Dignum et justum est: *Obamacare and Travail of the Little Sisters*

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ABSTRACT: This essay traces the Affordable Care Act from initiation through the bureaucratic unfolding of required preventive health services for women and presents the ethically reasoned objections to provision of certain services and compliance with regulations for implementation by the Little Sisters of the Poor, an international order of consecrated nuns dedicated to care of the elderly poor. The author's intent is to understand and intelligently convey the fundamental issues raised by their challenge.

The Affordable Care Act, signed into law by President Obama on March 28, 2012, followed a week later by amendments to the Health Care and Education Reconciliation Act of 2010, constitute what has become known as the "Affordable Care Act" (ACA),[1] popularly termed "Obamacare." Section 1001 of the ACA amends the Public Health Service Act of 2012 to add minimum coverage provisions for group and individual health insurance plans, including, "with respect to women, such additional preventive care and screenings not described…in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]…," an agency of the Department of Health and Human Services (HHS).[2]

Thereby, the majority of Congress and our President essentially delegated to HRSA, an unelected administrative bureau, the authority for determining "with respect to women" the "additional preventive care and screenings" that must be covered by health plans according to ACA mandate. On August 1, 2011, HRSA adopted and released guidelines for ACA required coverage by group health plans and health insurance issuers beginning on or after August 1, 2012, for "women's preventive health *services*" (italics added).[3] Note well the change in diction from "preventive care and screenings," designated by law, to

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[1] Morse EA. Lifting the Fog: Navigating the Penalties in the Affordable Care Act. *Creighton L. Rev.* 2013;46:207-257. p. 208.

[2] *Ibid.*, pp. 232-234.

[3] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. p. 39870.

"preventive *services*," as defined by the HRSA. According with "HRSA Guidelines," ACA required preventive health *services* for "women with reproductive capacity" without cost sharing include "contraceptive methods" and "sterilization."[4]

Simultaneous with this release, on August 1, 2011, the U.S. Departments of Health and Human Services, Labor and Treasury, which are jointly responsible for administrating and enforcing the ACA, provided authority to exempt from the requirement to cover contraceptive services the group health plans of nonprofit "religious employers," such as "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," whose primary "purpose is inculcation of religious values" and primarily employs and serves persons "sharing its religious tenets."[5] When final regulations were issued on February 10, 2012, a "temporary safe harbor from enforcement of the contraceptive coverage requirement" until August 1, 2013, was allowed for the group health plans of "certain nonprofit organizations with religious objections to contraceptive coverage."[6] Having published the proposed rules on February 15, 2012, the Departments invited public comment.

This communication reviews the response of the Little Sisters of the Poor ("Little Sisters"), an international order of consecrated nuns whose mission is to serve the elderly poor, later joined by other respondents, then tracks the evolution of ACA mandated rules and regulations, the implications of enforcement and the ethical challenge. Specifically this is not a law review. The query is, "What's all the hub-bub?" not how matters will be solved. Morally, for the analytic reader, this will be within an ethical framework. At law, this will follow Court decision.

The Little Sisters Protest

In compliance with Catholic doctrine which holds that there is objective moral order knowable by the intellect and that certain intrinsically evil actions, such as direct sterilization, contraception and induced abortion, are never morally justifiable regardless of the circumstances,[7] the Little Sisters on March 1, 2012, issued a statement that with good conscience they can not "directly provide or collaborate with the provisions of services that conflict with Catholic teaching,…" when providing health insurance benefits for employees of their homes for the aged.[8] Along with the Departments of Labor and Treasury, HHS next published an advance notice nearly a year later on February 6, 2013, proposing rules that might achieve their goals of "broad access" to contraceptive services without cost sharing for employees and students of nonprofit religious "eligible organizations" with religious objections to providing coverage for these services in their health care plans.[9] In such cases, the health insurance issuers would be required to

[4] *Ibid.*, pp. 39870-39872.

[5] *Ibid.*, p. 39871.

[6] *Ibid.*

[7] Smith R. Formal and material cooperation. *Ethics & Medics*, 1995;20(6):1-2.

[8] Little Sisters of the Poor. Statement of the Little Sisters of the Poor on the HHS Mandate, March 1, 2012 (http://www.littlesistersofthe poor.org/44-news-a-events/259-lsp-statement-on-hhs-preventive-services-mandate) (accessed January 1, 2016.).

[9] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. p. 39871.

"assume sole responsibility, independent of the eligible organization and its plan, for providing contraceptive coverage to participants and beneficiaries without cost sharing."[10] For self-insured eligible organizations with religious objections to contraceptive services, third party administrators of group health plans would be required to pay for this coverage or arrange for health insurance issuers to provide contraceptive coverage to participants and beneficiaries without cost sharing.[11] Insurance issuers would be able to offset the costs incurred by the third party administrator and the issuer by claiming an adjustment in the Federally-facilitated Exchange user fee.[12] That is a reduction in the fees required from insurers to participate in the insurance exchanges created by the ACA.

In April, 2013, the Little Sisters submitted formal comments to HHS pointing out that Christian Brothers Services, the third party administrator of their sponsored health care plan, also shares the sisters' commitment to Catholic teaching and indicating that the possibility of financial penalties levied for noncompliance with the proposed arrangements could threaten the operation of their homes for the aged.[13]

HHS Defines Required Contraceptive Methods For "Preventive Care" and Offers "Accommodation"

After receiving over 400,000 comments, the Departments promulgated the final Rules and Regulations on July 2, 2013, for ACA mandated "women's preventive health services" coverage, which includes "all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity…without cost sharing," and defined the requirements necessary for certain eligible organizations with religious objections to contraceptive coverage to be exempted from providing contraceptive services in their health care plans.[14] Morally and in conscience troubling for Catholic institutions and for several or more other health plan sponsors are the mandated provisions of sterilization *per se* and certain (or all) contraceptive methods. Particularly morally repugnant to some health care plan sponsors are listed "preventive care benefits" for "Emergency contraception, like Plan B® and ella® ";[15] because the endometrial effects of Plan B® (levogesteron) and ella® (ulipristal acetate) may be hostile to implantation of the developing conceptus and in the case of ulipristal acetate, possibly embryotoxic.[16] For an eligible organization to

[10] *Ibid*.

[11] *Ibid*., p. 39871.

[12] *Ibid*.

[13] Little Sisters of the Poor. Notice of Proposed Rulemaking on Preventive Services. File Code No. CMS-9968-P (http://www.littlesistersofthepoor.org/images/stories/downloads/LSP%20NPRM%20Comments%20for%20Filing%2020130408.pdf) (accessed January 21, 2016).

[14] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations, p. 39871.

[15] HealthCare.gov. Preventive care benefits for women (http://www.healthcare.gov/preventive-care-women/) (accessed November 16, 2015); HealthCare.gov. Health benefits & coverage. Birth control benefits (http://www.healthcare.gov/coverage/birth-control-benefits/) (accessed November 16, 2015).

[16] HealthCare.gov. Preventive care benefits for women (http://www.healthcare.gov/preventive-care-women/) (accessed November 16, 2015); HealthCare.gov. Health benefits & coverage. Birth control benefits (http://www.healthcare.gov/coverage/birth-control-benefits/) (accessed November 16, 2015).

avoid contracting, arranging, paying, or referring for contraceptive coverage, it must execute self-certification that it opposes providing coverage for some or all of the required contraceptive services, that it is a nonprofit entity and that it is a religious organization; and a copy of the self-certification must be provided to the health plan issuer or third party administrator prior to the beginning of the first plan year or to any new plan issuer or third party administrator with change of plans.[17] Once executed, self-certification need not be submitted to any of the government Departments, though the document must be retained in the eligible organization's records and available for examination upon request by the Departments.[18] The process of exemption from providing contraceptive services by self-insured eligible organizations that do not use third party administrators is much more onerous, but when finally submitted, "the Departments will provide a safe harbor from enforcement of the contraceptive coverage requirement while additional accommodation is considered."[19]

These Rules and Regulations were applied to the plans of eligible organizations beginning on or after August 1, 2013, but at the same time the temporary safe harbor for enforcement of the requirement for contraceptive coverage was extended to January 1, 2014.[20] When granting an injunction temporarily relieving Wheaton College from complying with the regulation to complete and transmit government prescribed Employee Benefits Security Administration (EBSA) Form 700 to self-certify religious objection against providing contraceptive coverage,[21] the U.S. Supreme Court noted that because the college had already notified the Government without using the form it meets the requirements on religious grounds for exemption from providing contraception.[22] So nothing "precludes the Government from relying on this notice…to facilitate provision of full contraceptive coverage under the Act."[23] In light of this ruling, the Departments of HHS, Labor and Treasury augmented the accommodation to eligible employers with an option to opt out of covering contraception by notifying HHS instead of sending the self-certification form to its insurer or third party administrator.[24] Rules and Regulations require health insurance issuers to expressly exclude contraceptive coverage from an eligible organization's group health plan when exempted, separate any enrollment

[17] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. pp. 39874-39875.

[18] *Ibid.*, p. 39875.

[19] *Ibid.*, pp. 37880-37881.

[20] *Ibid.*, p. 39872.

[21] EBSA Form 700—Certification (revised 2014) (www.dol.gov/.../preventiveserviceseligibleorganizationcertificationform.doc) (accessed January 13, 2016).

[22] Supreme Court of the United States. No. 13A1284. Wheaton College v. Sylvia Burwell, Secretary of Health and Human Services, et al., 573 U.S.___ (2014), July 3, 2014.

[23] *Ibid.*

[24] Brief for the Respondents. No. 15-105. Little Sisters of the Poor Home for the Aged, Denver Colorado et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al. and No. 15-119 Southern Nazarene University et al. Sylvia Burwell, Secretary of Health and Human Services, et al. On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth District. pp. 8-9; Supreme Court of the United States. No. 13A1284. Wheaton College v. Sylvia Burwell, Secretary of Health and Human Services, et al., 573 U.S.___ (2014), July 3, 2014.

materials regarding contraceptive coverage, notify participants and beneficiaries that the issuer provides separate payment for these services with no additional cost, and segregate all premium revenue collected from the eligible organization while accounting this segregation of funds.[25]

Failure of the HHS "Accommodation" to Satisfy Religious Objection

In any of these situations, by executing and providing self-certification of religious objection to contraceptive coverage in accord with federal Rules and Regulations, an eligible organization becomes a *necessary proximate cause* for the provision of sterilization and contraception, including methods with potential for inducing abortion of concepti.[26] Because this act initiates and implements the ACA requirement that an insurance issuer or third party then *must* independently provide coverage for sterilization procedures and all FDA-approved contraceptive methods without cost sharing.[27] A proximate cause "is not necessarily the closest cause in time or space nor the first event that sets in motion a sequence of events leading to an injury. A proximate cause produces particular, foreseeable consequences without the intervention of an unforeseeable cause."[28] For instance, if I know that a madman will kill you if he had a gun, I give him a gun and he kills you, that *is* a necessary proximate cause!

Even though ACA regulations may be intended by their authors to shield objecting eligible organizations from directly providing coverage for sterilization and contraceptive services, morally and in conscience, an eligible organization by complying with the requirements to self-certify would essentially, materially and immediately cooperate with the insurance issuer or third party's provision of these services.[29] The Little Sisters' case is even more complicated, because health care coverage for employees of their charitable homes for the poor is through the Christian Brothers Employee Trust, a self-funded plan that provides health and welfare benefits, consistent with Catholic doctrine, to the employees of Catholic employers nationwide.[30]

Facing $100 per day fines for each individual not covered for contraceptive services at the beginning of the next January 1 renewal of their sponsored health care plan, on September 24, 2013, the Little Sisters joined by Christian Brothers Services, third-party administrator of the Christian Brothers Employee Trust, and the Trust filed a class action suite for relief in federal court versus Kathleen Sebelius, Secretary of HHS, and

[25] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. pp. 39877-39878.

[26] The National Catholic Bioethics Center. Module 6. Reading. What is the principle of cooperation in evil? (http://ncbcenter.org/document.doc?id=139) (accessed January 13, 2016.); Catholic Encyclopedia: Occasions of Sin (http://www.newadvent.org/cathen/11196a.htm.) (accessed January 14, 2016).

[27] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. pp. 39871, 39875).

[28] The Free Dictionary (http://legal-dictionary.the freedictionary.com/Proximate+Cause) (accessed January 13, 2016).

[29] The National Catholic Bioethics Center. Module 6. Reading. What is the principle of cooperation in evil? (http://ncbcenter.org/document.doc?id=139) (accessed January 14, 2016).

[30] Christian Brothers Services Statement on Mandate Regarding Contraception (https://www.cbservices.org/newsroom/Statement-on-HHS-Mandate-Regarding-Contraception-CBS-2012.pdf.)(accessed January 15, 2016).

the Secretaries of the Departments of Labor and Treasury.[31] After initial denial by the U.S. 10th Circuit Court of Appeals in Colorado, U. S. Supreme Court Associate Justice Sonia Sotomayor granted temporary protection on December 31, 2013, the day before mandated fines were scheduled to take effect.[32] On January 24, 2014, the full U.S. Supreme Court granted relief to the plaintiffs while the case proceeded in the lower court.[33]

HHS Mandate Held to Violate Free Exercise of Religion

Later that year, in a celebrated case, *Burwell v. Hobby Lobby Stores*, et al., June 30, 2014, the U. S. Supreme Court held that HHS regulations mandating insurance coverage for contraceptive services under the ACA, while imposing multimillion dollar penalties for noncompliance on the *closely-held* for-profit corporate plaintiffs with religious objections to providing all FDA-approved contraceptive methods, violate the plaintiffs' "exercise of religion," according to the Religious Freedom Restoration Act (RFRA) of 1993.[34] The RFRA prohibits government from imposing "substantial burden" on religious exercise unless so doing is the least restrictive means of furthering a compelling government interest. In this case, owners of the closely-held plaintiff for-profit corporations expressed sincere Christian beliefs that "life begins with conception" and it would violate their religion to facilitate access to contraceptive methods that may be abortive.[35] The Supreme Court's majority opinion held that Congress designed the RFRA to provide merchants with very broad protection for religious liberty, that extending the free-exercise rights to closely-held corporations within the RFRA definition of "persons" is meant to protect the religious liberty of humans who own or control them, and that the government had "failed to show that the HHS contraceptive mandate is the least restrictive means of satisfying that interest," noting that "Religious employers, such as churches, are exempt from the mandate."[36]

As the Little Sisters' case continued on July 14, 2015, a three judge panel of the U.S. 10th Circuit Court of Appeals ruled against the Little Sisters and Christian Brothers, who had been joined in their suite by four Oklahoma Christian colleges and Reaching Souls

[31] Little Sisters of the Poor Home for the Aged, Denver Colorado, et al. v. Kathleen Sebelius, et al. Case 1:13-cv-02611 Document 1 Filed 09/24/13 USDC Colorado (http://www.becketfund.org/wp-content/uploads/2013/09/Little-Sisters-of-the-Poor-and-Christian-Brothers-v.-Sebelius.pdf) (accessed January 15, 2016).

[32] Little Sisters of the Poor v. Burwell. The Becket Fund (http://www.becketfund.org/littlesisters/) (accessed January 15, 2016).

[33] U.S. Supreme Court Protects Little Sisters of the Poor. The Becket Fund (http://www.becketfund.org/littlesisters/) (accessed January 15, 2016).

[34] Supreme Court of the United States. Syllabus: No. 13-354. Burwell, Secretary of Health and Human Services, et al v. Hobby Lobby Stores, Inc., et al., together with No. 13-356. Conestoga Wood Specialties Corp. et al. v. Burwell, Secretary of Health and Human Services, et al. Decided June 30, 2014.

[35] *Ibid*.

[36] *Ibid*.

International, an overseas Christian missionary organization.[37] The majority decision basically rested on their interpretation that the "petitioners had failed to establish" that the government's accommodation mandating third party payment for contraception services actually imposes "any burdens" on the petitioners themselves.[38] While Judge Baldock, one of the appellate court's three judge panel, agreed with the others that "the accommodation does not impose a substantial burden on employers with insured plans,…" in the Little Sisters' case it is because of the special circumstance that the Little Sisters self-insured plan was administered by Christian Brothers Services, which had promised not to provide contraception coverage even if the Little Sisters opt out, that "the Little Sisters had not established a substantial burden..."[39] Although a majority of the full 10th Circuit Court's judges voted against rehearing the case *en blanc*, five of the judges dissented: "When a law demands that a person do something the person considers sinful and the penalty for refusal is a large financial penalty, then the law imposes a substantial burden on that person's free exercise of religion."[40]

Little Sisters Appeal to the Supreme Court

Attorneys for the Little Sisters et al. promptly petitioned the U.S. Supreme Court for *writs of certiorari* (July 23, 2015), seeking judicial review at the highest level.[41] The Little Sisters soon were joined in their petition by more than a dozen Jewish, Christian, secular and professional organizations, and the attorneys general of twenty states.[42]

The U.S. Department of Justice responded (September 30, 2015) acknowledging that the Supreme Court should resolve the question but argued that the Court ought first consider and resolve *Roman Catholic Archbishop of Washington v. Burwell* appealed

[37] Fox News.Com. Denver court rules against Little Sisters of the Poor in contraception coverage case (http://www.foxnews.com/politics/2015/07/15/denver-court-rules-against-little-sisters-poor-contraception-coverage-case/) (accessed November 16, 2016); Jeffrey TP. 5 Judges: Forcing Contraception Reg on Nuns Like Providing 'Only Non-Kosher Food' to Jewish Prisoner. CNS News.com, September 24, 2015 (http://www.cnsnews.com/news/article/terence-p-feffrey/5-judges-forcing-contraception-reg-nuns-providing-jewish-prisoner) (accessed November 16, 2015).

[38] Brief for the Respondents. No. 15-105. Little Sisters of the Poor Home for the Aged, Denver Colorado et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al. and No. 15-119. Southern Nazarene University et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al.. On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth District. p. 12, pp. 13-14.

[39] *Ibid.*, p. 13.

[40] Judges Hartz, Kelly, Tymkovich, Gorsuch and Holmes, Dissenting. No. 13-1540. Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al. v. Sylvia Methews Burwell, et al., No. 14-6026. Southern Nazarene University, et al., v. Sylvia Mathews Burwell (https://www.ca10.uscourts.gov/opinions/13/13-1540.pdf) (accessed January 25, 2016); Jeffrey TP. 5 Judges: Forcing Contraception Reg on Nuns Like Providing 'Only Non-Kosher Food' to Jewish Prisoner. CNS News.com, September 24, 2015 (http://www.cnsnews.com/news/article/terence-p-feffrey/5-judges-forcing-contraception-reg-nuns-providing-jewish-prisoner) (accessed November 16, 2015).

[41] Supreme Court of the United States. Docket, No. 15-105, etc. (http://www. supremecourt.gov/Search.aspx?FileName=/cocketfiles/15-105.htm) (accessed January 20, 2016).

[42] SCOTUSblog. Little Sisters of the Poor Home for the Aged v. Burwell (http://www.scotusblog.com/case-files/cases/little-sisters-of-the-poor-home-for-the-aged-v-burwell/) (accessed January 19, 2016).

from the U.S. Court of Appeals for the District of Columbia. Contemporaneous with the government's response, the 8th Circuit Court of Appeals in St. Louis, when granting a preliminary injunction in *Sharpe Holdings v. HHS*, came to an opposite and conflicting conclusion from the Little Sisters case heard by the 10th Circuit Court. In deciding the Sharpe Holdings case, the 8th Circuit Court wrote that the HHS "accommodation does not qualify as the least restrictive means of furthering a compelling government interest…the government could provide contraceptive coverage to the affected women by other means."[43] The government respondents contend that the Little Sister's case "would be an especially unsuitable vehicle" to revolve these issues "because of the unusual and uncertain circumstances" raised in 10th Circuit Court Judge Baldock's reasoning that although the Little Sisters' plan is self-insured, "their employees would not receive contraceptive coverage even if they opted out," because of the Christian Brothers Services' promise.[44] The Respondent's Brief acknowledges a footnote, not included in the petitioner's preliminary injunction record, that in addition to Christian Brothers Services, the Little Sisters' self-insured plan also relies on another party, Express Scripts, to administer prescription drug claims.[45] If Express Scripts would provide contraceptive coverage under the accommodation, 10th Circuit Court Judge Baldock's conclusion would not be pertinent;[46] whereas, the Little Sisters' conscientious objection against facilitating contraceptive coverage would remain cogent.

The Little Sisters' attorneys replied (October 13, 2015) that the government's response directing attention to the *Roman Catholic Archbishop of Washington v. Burwell* case was an attempt to "hand-pick its preferred case and to constrain the scope" of the Supreme Court's review.[47] After "trying to pick and choose which religious groups to exempt from the contraceptive mandate, HHS should not now be allowed to pick and choose its opponent or which questions it must confront in defending its actions."[48] The Little Sisters' attorneys countered the government's insistence that their case is "especially unsuitable" for Supreme Court review because of the "the unusual and uncertain circumstances" raised by Christian Brothers' promise. The reply reiterated the Sisters' complaint that HHS regulations would compel them to assist in the government's effort to obligate or incentivize third parties to provide contraceptive coverage for their employ-

[43] Sharpe Holdings, Inc. v. HHS, No. 14-1507, 2015. (September 17, 2015); Brief for the Respondents. No. 15-105. Little Sisters of the Poor Home for the Aged, Denver Colorado et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al. and No. 15-119. Southern Nazarene University et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al. On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth District. pp. 14-20.

[44] Brief for the Respondents. No. 15-105. Little Sisters of the Poor Home for the Aged, Denver Colorado et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al. and No. 15-119. Southern Nazarene University et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al. On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth District. pp. 13, 20.

[45] *Ibid.*, pp. 20-21.

[46] *Ibid.*, pp. 13, 20-21.

[47] Reply Brief of Petitioners. No. 15-105. Little Sisters of the Poor Home for the Aged, Denver Colorado et al. v. Sylvia Mathews Burwell, Secretary of Health & Human Services, et al. p.1.

[48] *Ibid.*

ees, maintaining that "those circumstances are common to more than 400 non-exempt religious employers."[49] Moreover, the third party administrator for the health care plan of Reaching Souls International, a co-petitioner with the Little Sisters, confirmed that it *will* provide contraceptive coverage to employees if eligible organizations were to comply with self-certification.[50] The Little Sisters' petition, therefore, combines a case in which the ultimate provision of coverage for contraception is uncertain and one in which it is certain because the third party administrator is willing to provide the coverage, making this a "particularly good vehicle" to resolve the question.[51] What matters, quips the reply, is "which vehicle is best for this Court, not for HHS."[52] Finally, the Little Sisters' reply challenges HHS on Constitutional grounds, complaining that the government's Rules and Regulations which exempt "churches, their auxiliaries" and "associations of churches," shelter churches and other nonprofit religious organizations from the requirement to cover contraceptive services in their group health plans but not the Little Sisters, violate the free exercise protections of the First Amendment.[53]

The Supreme Court of the United States on November 6, 2015, granted *certiorari*, agreeing to consolidate, hear and consider the cases of *Little Sisters Home for the Aged et al. v. Burwell; Priests for Life et al. v. Department of Health & Human Services; and Roman Catholic Archbishop of Washington et al. v. Burwell* along with *David A Zubik et al. v. Burwell*.[54] It is the expressed intent of these petitioners to offer health plan coverage to their employees and students in manners consistent with the eligible organizations' religious beliefs. In summary, questions at issue are: 1) whether HHS regulatory methods for nonprofit religious employers to comply with the contraceptive mandate eliminates the substantial burden on the petitioners' religious exercise or violates the Religious Freedom Restoration Act (RFRA) of 1993, 2) whether HHS satisfies the RFRA test for overriding sincerely held religious objections even if overriding the religious objections will not fulfill the HHS intent to provide contraceptives at no cost to religious objectors' employees and students, 3) whether the ACA mandate to provide contraceptive services violates the religious freedom of non-exempt nonprofit religious organizations (*i.e.*, eligible organizations), and 4) whether the government can force objecting nonprofit religious organizations in violation of their religious beliefs to facilitate the provision of

[49] *Ibid.*, pp. 3-4.
[50] *Ibid.*, p. 5
[51] *Ibid.*, p. 6.
[52] *Ibid.*, p. 5.
[53] *Ibid.*, pp. 9-12.
[54] Supreme Court of the United States. Docket, No. 15-105, etc. (http://www. supremecourt.gov/Search.aspx?FileName=/docketfiles/15-105.htm) (accessed January 20, 2016).

sterilization, abortifacients and contraception in employer sponsored health care plans for their employees and students.[55]

Though ethically opposed to the government's goal of providing coverage for contraceptive services, according to their brief, the petitioners do *not* challenge the legality of the effort: they ask not to participate in that objective. While being subjected to the burden of massive government fines for refusal, the petitioners believe that cooperation with provision of coverage for those objectionable services or the submission of documentation that initiates the coverage is a violation of their religious freedom. Furthermore, the petitioners contend that the government can arrange methods for providing contraceptive services without cost sharing to employees and students unable to obtain those services through health care plans of objecting eligible organizations by means that do not violate the employers' religious beliefs and moral objections.[56]

Following the death of Associate Justice Antonin Scalia on February 13, 2016, the eight judges of the U. S. Supreme Court heard oral arguments on March 23, 2016, from attorneys representing the Little Sisters and six other religious non-profit petitioners joined in their common cause against HHS rules and regulations for the provision of contraceptive services. A key argument by the petitioners was that compliance with the mandated regulations would impose a substantial burden to their exercise of religion in violation of the RFRA of 1993.[57] On the other hand, government attorneys told the Court that it could not provide contraceptive coverage to the plaintiff's employees without returning to Congress for an amendment to the ACA mandate.[58] With an eye toward resolution, the Supreme Court on March 29, 2016, ordered attorneys consolidated for the plaintiffs' cases and the government's attorneys each to submit by April 20, 2016, one new brief on each side of the controversy and then single replies, expecting that with further "clarification and refinement," the parties should be able to "arrive at an approach…that accommodates the challengers' religious exercise while at the same time ensuring that women covered by the challengers' health plans receive full and equal health coverage, including contraceptive coverage."[59]

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[55] Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191. East Texas Baptist University, et al. v. Sylvia Burwell, et al., Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al. v. Sylvia Burwell, et al., Southern Nazarene University, et al. v. Sylvia Burwell, et al., Geneva College, et al. v. Sylvia Burwell. On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits. (January 4, 2016); Brief for Petitioners in Nos. 15-1418, 14, 1453 & 14-1505. David A Zubik, et al. vs. Sylvia Burwell, et al., Priests for Life, et al. v. Department of Health & Human Services, et al., Roman Catholic Archbishop of Washington, et al. v. Sylvia Burwell, et al. On Writ of Certiorari to the United States Courts of Appeals for the Third & D.C. Circuits (January 4, 2016).

[56] *Ibid*.

[57] Denniston L. Court seeks new way to decide birth-control cases. SCOTUSblog. March 29, 2016 (http://www.scotusblog.com/2016/03/court-seeks-new-way-to-decide-birth-control-cases/)(accessed March 30, 2016).

[58] *Ibid*.

[59] *Ibid.*; Little Sisters of the Poor Home for the Aged v. Burwell. SCOTUSblog. March 23, 2016 (http://www.scotusblog.com/case-files/little-sisters-of-the-poor-home-for-the-aged-v-burwell/)(accessed July 20, 2016).

In forthcoming briefs, the petitioners clarified that their religious exercise would not be infringed were they "to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception;" and the government confirmed that "…insured plans could be modified" to provide contraceptive coverage to employees through the petitioners' insurance companies "without any such notification from petitioners."[60] Then, on May 16, 2016, quoting their instructions of March 29, 2016, to provide supplemental briefs addressing "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without…notice from the petitioners" and encouraged by refinement in the positions of the parties, the eight judge Supreme Court ruled unanimously to vacate conflicting judgments by the several Courts of Appeal. Cases each were remanded to its respective Appeals Court to arrive at an approach that "accommodates the petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."[61] With this, citing the public notice of *Wheaton College v. Burwell* (*vide supra*), the Court noted that nothing in the opinion "precludes the Government from relying on this notice… to facilitate the provision of full contraceptive coverage."[62] Accordingly, "Because the Government may rely on this notice, the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice."[63] The opinion was careful to note that the Supreme Court expresses no view on the merits of the cases and has not decided "whether the petitioners' religious exercise was substantially burdened, whether the Government has a compelling interest or whether the current regulations are the least restrictive means of serving that interest."[64] Thus, aside from relief from the burden of massive government fines levied upon the Little Sisters and co-plaintiffs, matters have not been settled.

The Crux of the Matters

This is a complex history, but no less so than many questions that reach our U.S. Supreme Court. The forgoing attempt to succinctly as possible chronologically present the major issues raised by the Little Sisters of the Poor, those who have joined and friends in their case poses other matters, both practical and ethical, that deserve thoughtful

[60] United States Supreme Court. Nos. 14-1418 David A. Zubik, et al. Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al.; 14-1453 Priests for Life, et al., Petitioners v. Department of Health and Human Services, et al.; 14-1505 Roman Catholic Archbishop of Washington, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al.; 15-35 East Texas Baptist University, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al.; 15-105, Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al.; 15-119, Southern Nazarene University, et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al.; 15-191, Geneva College Petitioner v. Sylvia Burwell, Secretary of Health and Human Services, et al. 578 U.S.___ (2016), May 16, 2016.

[61] *Ibid*.

[62] *Ibid*.

[63] *Ibid*.

[64] *Ibid*.

public attention. The plaintiffs' legal challenge against ACA mandates requiring the provision of contraceptive services through non-exempted employer sponsored health care plans provided by nonprofit eligible religious organizations unless they self-certify and provide their religious objections, thereby triggering HHS arrangements to deliver these services, soon should be settled at least for now by Court decision, optimistically through confirmation of mutually agreed resolution between the plaintiff parties and the government. Notwithstanding the anticipated legal decisions regarding exemption from ACA mandated insurance coverage for sterilization and contraceptive services and the standing of rules for accommodation to exempt eligible organizations with religious objections to contraception, it remains practically and ethically appropriate to consider whether the Little Sisters and co-plaintiffs are simply "stirring a tempest in a teapot" or are their protestations right and just?

Let us first return to the congressional amendment designating the inclusion of "preventive care and screenings" for women in the ACA, as signed into law by President Obama on March 28, 2010. Ordinarily, the United States Public Health Service National Institutes of Health defines "Preventive Health Care" as screening for disease, vaccinations, genetic testing, attention to early symptoms and signs of disease, counselling to encourage exercise, healthy diet and weight, safe sexual relationships, use of safety restraints in automobiles, and against tobacco and illicit drug use and immoderate use of alcohol, but there is nothing in this definition about contraception, abortion, or sterilization.[65] So where and how do contraceptive methods, potential abortifacients and sterilization slip into ACA mandated "preventive health services" for "women who may become pregnant"?[66]

According to the Federal Register, HRSA, an administrative bureau of HHS tasked with providing guidelines for women's preventive health services, adopted recommendations for women's preventive services from the Institute of Medicine (IOM) as the rationale upon which ACA mandated contraceptive methods rest.[67] The IOM is a division of the private, nonprofit National Academies of Sciences, Engineering and Medicine, which operating under an 1863 congressional charter intends to provide independent scientific advice to inform public policy decisions.[68] In their July 19, 2011, report *Clinical Preventive Services for Women: Closing the Gaps*, the IOM in addition to those preventive services recommended for men, laudably recommends seven more evidence-based preventive services for women, including screening for gestational diabetes, counselling and screening methods for sexually transmitted diseases, comprehensive lactation counselling and support, screening and counselling regarding interpersonal and

[65] National Institutes of Health/U.S. National Library of Medicine. Preventive health care (https://www.nlm.nih.gov/medlineplus/ency/article/001921.htm) (accessed January 25, 2016).

[66] Preventive care benefits for women. HealthCare.gov (http://www.healthcare.gov/preventive-care-women/) (accessed November 16, 2015); Health benefits & coverage. Birth control benefits (http://www.healthcare.gov/coverage/birth-control-benefits/) (accessed November 16, 2015).

[67] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. p. 39870.

[68] The National Academies of Science, Engineering and Medicine. Institute of Medicine. What is IOM? (http://iom.nationalacademies.org/About-IOM.aspx) (accessed January 25, 2016).

domestic violence, and at least one well-women visit annually to obtain these services.[69] This IOM report also recommends for women the "full range" of "contraceptive methods, sterilization procedures, and patient education and counseling…"[70] Committee members who contributed to the IOM report were volunteer professionals from secular and Jewish universities and academic institutions, who had special interests in matters relating to public health and policy.[71] None were from specifically Catholic universities or institutions or entities identifiable as fully sharing their ethics concerning natural law and human reproduction.

Taking liberty with the designation of "additional preventive care and screenings" for women, according to congressional definition in Section 1001 of the Public Health Service Act (*vide supra*), HRSA not only based its "guidelines for women's preventive health services" on the IOM report of recommended "evidence-based preventive services" but also included contraceptive services and sterilization.[72] Now, it must be submitted that contraception does not prevent disease; contraception is intended to prevent pregnancy. And pregnancy is not a disease.

To be sure, pregnancy may be occasionally complicated by disease. The non-pregnant times of women's reproductive years, as well, may be complicated by disease. Whatever may be their status, it is clearly the charge of preventive medicine to vaccinate, screen and counsel women in order to protect, promote and maintain their health and well-being and that of their offspring and to prevent disease and disability.[73] But pregnancy is not a disease. Pregnancy is the natural human function for propagation of our species.

Indeed, in *General Electric v. Gilbert* the Supreme Court of the United States, citing findings from evidence given in the U.S. District Court, Richmond Virginia, rejected the view that pregnancy is even similar to disease or disability, holding to the district court's conclusion that, "The great mass of expert testimony presented here on the subject merely confirms what appears obvious to any layman: pregnancy is not a disease, as that term is commonly understood…"[74] Pregnancy is not a disease to be prevented. Biologically and in law this is incontrovertible.

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[69] Institute of Medicine. Clinical Preventive Services for Women: Closing the Gaps. July 19, 2011 (https://iom.nationalacademies.org/~/media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf.)(accessed January 25, 2016).

[70] *Ibid*.

[71] *Ibid*.

[72] Federal Register, Vol. 78, No. 127, July 2, 2013/Rules and Regulations. p. 39870.

[73] American College of Preventive Medicine. What is Preventive Medicine? (http://www.acpm.org/?page=whatispm) (accessed January 26, 2016).

[74] United States Supreme Court. No. 74. General Electric Co. v. Gilbert (December 7, 1976; United States District Court, E.D. Virginia, Richmond Division. Martha V. Gilbert v. General Electric Company 375 F. Supp. 367 (April 13, 1974); Morse EA. Lifting the Fog: Navigating the Penalties in the Affordable Care Act. *Creighton Law Review*. 2013;46:207-257. p. 234.

Some pharmaceutical formulations marketed and generally used for contraception may be properly and with good medical judgment preferably prescribed and used for the prevention and treatment of disease. When this is the *direct intent* and the therapeutic and/or prophylactic benefits of such medications outweigh possible unintended but foreseeable untoward and contraceptive effects with little or no abortive risk, according with the ethical principles of double effect and proportionate reason and in accord with magisterial and traditional Catholic teachings from natural law it could be argued that use of these formulations might be justified in some cases as a matter of preventive medicine and public policy.[75] This is not the Little Sisters and co-plaintiffs' contention in their case against HHS. Their complaint is that the government's regulatory accommodation does not exempt them from the statutory obligation to provide coverage for *contraceptive services*, but rather in fact while threatening disabling fines, the regulation would require them to directly facilitate this provision by self-notification of their religious objections. The complainants contend that the Rules and Regulations in effect, therefore, violate the RFRA of 1993, which prohibits government from imposing "substantial burden" on religious exercise unless so doing is the least restrictive means of furthering a compelling government interest. Besides, they complain that government's exemption of churches and integrated auxiliaries, conventions or associations of churches from the requirement to provide contraceptive services in their health care plans but not the plaintiffs violates the establishment clause of the U. S. Constitution.[76] Rather than being exempt from mandated health care plan coverage for provision of contraceptive services, by self-certification of their religious objections, the Little Sisters and co-plaintiffs immediately would put into effect HHS arrangements for the provision of contraceptive coverage by the insurance issuers or third party administrators of their plans, acts which the plaintiffs believe are morally wrong.

Given the questionable inclusion by HRSA of required coverage with no additional cost for sterilization and all FDA-approved contraceptives in ACA regulated health care plans, the exemption of churches, affiliates and under the order of law closely-held for-profit companies with religious objections to providing contraceptive services and the plaintiffs' uncontested ethical and religious objections against providing or materially cooperating in this coverage, the adamant insistence by HHS that the Little Sisters and their co-plaintiffs must take part in the government's plan to deliver contraceptive services is inexplicable.

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[75] Casey MJ, Salzman TA. Therapeutic, prophylactic, untoward, and contraceptive effects of combined oral contraceptives: Catholic teaching, natural law, and the principle of double effect when deciding to prescribe and use. *Am. J. Bioethics* 2014;14(7):20-34.

[76] Reply Brief of Petitioners. Little Sisters of the Poor Home for the Aged, Denver Colorado et al. v. Sylvia Mathews Burwell, Secretary of Health & Human Services, et al. pp. 9-12; Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191. East Texas Baptist University, et al. v. Sylvia Burwell, et al., Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al. v. Sylvia Burwell, et al., Southern Nazarene University, et al. v. Sylvia Burwell, et al., Geneva College, et al. v. Sylvia Burwell. On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits (January 4, 2016).