS4].

173. *See Green, supra* note 19.

III. THE CURRENT ACCOMMODATION AVAILABLE TO THE LITTLE SISTERS IS PROBLEMATIC

The outcome of the Little Sisters' case will have important consequences regarding not only the continued operation of the Little Sisters' homes for the aged, but also for the greater schemes of religious liberty law and welfare benefit regulation. Section A argues that the Supreme Court should find that the contraceptive care mandate violates RFRA as applied to the Little Sisters and other similarly situated religious nonprofits. No rebuttal offered in favor of the government's position could change the fact that the current accommodation fails to mitigate the substantial burden placed on the religious practices of the Little Sisters and similarly situated religious nonprofits by the mandate. Section B argues that, in addition to this incompatibility with RFRA, the government's position on the contraceptive care mandate also conflicts with ERISA. The incorporation of PPACA into ERISA for enforcement purposes combined two conflicting policies into one extremely complex statutory scheme at the expense of clear, predictable, and efficient regulation of benefit plans.

A. RFRA Violation

The Supreme Court should find its own reasoning concerning closely held for-profit corporations to be both applicable and dispositive in the Little Sisters' case. The Little Sisters' claim that the mandate places a substantial burden on free exercise, a burden that is not mitigated by the accommodation for religious nonprofits, is now supported by the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*¹⁷⁴ When the district court denied the Little Sisters' preliminary injunction, it did not have the Supreme Court's guidance regarding the scope of a plaintiff's ability to draw the line between religiously acceptable and unacceptable behavior.¹⁷⁵ In *Hobby Lobby Stores, Inc.*, the Supreme Court reasoned that, where plaintiffs have drawn a line between religiously acceptable and unacceptable conduct motivated by a sincere belief, "it is not for us to say that their religious beliefs

174. 134 S. Ct. 2751, 2778–79 (2014).

175. See *id.* (citing *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981)).

are mistaken or insubstantial.”¹⁷⁶ The Tenth Circuit had the benefit of this decision’s guidance, but mistakenly distinguished the Little Sisters’ case from *Hobby Lobby Stores, Inc.*

The alternative position taken by the district court and the Tenth Circuit is illogical and contradicts RFRA’s explicit policy of protection of and respect for religious belief. The district court’s position, affirmed by the Tenth Circuit, is that a court may accept the sincerity of the Little Sisters’ belief that complying with the mandate and executing the EBSA Form 700 would violate their religious beliefs while proceeding to find that the Little Sisters are mistaken in this belief because of differing interpretations of the regulation and characterizations of the beliefs in question. RFRA demands, and the Supreme Court has agreed, that a court must ask whether a governmental action places a substantial burden on *religious exercise motivated by sincere belief*, not whether the beliefs in question are reasonable or based upon correct interpretations of reality.¹⁷⁷ While these limits on judicial inquiry are highly controversial,¹⁷⁸ they are the current limits imposed under the law, and the Supreme Court must heed them. Accordingly, the Supreme Court must accept that complying with the mandate and seeking accommodation through either the July 2013 or the August 2014 procedures constitutes a violation of, and a substantial burden on, the Little Sisters’ religious beliefs. This assumes that the Supreme Court’s analysis will remain within the legal limits concerning RFRA violations and sincerity of belief. The Supreme Court must come to this conclusion because it must respect where the Little Sisters have sincerely drawn the line between morality and immorality.

This departure from the district court’s analysis would shed new light on the question of whether the mandate presents the same Hobson’s choice to religious nonprofits as it does to closely held for-profit corporations.¹⁷⁹ In *Hobby Lobby Stores, Inc.*, the Court characterized this Hobson’s choice as

176. *See id.* at 2779.

177. *See* discussion *supra* Section I.C.

178. *See* *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (noting the possibility that the Court’s current interpretation of RFRA could make RFRA boundless).

179. *See* *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225, 1237–38 (D. Colo. 2013).

forcing the plaintiffs to choose between violating their sincerely held religious beliefs or to risk facing severe financial penalties.¹⁸⁰ Any court considering the situation of religious nonprofits under the mandate should consider that religious nonprofits likely face a similar Hobson's choice—even though such nonprofits are eligible for the accommodation—because the accommodation would still result in the violation of the nonprofit's religious beliefs.¹⁸¹ Therefore, the accommodation places the Little Sisters in the take-it-or-leave-it position of either obeying the law at the expense of their consciences, or suffering severe financial penalties.

Additionally, if the Supreme Court reaches the question of whether the mandate satisfies the “least restrictive means” prong of analysis under RFRA, the Supreme Court should consider the previously proposed alternatives to the accommodation.¹⁸² One of the strongest alternatives proposed to the government as early as February 2012 was to tie the eligibility requirements for the religious employer exception to the more expansive definition of “church plans” under ERISA.¹⁸³

Some critics of the Little Sisters' position are concerned that expanding exemptions to the contraceptive care mandate will result in women actually having decreased access to contraceptive care that would have otherwise been available. On the contrary, the limited expansion of the religious employer exception suggested by this alternative would not undermine the government's interest in expanding contraceptive care coverage and would certainly not constitute

180. See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2777. The Court considered the possibility of having to eliminate health coverage completely to be similarly as unacceptable as the possibility of facing severe penalties. *Id.*

181. This is uniquely true for objecting religious nonprofits whose TPAs have no clear objections to providing contraceptive coverage. As discussed in the litigation surrounding *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013), *rev'd*, 794 F.3d 1151 (10th Cir. 2015), the possibility of government payments for compliant TPAs increased the probability that non-objecting TPAs will provide the disputed coverage.

182. See Alvaré, *supra* note 58 (critiquing the narrative of the mandate, which pits religious groups and advocates for the welfare of women against each other and characterizes religious groups as exemption seekers, rather than allies in the cause for women).

183. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

a declaration that the free exercise of religion necessarily trumps the right to access contraceptive care. The expanded exemption would generally cover plans that are already exempt from regulation under ERISA because of their church plan status, meaning these plans are not required to provide contraceptive coverage anyway, regardless of the obligations imposed by PPACA. The government has conceded that it cannot use its enforcement power under ERISA or PPACA to require church plans to actually provide contraceptive care or to require religious nonprofits to select a different, more compliant TPA.¹⁸⁴ Thus, church plans with objections to the mandate would be exempted along with other limited types of religious employers, and church plans without objections to the mandate have the option of electing to subject themselves to ERISA to comply with the mandate. Either way, the potential negative effect this expansion of the religious employer exception would have on women's current access to contraception is minimal at best.¹⁸⁵

While the Supreme Court should ultimately find for the Little Sisters because the government's position on PPACA contradicts and is overcome by RFRA's protections, all policy-making bodies should carefully consider the implications of the government's position explained in the next Section.

B. The Government's Positions on PPACA and ERISA Are Contradictory

In addition to these RFRA issues, the Little Sisters' case gives rise to questions concerning the current and future state of ERISA regulation of church plans. Courts and policy makers would do well to consider the implications of the defendants' position in the Little Sisters' case. The implications regarding how much enforcement authority based in ERISA the government possesses over church plans and other employers normally exempt from ERISA regulation are especially concerning because the government is claiming an unprecedented level of authority over religious employers' benefit plans. The government argues that compelling religious

184. See *supra* Section II.B.

185. See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2763–64 (finding that, in addition to those exempted on religious grounds, a “great many employers” are currently exempt from the contraceptive care mandate).

nonprofits to execute certain accommodation procedures is not a violation of the plaintiff's religious beliefs because the government cannot require a church plan TPA to actually provide contraceptive coverage under current regulation.¹⁸⁶ The fact that the government deems such conduct "meaningless" while the Little Sisters and numerous other religious employers consider the same conduct to constitute an impermissible violation of their conscience evidences a serious lack of understanding on the government's part regarding the beliefs that it is asking countless Americans to cast aside. This point is key for those who do not understand how merely completing a form that would not actually result in the provision of contraceptive care could possibly violate someone's beliefs who is religiously opposed to such care. There is real disagreement over how close one's conduct can come to an immoral act before the conduct itself becomes immoral. However, it is not for judges to use their positions of power to settle this philosophical debate in courts of law.

If courts are persuaded by this position, as the district court was, the resulting decisions would give rise to many concerning questions, such as: What other "meaningless" actions may the government require concerning church plans and their sponsors? Could the government require church plan sponsors to complete *all* forms required of plans covered by ERISA, even though such forms could not actually affect the implementation of the church plans in reality? Do church plans retain the freedom to refuse to participate in the accommodation's procedures by refusing to receive forms like the EBSA Form 700? If so, does the government possess the ability to issue future regulation, perhaps through the DOT which is not as limited by ERISA as the DOL, requiring

186. See discussion *supra* Section II.B. One must note the strangeness of the government defending the legitimacy of a *meaningless* action all the way to the Supreme Court. On appeal, the Little Sisters rely on previous ERISA-related decisions to contend that completing anything like the EBSA Form 700 may provide a basis for claims of beneficiaries of the Little Sisters' health plan based in state contract law; if such a suit were to occur, the Little Sisters' TPA could be held liable for not providing the coverage described on the Form, regardless of the TPA's church plan status. Brief of Appellants at 39, *Little Sisters of the Poor v. Sebelius*, 794 F.3d 1151 (10th Cir. 2015) (No. 13-1540), 2014 WL 897456 (citing *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1131 (D. Minn. 2011) (allowing church plan beneficiaries to proceed with breach of contract claims against a church plan on the basis of written statements)).

religious nonprofits to designate a more compliant TPA? If this were to happen, it would completely eliminate the dubious basis for the district court's decision because the Little Sisters' participation in the accommodation procedures would directly result in (1) the Little Sisters being forced to work with a health care provider not of their own choosing, and (2) their employees receiving the contraceptive healthcare coverage that the Little Sisters found so objectionable in the first place.

If government action would ultimately not result in religious organizations' employees actually receiving contraceptive care because the employer's church plan remained exempt from ERISA regulation, we must ask ourselves: What sort of policy is it to promote a Kafkaesque administrative branch that uses its statutory-based authority to coerce public action, all the while knowing that achieving this action will not ultimately achieve the original purpose of the statute? Therefore, decision makers should use caution when considering whether to encourage the assertion that the government does not run afoul of RFRA or ERISA by requiring the Little Sisters to comply with current accommodation procedures—even though achieving the Sisters' compliance would not, admittedly, result in contraceptive coverage actually being provided by the Trust.

Besides these issues regarding church plans, the Little Sisters' case also raises issues related to possible selective and unpredictable ERISA enforcement. The departments seek to enforce PPACA's contraceptive care mandate through authority at least partially based in ERISA, and it remains unclear whether PPACA or ERISA controls if certain sections are found to conflict.¹⁸⁷ Decision makers must consider whether the statutory language and underlying policies of ERISA and PPACA detrimentally conflict. This is especially concerning where ERISA requires that plans have a written instrument and explicitly provided amendment procedures, and PPACA contains the contraceptive care mandate and accompanying accommodation for religious nonprofits that seemingly allows the government to amend written instruments at will via any procedure of its choosing.¹⁸⁸ The government's claim that it may amend plan instruments at will in enforcing PPACA

187. See *supra* Section I.A.

188. See 29 U.S.C. § 1102(b)(3) (2012).

would dismantle any limitations that ERISA had placed upon government authority over benefit plans, which would be to the detriment of both employers and employees conducting benefit bargains.

Before the enactment of PPACA, sponsors under ERISA possessed the freedom and authority to determine *how* the content of their welfare benefit plans could be amended and *who* possessed the authority to amend.¹⁸⁹ By leaving plan sponsors with so much bargaining capital concerning the present and future content of welfare plans, Congress, according to multiple Supreme Court decisions, intended to support the welfare of plan beneficiaries by avoiding mounting costs, increasing unpredictability, and provoking a chilling effect on generous offers made by sponsors.¹⁹⁰

PPACA directly contradicts this policy by allowing the government to usurp the sponsor's control over plan content and amendments in an unprecedented manner. Under the auspices of the mandate, the government claims authority to oblige religious nonprofits to either provide contraceptive coverage or allow the government to change the content of their welfare plan.¹⁹¹ The government claims to be able to change plan content by adding an additional written instrument through a procedure that may, but likely does not, match the amendment procedures present in the initial instrument of the plan.¹⁹² Essentially, the government is using certain ERISA provisions to enforce PPACA's mandate but is implicitly choosing to not comply with the ERISA provisions concerning written instruments and proper amendment procedures.

Additionally, the contraceptive care mandate exists in tension with the Court's interpretation of the settlor doctrine.¹⁹³ The regulatory framework of the mandate penalizes sponsors whose plans lack certain content, as if the sponsor was a misbehaving fiduciary rather than a settlor determining or amending the content of a plan.¹⁹⁴ For clarity's sake, it would be good policy for reviewing courts and policy

189. See *supra* Section I.A.

190. See *supra* Section I.A.

191. See discussion of PPACA accommodation *supra* Section II.B.

192. See discussion of PPACA accommodation *supra* Section II.B.

193. See discussion of PPACA accommodation *supra* Section II.B.

194. See discussion of PPACA accommodation *supra* Section II.B.

makers to address this conflict between PPACA and ERISA. When addressing this statutory conflict, decision makers must take into account RFRA's standard for measuring the right to free exercise of religion against a constitutional ceiling, and they should ask whether Congress meant to put to religious nonprofits and other plan sponsors the choice of violating their religious beliefs or risking the possibilities of incurring fines, eliminating all healthcare benefits, or going out of business altogether.¹⁹⁵

CONCLUSION

The Supreme Court should follow the limits of judicial inquiry regarding the contraceptive care mandate and religious exercise set forth by its own interpretation of RFRA in *Hobby Lobby Stores, Inc.*¹⁹⁶ Under this precedent, the Supreme Court must find that religious nonprofits like the Little Sisters also face a Hobson's choice to either risk severe penalties or violate their religious beliefs because, even though they are eligible for the accommodation, executing the accommodation's procedures would violate the Little Sisters' religious beliefs just as much as providing contraceptive care themselves would.

If it reaches the question under RFRA of whether the government used the least intrusive means to further a compelling interest, the Supreme Court should also find that there are workable alternatives to the current accommodation that would not notably undermine the government's interest in women's welfare, such as expanding the religious employer exception to include church plans within the meaning of

195. See *supra* Section I.C. Catholic organizations choosing to shut down or sever their ties to the Church rather than comply with a law that they believe is immoral is a real possibility that has occurred in the recent past. See, e.g., Laurie Goodstein, *Illinois Catholic Charities Close Over Adoption Rules*, BOS. GLOBE (Dec. 29, 2011), <http://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhvJM/story.html> [<http://perma.cc/9XTB-6PC7>]; Laurie Goodstein, *Arizona: Hospital Loses Catholic Affiliation*, N.Y. TIMES (Dec. 22, 2010), http://www.nytimes.com/2010/12/22/us/22brfs-HOSPITALLOSE_BRF.html?_r=1& [<http://perma.cc/9EW6-DWF9>]; see also Edward Morrissey, *Obama Risks \$100 Billion If Catholic Hospitals Close: Bishops May Close Facilities Rather Than Bend to Contraception Dictate*, FISCAL TIMES (Feb. 29, 2012), <http://www.thefiscaltimes.com/Columns/2012/03/01/Obama-Risks-%24100-Billion-if-Catholic-Hospitals-Close?page=0%2C1> [<http://perma.cc/VQ96-K45D>].

196. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

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ERISA. Thus, the proper result regarding the Little Sisters' RFRA claim is to find that the mandate runs afoul of RFRA because it constitutes a substantial burden on religious exercise and does not use the least intrusive means of doing so.

Even if the Supreme Court does not come to this result, it is still important for both courts and policy makers to consider the possible effects the government's position in this litigation could have on the ERISA-based enforcement of PPACA against church plans, the present and future regulation of welfare plans under ERISA, and the broader landscape of welfare benefit bargains and regulation.