No. _____

In the Supreme Court of the United States

PRIESTS FOR LIFE, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID ELIEZER YERUSHALMI
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVE. N.W.
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Petitioners Priests for Life, a nonprofit Catholic organization; Father Frank Pavone, the National Director of Priests for Life; Alveda King, the niece of civil rights leader Martin Luther King, Jr. and the Pastoral Associate and Director of African-American Outreach for Priests for Life; and Janet Morana, the Executive Director of Priests for Life (collectively referred to as "Petitioners"), challenge the enforcement of the contraceptive services mandate of the Patient Protection and Affordable Care Act of 2010 (hereinafter "Affordable Care Act" or "Act"), which requires Priests for Life, a non-exempt religious employer, to affirmatively authorize coverage for, and access to, contraception, sterilization, abortifacients, and related education and counseling for the participants and beneficiaries of its healthcare plan under penalty of federal law in direct violation of Petitioners' sincerely held religious beliefs.

Whether the contraceptive services mandate of the Affordable Care Act as applied to non-exempt, nonprofit religious organizations violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq*.

PARTIES TO THE PROCEEDING

The Petitioners are Priests for Life, Father Frank Pavone, Alveda King, and Janet Morana.

The Respondents are United States Department of Health and Human Services; Kathleen Sebelius, in her official capacity as Secretary, U.S. Department of Health & Human Services; United States Department of the Treasury; Jacob J. Lew, in his official capacity as Secretary, U.S. Department of the Treasury; United States Department of Labor; and Thomas E. Perez, in his official capacity as Secretary, U.S. Department of Labor (collectively referred to as "Respondents").

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

RULES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that the Court grant this petition to review a case still pending in the United States Court of Appeals for the District of Columbia Circuit before final judgment is entered in that court. This petition is filed under the authority of Title 28, United States Code, Section 2101(e) and Rule 11 of the Supreme Court Rules. The United States District Court for the District of Columbia rendered judgment in favor of Respondents on December 19, 2013, holding, in relevant part, that Petitioners "have not stated a *prima facie* case under RFRA because they have not alleged a substantial burden on their religious exercise." App. 27. Petitioners filed an immediate appeal of that decision and an emergency motion for an injunction pending appeal. The motion was granted by a three judge panel of the court of appeals on December 31, 2013, enjoining Respondents "from enforcing against [Petitioners] the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court."[1] App. 44.

This "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Indeed, the Court will be deciding this term whether the religious owners of a family business,

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[1] In the order granting the injunction, the court of appeals also consolidated the case with *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (ABJ), 2013 U.S. Dist. LEXIS 179317 (D.D.C. Dec. 20, 2013), *appeal docketed*, No. 13-5371, (D.C. Cir.), *petition for cert. docketed*, No. 13-829, (U.S. Jan. 14, 2014). App. 43-44.

or their closely-held business corporation, have free exercise rights that are violated by the application of the contraceptive services mandate of the Affordable Care Act. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013) (No. 13-356). As set forth below and noted previously, this mandate also has further sweeping application in that it applies to non-exempt, nonprofit religious organizations such as Priests for Life. Thus, it will serve the public interest by having this matter resolved immediately for all affected parties.

OPINION BELOW

The opinion of the district court appears at App. 1-40 and is available at 2013 U.S. Dist. LEXIS 177951 (D.D.C. Dec. 19, 2013).

JURISDICTION

The final judgment of the district court was entered on December 19, 2013. App. 41. Petitioners filed an immediate and timely appeal of that decision and an emergency motion for an injunction pending appeal. The motion was granted by a three judge panel of the D.C. Circuit on December 31, 2013. App. 42-44. Petitioners are invoking the jurisdiction of this Court pursuant to Title 28, United States Code, Sections 1254(1) and 2101 and Rule 11 of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Exercise Clause of the First Amendment provides, "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I.

RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b).

STATEMENT OF THE CASE

I. The Contraceptive Services Mandate & "Accommodation."[2]

This case is one of the many cases challenging the contraceptive services mandate of the Affordable Care Act as applied to non-exempt, nonprofit religious employers.[3] Petitioners, a Catholic, pro-life advocacy organization and several of its officers, including Father Frank Pavone, are uniquely situated to advance this important challenge on behalf of non-exempt religious employers who object to the contraceptive

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[2] The statutory and regulatory background of the challenged mandate is set forth in detail in the district court's opinion. App. at 5-9.

[3] *See, e.g., Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542 (BMC), 2013 U.S. Dist. LEXIS 176432 (E.D.N.Y. Dec. 13, 2013) (enjoining the mandate as applied to non-exempt, nonprofit religious organizations); *Zubik v. Sebelius*, Nos. 13cv1459 & 13cv0303, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013) (preliminarily enjoining the mandate as applied to non-exempt, nonprofit religious organizations); *Legatus v. Sebelius*, No. 2:12-cv-12061-RHC-MJH, 2013 U.S. Dist. LEXIS 178691 (E.D. Mich. Dec. 20, 2013) (same); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-01092-D, 2013 U.S. Dist. LEXIS 178752 (W.D. Okla. Dec. 20, 2013) (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207-JFC, 2013 U.S. Dist. LEXIS 179476 (W.D. Pa. Dec. 23, 2013) (same); *Southern Nazarene Univ. v. Sebelius*, No. 5:13-cv-01015-F, 2013 U.S. Dist. LEXIS 179569 (W.D. Okla. Dec. 23, 2013) (same); *see also Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS, 2013 U.S. Dist. LEXIS 179318 (N.D. Ind. Dec. 20, 2013) (denying request to enjoin the mandate on behalf of non-exempt, nonprofit religious organizations); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 U.S. Dist. LEXIS 180364 (M.D. Tenn. Dec. 26, 2013) (same).

services mandate on religious grounds. Indeed, Priests for Life was founded in 1991 to pursue in a singularly-focused way one of the most important religious purposes of the Catholic Church today: to spread the Gospel of Life to people throughout the world. The Gospel of Life, which is an expression of the Catholic Church's position and central teaching regarding the value and inviolability of human life, affirms and promotes the culture of life and actively opposes and rejects the culture of death. Contraception, sterilization, and abortifacients are all instruments of the culture of death, and their use can never be approved, endorsed, facilitated, promoted, or supported in any way. App. 51, 53. Thus, this challenge goes to the very core of Priests for Life's corporate *raison d'être*. Consequently, Petitioners are well situated to challenge the mandate and its application to non-exempt, nonprofit religious organizations.

As set forth in the challenged regulations, the government's stated objective for mandating coverage for contraceptive services is as follows: "By expanding coverage and eliminating cost sharing for recommended preventive services,[4] [the regulations

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[4] The "preventive services" required by the challenged mandate include "all Food and Drug Administration approved contraceptive methods [and] sterilization procedures." App. 5. FDA-approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the "morning after pill"), and ulipristal (also known as "ella" or the "week after pill"). Plan B and ella, as well as certain intrauterine devices ("IUD"), can prevent the implantation of a human embryo in the wall of the uterus, thereby causing the embryo's death and thus operating as abortifacients. App. 51-52; *see also* App. 4-5.

are] expected to increase access to and utilization of these services, which are not at optimal levels today." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010).

Pursuant to the final regulations, the singular exemption from the proscriptions of the contraceptive services mandate for organizations that object to it on religious grounds applies only to those organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). These organizations are essentially churches and religious orders — a very narrow class of nonprofit organizations.

And while Priests for Life is a nonprofit religious organization which exists for the very purpose of opposing what the government seeks to do through the challenged mandate, it does not qualify for the only statutory exemption from the mandate. App. 8, 49.

The government rejected considering a "broader exemption" from the challenged mandate because it believes that such an exemption "would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits [of requiring the coverage]." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). According to the government:

> Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the

> exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, thereby inhibiting the use of contraceptive services and the benefits of preventive care.

77 Fed. Reg. at 8728.

Thus, as the government consistently acknowledges, the ultimate goal of the challenged mandate is to increase the "use of contraceptive services" by compelling access to these services and to ensure that employees, including employees of religious organizations such as Priests for Life, are not "subject" to the employer's religious beliefs regarding such services.

Accordingly, instead of providing an exemption for organizations such as Priests for Life — an exemption that would have addressed Priests for Life's religious objections to the mandate — the government created an "accommodation" scheme for "eligible organizations" — a scheme that has the purpose and effect of advancing the government's objective of "increasing access to and utilization of" contraceptive services by requiring, *inter alia*, coverage of such services for the participants and beneficiaries of the religious organization's healthcare plan so long as they are enrolled in the plan. 78 Fed. Reg. at 39,896.

Pursuant to the final rules, an "eligible organization" that qualifies for the "accommodation" is an organization that satisfies all of the following requirements: (1) the organization opposes providing coverage for some or all of any contraceptive services required to be covered by the challenged mandate on

account of religious objections; (2) the organization is organized and operates as a nonprofit entity; (3) the organization holds itself out as a religious organization; and (4) the organization self-certifies, in a form and manner specified by the government, that it satisfies (1) through (3) above. The "eligible organization" must provide the "certification" to its insurer and make it available for examination upon request by the first day of the first plan year to which the "accommodation" applies. 78 Fed. Reg. at 39,892-93; *see* App. 6-8.

An insurer that receives a copy of the certification must, *inter alia*, provide separate payments for the required contraceptive services for the "eligible organization's" plan participants and beneficiaries so long as they remain enrolled in the plan. 78 Fed. Reg. at 39,896. Thus, Priests for Life's insurer's obligation — an obligation triggered by Priests for Life's execution and delivery of the "certification" — to make direct payments for contraceptive services would continue only "for so long as the participant or beneficiary remains enrolled in [Priests for Life's] plan." 78 Fed. Reg. at 39,876.

Additionally, for each plan year to which the "accommodation" applies, Priests for Life's insurer must provide to Priests for Life's plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify, *inter alia*, that the insurer provides coverage

for contraceptive services, and it must provide contact information for questions and complaints. 78 Fed. Reg. at 39,897.

Thus, pursuant to this "accommodation," Priests for Life will play a direct, central, and indispensable role in facilitating the government's objective of promoting the use of contraceptive services required by the mandate, contrary to Petitioners' religious beliefs. App. 50, 62-63.

Consequently, the government mandate directly forces Priests for Life to provide the means and mechanism by which contraception, sterilization, and abortifacients (and related education and counseling) are provided to its employees (*i.e.*, its healthcare plan participants and beneficiaries), which is unacceptable to Petitioners because it compels them to violate their sincerely held religious beliefs. App. 50-60, 62-63.

Priests for Life's refusal to cooperate with the government's "accommodation" scheme subjects it to crippling fines of $100 per employee per day. *See* 26 U.S.C. § 4980D. The only other "option" presented by way of this Hobson's choice is for Priests for Life to drop its healthcare coverage altogether, which will directly harm the individual Petitioners and Priests for Life as an organization. App. 57-60, 63.

II. Petitioners' Religious Objection to the Mandate & "Accommodation."

Father Pavone, testifying on behalf of Priests for Life, summed up Petitioners' religious objection to the mandate and its "accommodation" as follows:

> Priests for Life cannot and will not submit to *any* requirement imposed by the federal government that has the purpose or effect of providing access to or increasing the use of contraceptive services. This specifically includes the requirement under the so-called "accommodation" that Priests for Life provide its healthcare insurer with a "self-certification" that will then trigger the insurer's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries" of Priests for Life's health care plan. This "self-certification" is the moral and factual equivalent of an "authorization" by Priests for Life to its insurer to provide coverage for contraceptive services to its plan participants and beneficiaries. Priests for Life is prohibited based on its sincerely held religious beliefs from cooperating in this manner with the federal government's immoral objectives.
>
> These sincerely held religious beliefs, which prohibit Priests for Life from executing the "self-certification," are neither trivial nor immaterial, but rather central to the teaching and core moral admonition of our faith, which requires us to avoid mortal sin. Thus, neither [Petitioners] nor Priests for Life can condone, promote, or cooperate with the government's illicit goal of increasing access to and utilization of contraceptive services — the express goal of the challenged mandate and the government's so-called "accommodation."

App. 62-63.

Indeed, Priests for Life, a Catholic organization, is morally prohibited based on its sincerely held religious convictions from cooperating with evil. Thus, Petitioners object to being forced by the federal government to purchase a healthcare plan that provides Priests for Life's employees with access to contraceptives, sterilization, and abortifacients, all of which are prohibited by their religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life. Contraception, sterilization, and abortifacients are immoral regardless of their cost. App. 54. Consequently, the burden imposed upon Petitioners' religious exercise by the challenged mandate is precisely the same whether the government is forcing Petitioners to authorize, enable, endorse, and facilitate "access to and utilization of" contraceptive services for Priests for Life's plan participants and beneficiaries via signing a "certification" or via payment to Priests for Life's insurance carrier.

REASON FOR GRANTING THE PETITION

I. The Court Should Grant Review to Determine Whether the Free Exercise Rights of Non-Exempt, Nonprofit Religious Employers Are Violated by the Contraceptive Services Mandate.

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). This general prohibition is not without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in

furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). Congress, through RFRA, intended to bring Free Exercise Clause jurisprudence back to the test established prior to *Emp't Div. v. Smith*, 494 U.S. 872 (1990). *See, e.g.,* 42 U.S.C. § 2000bb (enacting RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

Fundamentally, the right to free exercise of religion embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940); *see McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."). Indeed, "[t]he principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Justice Brennan, writing for the Court in *Sherbert v. Verner,* 374 U.S. 398 (1963), put it well: "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals because they hold religious views abhorrent to the authorities." *Id.* at 402 (citations omitted).

Here, Petitioners are pressured to choose between violating their religious beliefs in managing their selected healthcare plan by authorizing, via self-certification, coverage of contraceptive services to the plan's participants and beneficiaries — an affirmative

act that by its very purpose and effect promotes and endorses the government's immoral objective "to increase access to and utilization of" contraceptive services — or paying onerous penalties. Such an endorsement, procured exclusively by regulatory compulsion, is a compelled affirmation of a repugnant belief that standing alone, is a cognizable burden on free exercise. And this burden becomes substantial because the government commands compliance by giving Petitioners a Hobson's choice. They can either abide by the government's requirement that Priests for Life authorize the direct payment of coverage for contraceptive services to its healthcare plan participants and beneficiaries — an act repugnant to their religious beliefs — or face crippling fines. The only other "choice" for Petitioners would be to drop healthcare coverage for Priests for Life's employees, which itself would cause substantial harm. *See* App. 58-60, 63.

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), the Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a factory that produced armaments, claiming that the production of items that could be used for war was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. *See id*. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). The district court improperly dismissed *Thomas*, along with *Sherbert* and *Yoder*, as inapposite because, according to the court, the government-imposed sanctions in those cases "all fell directly upon the plaintiffs' participation in or

abstention from a specific religious practice." App. 25. But that is simply an incorrect reading of the facts and decision in *Thomas*. Thomas specifically stated that he did not object to the physical work required of him. *Thomas*, 450 U.S. at 711 ("When asked at the hearing to explain what kind of work his religious convictions would permit, Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms — for example, as an employee of a raw material supplier or of a roll foundry.") (emphasis added). In fact, Thomas made it clear that it was not the physical act of the work that violated his religious beliefs, but the purposes and effects of what someone else would do with the result of his "work" at some later point in time (*i.e.*, use the tanks he worked on for war). *See id*. at 714 (quoting Thomas at his hearing).

So it is in the case at bar: Petitioners do not object to declaring their objection to contraceptive coverage, such as signing the pleadings in this case and the declarations submitted in support of Petitioners' motion for summary judgment, *see* App. 48-64, or even writing an op-ed in a Catholic newspaper. That is, the physical act of signing some statement that is aligned in its purposes and effects with Petitioners' religious beliefs is perfectly consonant with Petitioners' religious faith. But Thomas did object to doing the exact same unobjectionable work when that work resulted in a thing (*i.e.*, a tank) that would be used subsequently by a third-party (*i.e.,* the military) to do that which was objectionable: to wage war. That is, not only is waging war objectionable to Thomas, but any act, the purpose

and effect of which is to facilitate the waging of war by a third party at some later time, was proscribed by Thomas' religious beliefs, and thus a substantial burden was found. And the same is true here.

Petitioners object on religious grounds to executing a document (*i.e.,* the self-certification) that has, by operation of the federal regulation that requires it, the purpose and effect of authorizing coverage for contraceptive services (indeed, it has the purpose and effect of endorsing and facilitating the government's objective of "increasing access to and utilization of" contraceptive services) contrary to Petitioners' religious beliefs. Thus, *Thomas* provides an *a fortiori* argument for a RFRA violation here. Thomas stated expressly that he had no religious objection to working in a roll foundry, the product of which might be used later to build a tank. But doing that same work in a factory that more directly violated his religious objection to war was too direct pursuant to his religious beliefs. In other words, this Court credited Thomas' religious beliefs for determining how direct or indirect an enabler or facilitator Thomas could be before he violated his religious beliefs. Indeed, neither a federal court nor a government agency may decide how direct an enabler or facilitator Thomas could be for war waging. *See Thomas*, 450 U.S. at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs."). And the same is true here with regard to the contraceptive services coverage mandated by the federal government.[5]

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[5] The Seventh Circuit in *Korte v. Sebelius,* 735 F.3d 654 (7th Cir. 2013) (emphasis added), echoed this principle in a case challenging

In this case, Petitioners have made absolutely clear that their religious faith forbids them from executing a document they know has the purpose and effect of authorizing and thus triggering coverage for contraceptive services. *See* App. 61-63. Unlike Thomas, whose religious beliefs drew a line between possible indirect enabling of war by working in a foundry and still indirect (but less so according to

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the mandate on behalf of a for-profit company and its owners:

> The government's "attenuation" argument posits that the mandate is too loosely connected to the use of contraception to be a substantial burden on religious exercise. Because several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception, any complicity problem is insignificant or nonexistent. This argument purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question.
>
> To repeat, the judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken. . . . The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for the Kortes and the Grotes to decide. They have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

Id. at 685.

Thomas) enabling of war in an armament factory, Petitioners have no ambiguity about their religious faith. By executing the self-certification, Petitioners would be directly and with certainty impermissibly assisting the commission of a wrongful act in violation of the moral doctrines of the Catholic Church. Thus, this is a forced "act" or "exercise" that Petitioners' religious faith forbids because of its purpose and effect no less, and even more so, than the act in *Thomas*. *See* App. 4 (incorrectly asserting that the mandate "does not require *plaintiffs* to 'perform acts' at odds with their beliefs").

In sum, there can be no question that the burden in the form of a federal mandate that coerces Petitioners to violate their sincerely held religious beliefs is a substantial burden prohibited by RFRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Ave. N.W. Suite 201
Washington, D.C. 20006
(646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 13-1261 (EGS)

[December 19, 2013]

PRIESTS FOR LIFE, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

Defendants.

MEMORANDUM OPINION

This case presents one of many challenges to the contraceptive services mandate of the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010). A number of circuits, including the District of Columbia Circuit, have examined the mandate's requirements regarding contraceptive coverage for employees of for-profit companies; that issue is now pending before the Supreme Court. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, (10th Cir. 2013) (en banc), *cert. granted*, 2013 U.S. LEXIS 8418 (U.S. Nov. 26, 2013) (Case No. 13-354); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert.*

granted, 2013 U.S. LEXIS 8418 (U.S. Nov. 26, 2013) (No. 13-354); *see also, e.g.*, *Gilardi v. United States Dep't of Health and Human Services*, 733 F.3d 1208 (D.C. Cir. 2013).

The instant case presents a different issue: the obligations, *vel non*, of non-profit religious organizations to provide contraceptive coverage under the mandate. These organizations are eligible for an accommodation to the mandate; specifically, they are not required to provide contraceptive coverage to their employees if they object to doing so on religious grounds. Under the regulations, an employer in this situation can self-certify to its health insurance issuer that it has a religious objection to providing coverage for contraceptive services as part of its health insurance plan. Once the issuer receives the self-certification, the non-profit organization is exempt from the mandate. The organization's employees will receive coverage for contraceptive services, but that coverage will be provided directly through the issuer. The coverage is excluded from the employer's plan of benefits, and the issuer assumes the full costs of coverage; it is prohibited from charging any co-payments, deductibles, fees, premium hikes or other costs to the organization or its employees.

Priests for Life, a non-profit organization which takes a "vocal and active role in the pro-life movement," Complaint ¶ 73, and three of its employees have filed this lawsuit objecting to the accommodation to the mandate. They allege that the self-certification Priests for Life must provide to its issuer violates their rights under the Religious Freedom Restoration Act, 42

U.S.C. §§ 2000bb, et seq. ("RFRA"), and the First and Fifth Amendments to the Constitution.

The Supreme Court has made clear that religious exercise is impermissibly burdened when government action compels individuals "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). At the same time, acts of third parties, which do not cause adherents to act in violation of their religious beliefs, do not constitute an impermissible burden. *Kaemmerling v. Lappin,* 553 F.3d 669, 678 (D.C. Cir. 2008). The right to religious freedom "simply cannot be understood to require the Government to conduct its [] affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious freedom is protected "in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. N'west Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988) (citations omitted).

Plaintiffs here do not allege that the self-certification itself violates their religious beliefs. To the contrary, the certification states that Priests for Life is opposed to providing contraceptive coverage, which is consistent with those beliefs. Indeed, during oral argument, plaintiffs stated that they have no religious objection to filling out the self-certification; it is the issuer's subsequent provision of coverage to which they object. But filling out the form is all that the ACA requires of the plaintiffs in this case.

There is no doubt that the plaintiffs find the statute's requirement that the issuer provide

contraceptive coverage profoundly opposed to their religious scruples. But the issuer's provision of coverage is just that -- an entirely third party act. The *issuer's* provision of coverage does not require *plaintiffs* to "perform acts" at odds with their beliefs. *Yoder*, 406 U.S. at 218. Accordingly, the accommodations to the contraceptive services mandate do not violate their religious rights.

Pending before the Court is the plaintiffs' motion for summary judgment and the defendants' cross motion to dismiss or in the alternative for summary judgment. Upon consideration of the motions, the oppositions and replies thereto, the *Amicus Curiae* brief of the American Civil Liberties Union, the entire record, and for the reasons explained below, defendants' motion to dismiss is **GRANTED;** accordingly, the parties' motions for summary judgment are hereby **DENIED AS MOOT**.

I. BACKGROUND

Priests for Life is a non-profit corporation incorporated in the State of New York, and Father Frank Pavone, Alveda King, and Janet Morana are among its employees. Compl. ¶¶ 6-11. "A deep devotion to the Catholic faith is central to the mission of Priests for Life." Compl. ¶ 85. Its mission is to "unite and encourage all clergy to give special emphasis to the life issues in their ministry . . . [and] to help them take a more vocal and active role in the pro-life movement." Compl. ¶ 73. Accordingly, "contraception, sterilization,

abortifacients[1] and abortion . . . are immoral and antithetical to Priests for Life's religious mission." *Id*. Priests for Life provides health insurance for its employees. Compl. ¶ 93. The next plan year will commence on January 1, 2014. Compl. ¶ 101.

Plaintiffs' claims arise out of certain regulations promulgated in connection with the ACA. The Act requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, for "women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HRSA")]." 42 U.S.C. § 300gg-13(a)(4). The HRSA, an agency within the Department of Health and Human Services ("HHS"), commissioned the Institute of Medicine ("IOM") to conduct a study on preventive services. On August 1, 2011, HRSA adopted IOM's recommendation to include "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Dec. 17, 2013).

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[1] Plaintiffs use the word "abortifacient" to refer to drugs such as Plan B and Ella that they allege cause abortions. *See, e.g.*, Compl. ¶ 37. Plaintiffs do not allege that the regulations will require them to provide insurance coverage for the medical procedure of abortion.

Several exemptions and safe-harbor provisions excuse certain employers from providing group health plans that cover women's preventive services as defined by HHS regulations. First, the mandate does not apply to certain "grandfathered" health plans in which individuals were enrolled on March 23, 2010, the date the ACA was enacted. 75 Fed. Reg. 34,538 (June 17, 2010). Second, certain "religious employers" are excluded from the mandate. *See, e.g.*, 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A). On June 28, 2013, the government issued final rules on contraceptive coverage and religious organizations; the rules became effective August 1, 2013. 78 Fed. Reg. 39,870 (July 2, 2013). These regulations are the subject of this case.

Under the final regulations, a "religious employer" exempt from the contraceptive services mandate is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a). Non-profit organizations which do not qualify for this exemption may, however, qualify for an accommodation with respect to the contraceptive coverage requirement if they are "eligible organizations" under the regulations. An "eligible organization" must satisfy the following criteria:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under

§ 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in the form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (1) through (3), and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75.

Once an eligible organization provides a copy of a self-certification to its issuer, which provides coverage in connection with the group health plan, the organization is relieved of its obligation "to contract, arrange, pay or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The group health plan issuer which receives the self-certification form must (1) exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan, and (2) provide separate payments for any contraceptive services required to be covered for plan participants and beneficiaries. The issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance or a deductible) on plan participants or beneficiaries. 78 Fed. Reg. at 39,896. Likewise, the issuer is prohibited from imposing any

premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization or the group health plan. *Id.* Failure to self-certify or otherwise comply with the mandate will result in Priests for Life's issuer including contraceptive services within Priests for Life's healthcare policy, and charging the organization for such coverage.[2]

The parties agree that Priests for Life does not qualify for an exemption to the contraceptive services mandate. The grandfathered plans provision does not protect the organization because the current health insurance plan has made changes since 2010, including an increase in the percentage cost-sharing requirement. *See* Decl. of Fr. Pavone, ECF No. 7-1, at ¶ 5. Priests for Life also does not satisfy the definition of "religious employer" and is not eligible for an exemption on that ground. *Id.* at ¶ 3. Finally, the parties agree that Priests for Life would qualify as an

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[2] During the initial briefing, the parties stated that if Priests for Life refused the accommodation, it could be fined $100 per employee per day. 26 U.S.C. § 4980D. At oral argument, however, the government informed the court that the ACA imposes an independent obligation on insurers to sell policies which comply with the law, including, *e.g.*, coverage for contraceptive services. *See* Defs.' Suppl. Mem. at 1-4 [ECF No. 31], *citing* 42 U.S.C. §§ 300gg-13; 300gg-22; 76 Fed. Reg. 46,621, 623 (Aug. 3, 2011). This does not alter the analysis, however. Under the statute and regulations, if Priests for Life refuses the accommodation, it would then be placed in the position of providing contraceptive services to its employees as part of its plan of benefits, and paying for such services. As this Circuit held in *Gilardi*, this arrangement would substantially burden Plaintiffs' free exercise of religion. *Gilardi*, 733 F.3d at 1216-19.

"eligible organization," entitled to the accommodation, if it completes the self-certification form. Compl. ¶ 6.

Priests for Life states that completing the self-certification form will require it to violate its sincerely held religious beliefs because "the government mandate forces Priests for Life to provide the means and mechanism by which contraception, sterilization and abortifacients are provided to its employees. . . . There is no logical or moral distinction between the [] contraceptive services mandate . . . and the "accommodation[.]" . . . Priests for Life [is] still paying an insurer to provide [its] employees with access to a product [] that violates [its] religious convictions." Compl. ¶¶ 69-70, see also *id.* ¶ 105 ("Priests for Life objects to being forced by the government to purchase a health care plan that provides its employees with access to contraceptives, sterilization and abortifacients, all of which are prohibited by its religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life.").

On September 19, 2013, plaintiffs moved for a preliminary injunction as to all counts of the Complaint. On September 25, 2013, the parties agreed to consolidate the preliminary injunction motion with the merits under Federal Rule of Civil Procedure 65(a)(2). Thereafter, plaintiffs filed a motion for summary judgment and defendants filed a cross motion to dismiss or in the alternative for summary judgment. Toward the end of the briefing schedule set by the Court, the D.C. Circuit issued its decision in *Gilardi*, addressing religious freedom claims arising from different regulations under the ACA's contraceptive

services mandate. Following *Gilardi*, the Court ordered the parties to file supplemental briefs addressing its impact on this case. The Court heard oral argument on the parties' cross motions on December 9, 2013. The motions are ripe for determination by the Court.

II. STANDARD OF REVIEW

A. Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted; alteration in original). While detailed factual allegations are not necessary, plaintiffs must plead enough facts "to raise a right to relief above the speculative level." *Id.*

When ruling on a Rule 12(b)(6) motion, the court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002). The Court must construe the complaint liberally in plaintiffs' favor and grant plaintiffs the benefit of all reasonable inferences deriving from the complaint. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court must not accept plaintiffs' inferences that are "unsupported by the facts set out in the complaint." *Id.* "Nor must the court

accept legal conclusions cast in the form of factual allegations." *Id.* "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

B. Motion for Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (internal quotation marks omitted). To defeat summary judgment, the non-moving party must "designate specific facts showing there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). The existence of a factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the non-moving party; a fact is only "material" if it is capable of affecting the outcome of the litigation. *Id.* at 248; *Laningham v. U.S. Navy,* 813 F.2d 1236, 1241 (D.C. Cir. 1987). In assessing a party's motion, "[a]ll underlying facts and inferences are analyzed in the light most favorable to the nonmoving party." *N.S. ex rel. Stein v. District of Columbia,* 709 F. Supp. 2d 57, 65 (D.D.C. 2010), citing *Anderson,* 477 U.S. at 247.

III. DISCUSSION

A. Standing

The parties do not dispute that Priests for Life, a nonprofit religious organization, has standing to advance all of its constitutional and statutory claims. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 381, 384 (1990); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467-70 (D.C. Cir. 1996). The Court, therefore, has jurisdiction to hear and decide the issues presented by this case. *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-orcontroversy requirement.").

While the defendants challenge standing of the individual plaintiffs, they acknowledge that the individual plaintiffs' claims are identical to Priests for Life's claims. *See* Defs.' Combined Mot. to Dismiss or for Summ. J and Opp'n to Pls.' Mot. (hereinafter "Defs.' Mot.") at 13, n.8. At oral argument, the parties agreed that it is unnecessary for the Court to address the standing of the individual plaintiffs. *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (it is unnecessary to address the standing of party whose presence or absence is immaterial to a suit's outcome, where another party clearly has standing) (citation omitted). Accordingly, because the presence of the individual plaintiffs has no impact on the merits of this case, the Court need not reach the issue of their standing.

B. The RFRA

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1, provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." Subsection (b) provides that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Congress enacted the RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court held that the right to free exercise of religion under the First Amendment does not exempt an individual from a law that is neutral and of general applicability, and explicitly disavowed the test used in earlier decisions, which prohibited the government from substantially burdening a plaintiff's religious exercise unless the government could show that its action served a compelling interest and was the least restrictive means to achieve that interest. 42 U.S.C. § 2000bb. The purpose of the RFRA was to "restore the compelling interest test" as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Id.*

In order to state a prima facie case under RFRA, and thus to survive a motion to dismiss, plaintiffs must allege a substantial burden on their religious exercise.

The statute defines "religious exercise" broadly, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4); 2000cc-5. The RFRA does not define "substantial burden," but because the RFRA intends to restore *Sherbert* and *Yoder*, those cases are instructive in determining the meaning of that term. In *Sherbert*, plaintiff's exercise of her religion was impermissibly burdened when plaintiff was forced "to choose between following the precepts of her religion," resting and not working on the Sabbath and forfeiting certain unemployment benefits as a result, or "abandoning one of the precepts of her religion in order to accept work." 374 U.S. at 404. In *Yoder*, the "impact of the compulsory [school] attendance law on respondents' practice of the Amish religion [was found to be] not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

This Circuit also recently addressed the issue of substantial burden in the context of a RFRA challenge to the ACA in *Gilardi*. The Gilardi brothers are the two owners of closely held for-profit companies. Their companies are not eligible for the accommodations available to Priests for Life; the regulations require such companies to provide contraceptive coverage for the participants and beneficiaries in their group health plans. The Gilardis challenged the provisions of the contraceptive mandate which would have required them to directly provide contraceptive coverage to their employees, claiming it substantially burdened their religious beliefs opposing contraception. The Circuit

agreed, finding that "the burden on religious exercise . . . occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." 733 F.3d at 1217. "The contraceptive mandate," as applied to companies not eligible for the accommodations, "demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans." *Id.* at 1217-18.

Unlike the Gilardis, Priests for Life is eligible for the accommodations to the mandate, and therefore is not required to provide contraceptive services to its employees. To take advantage of the accommodations, Priests for Life will be required to provide its insurer with a self-certification form stating that it is a religious, non-profit organization which opposes providing coverage for some or all of any contraceptive services required to be covered by the mandate. 78 Fed. Reg. at 39,874, 39,892.[3] Plaintiffs argue that the self-

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[3] In addition, Priests for Life claims that it will be required to "identify its employees to its insurer for the distinct purpose of enabling and facilitating the government's objective of promoting the use of contraceptive services;" Pls.' Mot. for Prelim. Inj. at 7 (hereinafter "Pls.' Mot."); and "coordinate with its insurer when adding or removing employees and beneficiaries from its health care plan to ensure that these individuals receive coverage for contraceptive services," *id.* at 8. Plaintiffs provide no support for their claim that the challenged regulations require either of these things, and admitted at oral argument that Priests for Life must "identify" its employees to its insurer and "coordinate" with its insurer in order to provide its current health care plan to its

certification substantially burdens their exercise of religion because the accommodations require Priests for Life to "promote, facilitate and cooperate in the government's immoral objective to increase the use of contraceptive services in direct violation of Plaintiffs' sincerely held religious beliefs." Pls.' Mot. at 1. "[B]ecause Priests for Life provides its employees with a health care plan, the government mandate forces Priests for Life to provide the means and mechanism by which contraception, sterilization, and abortifacients (and related education and counseling) are provided to its employees (and beneficiaries), which is unacceptable to Plaintiffs because it violates their sincerely held religious beliefs." *Id.* at 9. "This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life." *Id*. at 15. In sum, Plaintiffs alleges they are pressured to choose between violating their religious beliefs by "support[ing] and provid[ing] access to" the services provided under the contraception mandate, or "leaving the health care insurance market altogether." *Id.* at 16.

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insurer and "coordinate" with its insurer in order to provide its current health care plan to its employees. Priests for Life also suggests, without support, that it will ultimately have to bear the costs of the contraceptive services mandate, because the insurance companies will somehow find a way to either raise premiums to cover the cost of such coverage, or fail to lower premiums to reflect the savings to the insurer by its provision of such coverage. Pls.' Mot. at 9, n.6, 10, n.7. The plain language of the regulations, however, prohibits insurers from passing along any costs of contraceptive coverage to eligible organizations such as Priests for Life, whether through cost-sharing, premiums, fees, or other charges. 78 Fed. Reg. at 39,875-77. The Court declines, therefore, to find a substantial burden exists on any of these grounds.

Defendants do not question the sincerity of Plaintiffs' religious beliefs, but they do dispute whether the accommodations impose a substantial burden on the exercise of those beliefs. Defendants argue that the regulations impose no more than a *de minimis* burden on Plaintiffs' religious exercise because the regulations "do not require Priests for Life to "modify [its] religious behavior in any way."" Defs.' Mot. at 15 (quoting *Kaemmerling v. Lappin,* 553 F.3d 669, 679 (D.C. Cir. 2008)). Defendants contend that Priests for Life "is not required to contract, arrange, pay or refer for contraceptive coverage . . . Priests for Life need not do anything more than it did prior to the promulgation of the challenged regulations – that is, to inform its issuer that it objects to providing contraceptive coverage in order to insure that it is not responsible for contracting, arranging, paying or referring for such coverage." *Id.* at 14-15. The self-certification form only "require[s] [Priests for Life] to inform its issuer that it objects to providing contraceptive coverage, which it has done . . . voluntarily anyway even absent these regulations" in order to insure that it does not provide such coverage. *Id.* 15-16. Accordingly, Defendants argue that completing the self-certification form "is at most, *de minimis*, and thus cannot be "substantial" under RFRA." *Id.* 17. For the reasons set forth below, the Court agrees with the government.

A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Gilardi*, 733 F.3d at 1216 (quoting *Kaemmerling*, 553 F.3d at 678); *see also Yoder*, 406 U.S. at 218 (law substantially burdens the exercise of religion if it compels individuals "to perform acts undeniably at odds with fundamental

tenets of their religious beliefs.") "An inconsequential or *de minimis* burden on religious practice does not rise to this level[.]" *Kaemmerling*, 553 F.3d at 678. Finally, an adherent is not substantially burdened by laws requiring third parties to conduct their internal affairs in ways that violate his beliefs. *Id.* at 679.

In *Kaemmerling*, a federal prisoner claimed that the statutorily mandated collection and use of his DNA for purposes of a national law enforcement database substantially burdened his free exercise rights. Kaemmerling alleged that the collection, storage, and use of his DNA violated his sincerely held religious beliefs. The D.C. Circuit "accept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature," 553 F.3d at 679. The Court further noted that the government commanded compliance with the statute; failure to cooperate with collection of a fluid sample from which the DNA would be isolated is a misdemeanor offense. *Id.* at 673. Nevertheless, the Court rejected his RFRA claim because the government was not forcing him to modify his own behavior. The Court explained:

> Kaemmerling does not allege facts sufficient to state a substantial burden . . . because he cannot identify any "exercise" which is the subject of the burden to which he objects. The extraction and storage of DNA information are entirely the activities of the FBI, in which Kaemmerling plays no role and which occur after the [prison] has taken his fluid or tissue sample (to which he does not object). The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to

modify his religious behavior in any way – it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the [prison] takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [him] to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

Kaemmerling alleges no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform. Religious exercise necessarily involves an action or practice, as in *Sherbert*, where the denial of unemployment benefits "impede[d] the observance" of the plaintiff's religion by pressuring her to work on Saturday in violation of the tenets of her religion, 374 U.S. at 404, or in *Yoder*, where the compulsory education law compelled the Amish to "perform acts undeniably at odds with fundamental tenets of their religious beliefs," 406 U.S. at 218. Kaemmerling, in contrast, alleges that the DNA Act's requirement that the federal government collect and store his DNA information requires the government to act in ways that violate his religious beliefs, but he suggests no way in which these governmental acts pressure him to modify his own behavior in any way that would violate his beliefs. *See* Appellant's Br. at 21 (describing alleged substantial burden as "knowing [his] strongly held beliefs had been

> violated by a[n] unholy act of an oppressive regime").

553 F.3d at 679.[4] The *Kaemmerling* court relied on *Bowen v. Roy*, in which a Native American man objected to the states' use of his child's Social Security number in determining eligibility for welfare benefits. The parents objected to a statutory requirement that state agencies "shall utilize" Social Security numbers "not because it place[d] any restriction on what [the father] may believe or what he may do, but because he believes the use of the number," a governmental act, "may harm his daughter's spirit." 476 U.S. 693, 699 (1986). The Supreme Court concluded that the government's use of the child's Social Security number did not impair her parents' freedom to exercise their religion.

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the

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[4] Other Circuits have also emphasized the requirement that an adherent be pressured to modify his own conduct in order to show a substantial burden on religious exercise. *See, e.g.*, *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc) (to establish a substantial burden under RFRA, governmental action must "coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, [or] condition a governmental benefit upon conduct that would violate their religious beliefs."); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("within the meaning of RFRA, a substantial burden on religious exercise is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to these beliefs.") (internal citation omitted).

> individual believes will further his or her spiritual development or that of his or her family. The Free Exercise clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . [A]ppellees may not demand that the Government join in their chosen religious preferences by refraining from using a number to identify their daughter.

Id. at 699-700. Other Supreme Court decisions have similarly rejected free exercise challenges to laws which would not require a plaintiff to modify his own behavior, but would permit a third party to engage in behavior to which the plaintiff objects on religious grounds. In *Lyng*, the Court rejected Native American tribes' challenge to government building roads and harvesting timber on national forest land used by the tribes for religious purposes. The Court explained "government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not violate the First Amendment. 485 U.S. 439, 450 (1988). "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government . . . " *Id.* at 451 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

In this case, the Court does not doubt the sincerity of Plaintiffs' beliefs, nor does it doubt that condemnation of contraception is central to their exercise of the Catholic religion. "It is not within the

judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. Comm'r of Internal Revenue Serv.*, 490 U.S. 680, 699 (1989). However, to prevail under the substantial burden test Plaintiffs must show more than a governmental action that violates their sincerely held religious beliefs; they must show that the governmental action forces Priests for Life, itself, to modify its own behavior in violation of those beliefs. *Kaemmerling*, 553 F.3d at 679.[5] This is where Plaintiffs' RFRA challenge must fail--like the challenges in *Kaemmerling* and *Bowen*, the accommodations to the contraceptive mandate simply do not require Plaintiffs to modify their religious behavior. The accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party –

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[5] For this reason, *inter alia*, the Court is not persuaded by the rationale articulated in two recent cases that a plaintiff can meet his burden of establishing that the accommodation creates a "substantial burden" upon his exercise of religion simply because he claims it to be so. *See Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 U.S. Dist. LEXIS 176432, *44 (E.D.N.Y. Dec. 13, 2013) (stating that plaintiffs "consider [completing the self-certification] to be an endorsement of [contraceptive services] coverage to which they object; to them, the self-certification compels affirmation of a repugnant belief. It is not for this Court to say otherwise."); *see also Zubik v. Sebelius*, No. 13-1459, 2013 U.S. Dist. LEXIS 165922, *79-*82 (W.D. Pa. Nov. 21, 2013) (reaching the same conclusion). In this Court's view, those opinions misconceive RFRA's substantial burden test, which requires courts to "accept as true the factual allegations that [a plaintiff's] beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." *Kaemmerling*, 553 F.3d at 679.

namely, the issuer – and Priests for Life plays no role in that activity. As in *Kaemmerling*, "[a]lthough the [third party]'s activities . . . may offend [plaintiff's] religious beliefs, they cannot be said to hamper [his] religious exercise." 553 F.3d at 679.

Priests for Life attempts to distinguish *Kaemmerling* on the grounds that Mr. Kaemmerling did not object to the government taking his fluid, hair, or tissue samples; he only objected to the subsequent extraction and storage of his DNA. Priests for Life claims that in this case, "the coverage for the morally objectionable contraceptive coverage will occur *only* because Priests for Life has played an *active role* in purchasing a healthcare plan and then authorizing the issuer of its plan through "self-certification" to provide the objectionable coverage directly to its plan participants and beneficiaries (a role that is prohibited by Plaintiffs' religion) and thereby cooperating with and thus facilitating the government's illicit objective "to increase access to and utilization of" contraceptive services (cooperation that is prohibited by Plaintiffs' religion)." Pls.' Combined Opp'n to Govt's Mot./Reply in Support of Pls.' Mot. (hereinafter "Pls.' Opp'n/Reply") at 23 (emphasis in original). The Court does not find this distinction to be meaningful. The governmental action in *Kaemmerling* could not have occurred without the plaintiff playing an active role by providing a blood sample. Nevertheless, the court rejected claims that his action constituted a substantial burden because the action did not, in and of itself, violate plaintiff's religious beliefs. The fact that government action thereafter was deeply offensive to his beliefs did not give rise to a RFRA claim. *See Kaemmerling*, 553 F.3d at 679 (plaintiff's knowledge that his "strongly held

beliefs had been violated by a[n] unholy act of an oppressive regime" was not enough to violate the RFRA because the government's actions do not "pressure him to modify his own behavior in any way that would violate his beliefs."); *see also Bowen*, 476 U.S. at 699-700 (rejecting plaintiff's challenge to the government's use of his daughter's Social Security number because it "may harm his daughter's spirit. . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.")

In this case, Plaintiffs assert an objection to a single requirement the regulations impose on Priests for Life directly: completing a self-certification form stating that it is a nonprofit religious organization which objects to providing contraceptive services coverage. Pls.' Mot. at 7. However, during oral argument Plaintiffs conceded that they have no religious objection to the self-certification form, in and of itself. Rather, Plaintiffs' act under the accommodations becomes burdensome only when it is characterized as "cooperating" with or providing "authorization" for "the government's illicit goal of increasing access to and utilization of contraceptive services." Pls.' Opp'n/Reply at 23. But no matter how religiously offensive the statutory or regulatory objective may be, the law does not violate RFRA unless it coerces individuals into acting contrary to their religious beliefs. *See Lyng*, 458 U.S. at 450. In this case, it is only the subsequent actions of third parties – the government's and the issuer's provision of contraceptive services, in which Priests for Life plays no role – that animate its religious objections. Under *Bowen* and *Kaemmerling*,

however, RFRA does not permit Plaintiffs to proscribe the conduct of others.

Plaintiffs' reliance on *Sherbert*, *Yoder*, and *Thomas* is unavailing. Pls.' Mot. at 21. Plaintiffs argue that these cases, particularly *Thomas*, established that the impact of a "substantial burden" need not be direct. *Id.* at 20. In each of these cases, however, the burdens of the governmental action – denial of unemployment benefits for refusal to work on the Sabbath or in an armaments factory, threatened criminal prosecution for refusing to send children to school – all fell directly upon the plaintiffs' participation in or abstention from a specific religious practice. That is not the case here; once again, the only action required of Priests for Life under the accommodations is *consistent* with its beliefs. It is only the independent actions of third parties which result in the availability of contraceptive services. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 415 & n.15 (E.D. Pa. 2013) (explaining that while an indirect *compulsion* may constitute a substantial burden, legislation which imposes only an indirect *burden* on the exercise of religion does not), *aff'd* 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8418 (U.S. Nov. 26, 2013) (No. 13-354).[6]

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[6] The Court is not persuaded by the rationale in *Archdiocese of N.Y.*, which states that completing the self-certification form, itself, amounts to a substantial burden on the plaintiffs' exercise of religion, because if they do not complete the form, they are subject to penalties or other forms of government coercion. *See, Roman Catholic Archdiocese of N.Y.*, 2013 U.S. Dist. LEXIS 176432, *32 (stating that RFRA's "substantial burden" test is met by a finding that plaintiffs face "substantial pressure" to comply with the law.) The Court agrees with the reasoning of *Kaemmerling*, which, in the Court's view, correctly interpreted

This Circuit's recent decision in *Gilardi* does not alter the analysis. In *Gilardi*, the plaintiffs themselves (through their companies) had to provide contraceptive coverage for the participants and beneficiaries of their plan. The Circuit explained that the Gilardis were substantially burdened when they had to place contraceptive coverage into "the basket of goods and services that constitute [their companies'] healthcare plan." *Gilardi*, 733 F.3d at 1218. The Circuit repeated the nature of the burden later in the opinion, defining the burden as a "demand[] that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement . . . is a "compel[led] affirmation of a repugnant belief."" *Id.* at 1218 (quoting *Sherbert*, 374 U.S. at 402). Priests for Life need do none of those things. It need not place contraceptive coverage into "the basket of goods and services that constitute its healthcare plan," nor must it even *permit*, much less "approve and endorse" such coverage in its plan. *Gilardi*, 733 F.3d at 1217. On the contrary, Priests for Life need only reaffirm its religiously based opposition to providing contraceptive coverage, at which point third parties will provide the coverage separate and apart from Priests For Life's plan of benefits. In the Court's view, the Circuit's holding on

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Sherbert, *Yoder* and *Thomas* to hold that even a threat of criminal sanction did not amount to a substantial burden when it did not impact plaintiff's religious exercise. *Kaemmerling*, 553 F.3d at 679 ("Although the [third party]'s activities . . . may offend [plaintiff's] religious beliefs, they cannot be said to hamper [his] religious exercise.")

the issue of substantial burden in *Gilardi* is distinguishable from this case.

For the foregoing reasons, the Court finds that Plaintiffs have not stated a *prima facie* case under RFRA because they have not alleged a substantial burden on their religious exercise. Therefore, Count II of the Complaint will be dismissed for failure to state a claim.

C. **The Free Exercise Clause**

The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694, 702 (2012). The right of free exercise protected by the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quotation omitted). A law is not neutral "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious beliefs." *Id.* at 543.

This Court agrees with the vast majority of courts which have considered the issue and found that the contraceptive services regulations are neutral and generally applicable, and accordingly have rejected Free Exercise Clause challenges. *See* Defs.' Mot. at 32 n.5 (citing, e.g., *MK Chambers Co. v. U.S. Dep't of*

Health & Human Servs., U.S. Dist. LEXIS 47887, *13-15 Case No. 13-11379 (E.D. Mich. Apr. 3, 2013); *Conestoga*, 917 F. Supp. 2d at 409-10; *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093, *23, Case No. 12-1906 (W.D. Mich., Dec. 24, 2012), *aff'd* 730 F.3d 618 (6th Cir. 2013), *petition for cert. filed*, (U.S. Oct. 15, 2013) (No. 13-482); *Hobby Lobby*, 870 F. Supp. 2d 1278, 1289-90 (W.D. Okl. 2012) *rev'd on other grounds*, 723 F.3d 1114). Although these cases do not specifically address the accommodations to the mandate at issue here, nothing about the specific regulations governing the accommodations leads to a different result.

Plaintiffs do not dispute that the regulations' stated purpose is secular: to promote public health and gender equality. Nevertheless, they argue that the mandate, and its accommodations, is not neutral because it was "designed to target employers who refuse to provide contraceptive services to their employees based on the employers' religious beliefs." Pls.' Mot. for Prelim. Inj. 23-24. They cite the exemption for "religious employers" as defined by 45 C.F.R. § 147.131(a), which applies only to houses of worship and their integrated auxiliaries, but not to other religious organizations, and argue that the exemption divides religious objectors into favored and disfavored groups without any secular purpose. Pls.' Mot. at 24.

As several other courts considering the issue have found, "carving out an exemption for defined religious entities does not make a law nonneutral as to others." *Hobby Lobby*, 870 F. Supp. 2d at 1289 (W.D. Okl. 2012). In other words, the neutral purpose of the regulations – to make contraceptive coverage available to women – is not altered because the legislature chose

to exempt some religious institutions and not others. On the contrary, "the religious employer exemption presents a strong argument in favor of neutrality, demonstrating that the "object of the law" was not to "infringe upon or restrict practices because of their religious motivation."" *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1161 (E.D. Mo. 2012) (quoting *Lukumi*, 508 U.S. at 533); *see also Catholic Charities of Diocese of Albany v. Serio*, 7 N.E.2d 510, 522 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007) (rejecting Free Exercise Clause challenge to state law requiring contraceptive coverage on grounds that the law exempted some, but not all, religious institutions. "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion."). Indeed, Priests for Life itself is the beneficiary of an accommodation to the regulations, which was enacted for the purpose of *alleviating* any burden on its religious practice.

Plaintiffs argue that a statement in the Overview of the Final Regulations authorizing the religious employer exemption from the mandate reveals a discriminatory intent toward all employers which oppose contraceptive coverage and which do not qualify for the exemption.

> A group health plan . . . qualifies for the [religious employer] exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of that organization . . . . Employers that do not

> primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.

Pls.' Mot. at 5, 24 (*quoting* 77 Fed. Reg. 8724, 8728). For the reasons just discussed, this comment lacks significance in the context of a Free Exercise Clause claim. It merely explains that the regulations confer the special benefit of an exemption only for those religious organizations that are essentially houses of worship and their integrated auxiliaries, and who therefore may be permitted to give employment preference to members of their own religion. *See, e.g.*, 42 U.S.C. § 2000e-1(a). That benefit, as discussed above, "is justifiable as a legislative accommodation--an effort to alleviate a governmentally imposed burden on religious exercise." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 85 (Cal. 2004). Those non-profit religious organizations that do not qualify for the exemption but nevertheless are opposed to contraceptive services, like Priests for Life, are also eligible for an accommodation. Finally, employers that do not qualify for an exemption or accommodation are subject to the contraceptive services mandate in the same manner as all other employers, whether religious or non-religious. Accordingly, while the regulations "treat some [] employers" with religious objections to

contraceptive coverage "more favorably than other employers, it does not under any circumstance treat [employers with religious objections] less favorably than any other employers." 85 P.3d at 85. Therefore, Plaintiffs' neutrality argument fails.

Plaintiffs also claim that the law is not one of general applicability because "Congress has permitted exemptions from the requirements of the Act," including those for grandfathered plans and certain religious employers. Pls.' Mot. at 24. The existence of categorical exemptions, however, does not mean that the law does not apply generally. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (finding social security tax requirements generally applicable despite existence of categorical exemptions). As the Supreme Court has held, laws are not generally applicable when they "in a selective manner impose burdens only on conduct motivated by religious beliefs." *Lukumi,* 508 U.S. at 543 (invalidating statute which prohibited only the religious practice of animal sacrifice, but not hunting or other secular practices involving killing of animals). The regulations in this case do not impose burdens selectively; they apply to all non-exempt employers, regardless of their religious beliefs. See *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) ("pharmacists who do not have a religious objection to [filling prescriptions for contraceptives] must comply with the rules to the same extent—no more and no less—than . . . pharmacists who may have a religious objection to [filling the prescriptions]. Therefore, the rules are generally applicable.") And again, to the extent the accommodation alters the analysis, it promotes, not restricts, the free exercise of

religion by excusing from compliance employers such as Priests for Life due to their religious beliefs.

Accordingly, the Court concludes that the regulations, and the accommodations, do not violate the Free Exercise Clause. Therefore, Count I of the Complaint will be dismissed for failure to state a claim.

D. Freedom of Speech and Expressive Association

Plaintiffs next argue that the accommodation to the contraceptive services mandate violates their right to Free Speech and Expressive Association under the First Amendment. They claim the accommodation compels speech, in violation of their deeply held religious beliefs, by requiring them to complete the self-certification form, which then leads to Priests for Life's insurer providing contraceptive coverage. Pls.' Mot. at 31. They claim the same requirement violates their right to associate, which they do for the purpose of expressing a "message that *rejects* the promotion and use of contraceptive services." *Id.* at 29.

As Defendants point out, "every court to review a Free Speech challenge to the prior contraceptive-coverage regulations has rejected it." Defs.' Mot. at 35 (citing, e.g., *MK Chambers Co.*, 2013 U.S. Dist. LEXIS 47887, *15-17; *Conestoga*, 917 F. Supp. 2d at 418; *Autocam*, 2012 U.S. Dist. LEXIS 184093, *23-*25). These cases rely on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ("*FAIR*"), a case Plaintiffs do not address. In *FAIR*, the Court rejected a free speech and expressive association challenge to the Solomon Amendment, a statute that conditioned federal funding to law schools upon their agreement to permit military

recruiters on campus. The Court found that the statute "neither limits what law schools may say nor requires them to say anything. Law schools remain free . . . to express whatever views they may have on the military . . . the [statute] regulates conduct – not speech. It affects what law schools must *do* – afford access to military recruiters – not what they may or may not say." *FAIR*, 547 U.S. at 60. The Court found that to the extent that complying with the Amendment required the school to speak, such as by sending emails or posting notices on behalf of military recruiters, such speech was "plainly incidental to the . . . regulation of conduct." *Id.* at 62. "It has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because such conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (citation omitted).

A similar analysis applies to this case. The regulations regarding contraceptive coverage, including the accommodation, place no limits on what Plaintiffs may say; they remain free to oppose contraceptive coverage for all people and in all forms. Rather, the accommodation regulates conduct; specifically, the conduct of Priests for Life's insurance provider. And like the law schools in *FAIR*, the only speech the accommodations require of Priests for Life is incidental to the regulation of conduct. Priests for Life's speech in this case is its self-certification that it opposes contraceptive coverage. This speech is necessary only because it is attendant to the regulation of conduct, specifically, the insurance company's provision of contraceptive services. Indeed, the speech at issue in this case is even farther from a First Amendment

violation than the speech in *FAIR*; in that case, the speech was incidental to the law schools' conduct, while in this case the speech is incidental to the conduct of a wholly separate entity. And in any event, the speech at issue here is in *accordance* with Priests for Life's religious beliefs, not fundamentally opposed to it. *Cf. West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943) (invalidating state law requiring Jehovah's Witness schoolchildren to recite the Pledge of Allegiance and to salute the flag); *Wooley v. Maynard,* 430 U.S. 705 (1977), (striking down law that required Jehovah's Witnesses to display the state motto—"Live Free or Die"—on their license plates).

Plaintiffs argue strenuously in their motion that because opposition to contraception is a fundamental part of their organizational message, any provision of contraceptive coverage by any other party must necessarily interfere with that message and therefore be considered compelled speech. See Pls.' Mot. at 28-32. But this is not the test for compelled speech in violation of the First Amendment. As the Court held in *FAIR*, one speaker who is forced to host another speaker's message may only assert a compelled-speech violation when the message it is forced to host is "inherently expressive." *FAIR*, 547 U.S. at 64. For example, the "expressive nature of a parade" was a key part of the holding in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 568 (1995). Likewise, in *Pacific Gas and Electric Company v. Public Utility Commission of California*, 475 U.S. 1 (1986), the compelled inclusion of a third party newsletter along with Pacific Gas's own newsletter "interfered with the utility's ability to communicate its own message in its newsletter." *FAIR*, 547 U.S. at 64.

By contrast, there is nothing inherently expressive about Priests For Life's *insurer*, wholly separate from Priests for Life, providing contraceptive coverage, just as there is nothing inherently expressive about a law school's decision to allow recruiters on campus. *Id.*, see also *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093, *23.[7]

Plaintiffs' expressive association claim is also devoid of merit. The government violates expressive association rights under the First Amendment by directly interfering with an association's composition by forcing them to accept members or hire employees who would "significantly affect [the association's] expression," *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000). It may also infringe on the freedom of expressive association by passing laws requiring disclosure of anonymous membership lists, or imposing penalties or withholding benefits based on membership

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[7] Priests for Life also argues that the ACA's requirement that contraceptive coverage include patient education and counseling for women constitutes prohibited speech because it advocates a particular viewpoint or content. See Pls.' Opp'n/Reply at 28. This Court agrees with the *Conestoga* court, which considered and rejected the same argument, explaining, "[w]hile the regulations mandate that [insurance companies] provide coverage for "education and counseling for women with reproductive capacity," which may include information about the contraceptives which Plaintiffs believe to be immoral, they are silent with respect to the content of the counseling given to a patient by her doctor. . . . As such, it cannot be said that Plaintiffs are being required to [host] the advocacy of a viewpoint with which they disagree. Plaintiffs' concern that a doctor may, in some instances, provide advice to a patient that differs from [plaintiffs'] religious beliefs is not one protected by the First Amendment." *Conestoga*, 917 F. Supp. 2d at 419 (internal citations omitted).

in a disfavored group. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982); *Healy v. James*, 408 U.S. 169, 180-84 (1972). These laws were invalidated because they "made group membership less attractive, raising [] First Amendment concerns affecting the group's ability to express its message." *FAIR*, 547 U.S. at 69. By contrast, the presence of military recruiters on a law school campus "has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. . . . A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." *Id.* at 69-70.

As in *FAIR*, the regulations and accommodations do not violate Plaintiffs' right to associate. The regulations and accommodations in no way restrict Priests for Life's members, employees, and donors from associating to express their opposition to contraception. Nothing about the regulations or the accommodations force Plaintiffs to accept members or employees it does not desire, nor do they make group membership less desirable as in *Socialist Workers '74* or in *Healy*. Like the plaintiffs in *FAIR*, there can be no doubt that Plaintiffs find the content of the regulations repugnant to their religious beliefs. See Compl. at ¶¶ 87-8, 90 (explaining its beliefs that access to contraception "harms women," is "gravely immoral," and "a grave sin."). However, the fact that a third party provides contraceptive coverage to Priests for Life's employees, separate from Priests for Life or its employer-sponsored

health plan, does not affect the group's ability to express its message under the First Amendment, and therefore does not violate its associational rights.

The government has not compelled plaintiffs to speak, nor has it violated their rights to expressive association. Accordingly, Count III of the Complaint will be dismissed.

E. Establishment Clause and Equal Protection Clause

The Establishment Clause prohibits the government from showing a preference for any religious denomination over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Plaintiffs claim that the contraceptive services mandate, its exemption for religious employers, and its accommodations create an impermissible government preference in favor of churches and religious orders over other religious organizations. Pls.' Opp'n/Reply at 29-30. As with Plaintiffs' Free Speech/ Expressive Association Claim, defendants point out that every court to consider an Establishment Clause challenge to the contraceptive services mandate has rejected it. Defs.' Mot. at 39 (citing, e.g., *O'Brien*, 894 F. Supp. 2d at 1162; *Conestoga*, 917 F. Supp. 2d at 416-17). As these courts found, the regulations permit the government to distinguish between religious organizations based on structure and purpose when granting religious

accommodations, which is not prohibited under the Establishment Clause. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1163-4 (collecting cases).[8]

Plaintiffs do not address this authority. The crux of their argument rests on a statement in the Overview of the Final Regulations authorizing the religious employer exemption from the mandate, which states in relevant part:

> A group health plan . . . qualifies for the [religious employer] exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of that organization . . . . Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and

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[8] Plaintiffs claim that under *Larson*, the government is prohibited from making other distinctions among types of religious institutions, in addition to denominational preferences. Pls.' Opp'n/Reply at 31-32. Plaintiffs misread *Larson*. The *Larson* court invalidated the statute at issue not because it distinguished between different types of organizations based on their structure or purpose, but rather because it "was drafted with the explicit intention of including particular religious denominations and excluding others." 456 U.S. at 254.

> thereby inhibiting the use of contraceptive services and the benefits of preventive care.

Pls.' Mot. at 35 (*quoting* 77 Fed. Reg. at 8728); Pls.' Opp'n/Reply at 33 (same). The Court has already considered this statement in the context of Plaintiffs' Free Exercise Clause challenge and found it constitutionally permissible. See *supra* at III.C. Nor does it violate the Establishment Clause, because it delineates the contours of a religious accommodation that applies equally to organizations of every faith and does not favor any denomination over another. *See, e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (rejecting Establishment Clause challenge to law exempting from property taxes property of religious organizations used exclusively for religious worship); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (upholding Social Security tax exemption only for members of organized religious sects, despite the fact that "some individuals receive exemptions, and other individuals with identical beliefs do not," because the purpose of the exemption was not to discriminate among religious denominations).

Plaintiffs' Equal Protection claim is identical to its other First Amendment Claims: they claim the regulations, religious employer exemption and accommodation impinge on Priests for Life's fundamental right to free exercise of religion, freedom of speech and expressive association. Pls.' Mot. at 33. The Court has already rejected these underlying claims, however. "Where a plaintiff's First Amendment free exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to

religious free exercise claim based on the same facts." *Wirzburger v. Galvin*, 412 F.3d 271, 282-83 (1st Cir. 2005) (citing *Locke v. Davey*, 540 U.S. 712, 721 (2004). Applying rational basis scrutiny to the fundamental rights-based claim that the regulations violate equal protection, the Court has no trouble determining that the contraceptive services mandate is rationally related to the legitimate government purposes of promoting public health and gender equality. *See, e.g.*, *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). Indeed, Plaintiffs do not argue that the regulations would fail such review.

The Plaintiffs have failed to state a claim under the Establishment Clause or the Equal Protection Clause. Therefore, Counts IV and V will be dismissed.

IV. CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss all counts of Plaintiffs' Complaint is **GRANTED**; accordingly, the parties' cross motions for summary judgment are **DENIED AS MOOT.** An appropriate Order accompanies this Memorandum Opinion.

Signed: Emmet G. Sullivan
United States District Judge
December 19, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 13-1261 (EGS)

[December 19, 2013]

PRIESTS FOR LIFE, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion filed on this day, it is hereby

ORDERED that defendants' Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED that the parties' cross motions for summary judgment are **DENIED AS MOOT.**

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 19, 2013

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368

September Term, 2013

1:13-cv-01261-EGS

[Filed December 31, 2013]

Priests For Life, et al.,

Appellants

v.

United States Department of Health and Human Services, et al.,

Appellees

No. 13-5371

1:13-cv-01441-ABJ

Roman Catholic Archbishop of Washington, et al.,	)
Appellants	)
Thomas Aquinas College,	)
Appellee	)
v.	)
Kathleen Sebelius, et al.,	)
Appellees	)

BEFORE: Henderson, Tatel[*], and Brown, Circuit Judges

ORDER

Upon consideration of the emergency motion for injunction pending appeal in No. 13-5368, the response, the reply, and the Rule 28(j) letters; the emergency motion for injunction pending appeal in No. 13-5371, the response, the reply, and the Rule 28(j) letters, it is

ORDERED that the motions for injunction pending appeal be granted. Appellants have satisfied the requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); D.C. Circuit Handbook of Practice

[*] Judge Tatel would deny the emergency motions for injunction pending appeal for the reasons in the attached statement

and Internal Procedures 33 (2013). Appellees are enjoined from enforcing against appellants the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court. It is

FURTHER ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that appellants in these consolidated cases show cause by January 14, 2014, why they should not be required to file one joint opening brief limited to 14,000 words and one joint reply brief limited to 7,000 words. The parties are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. Whether the parties are aligned or have disparate interests, they must provide *detailed* justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

TATEL, *Circuit Judge*: Appellants challenge a section of the Affordable Care Act that requires certain religious organizations to "self certify" their religious objections to the provision of contraceptive services in order to escape the Act's requirement that they provide such services to their employees. Because I believe that Appellants are unlikely to prevail on their claim that the challenged provision imposes a "substantial burden" under the Religious Freedom Restoration Act (RFRA), I would deny their application for an injunction pending appeal. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (denying injunction pending appeal); *University of Notre Dame v. Sebelius*, No. 13-1540 (7th Cir. Dec. 30, 2013) (same). Simply put, far from imposing a "substantial burden" on Appellants' religious freedom, the challenged provision allows Appellants to avoid having to do something that would substantially burden their religious freedom.

Of course, if Appellants were correct that the challenged provision requires them to engage in acts that "affirmatively authorize" and "trigger[]" contraceptive coverage, PFL Mot. 2, 7, then I would agree that we should grant an injunction pending appeal. 42 U.S.C § 2000bb-1(a)-(b); *Gilardi v. Department of Health and Human Services*, No. 13-5069, slip op. at 21–23 (D.C. Cir. Nov. 1, 2013). But that is not how the challenged provision operates. As the government points out, the Affordable Care Act requires employers and insurers to provide health plans that include contraceptive coverage. *See* 29 C.F.R. 2590.715–2713(a)(1)(iv); PFL Opp. 3–5. Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to

Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not *because* Appellants self-certify. Insofar as Appellants argue that they are burdened by authorizing their third-party administrator to provide contraceptive coverage, the government has conceded that the contraceptive mandate cannot be enforced against third-party administrators of church plans, and Appellants have provided no reason for us to believe that the Catholic Archdiocese of Washington's plan, Appellants' third-party administrator, will provide such coverage. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441, slip op. at 46–51 (D.D.C. Dec. 20, 2013); *see also Little Sisters of the Poor Home for the Aged* at 2–3. In other words, it was Congress that "authorized" insurers to provide contraceptive coverage to Appellants' employees—services those employees will receive regardless of whether Appellants self-certify.

Appellants also argue that they are burdened simply by participating in a "scheme" in which contraceptive services are provided. *See* PFL Reply 4; Archbishop Reply 6. Although we must accept Appellants' assertion that the scheme itself violates their religious beliefs, we need not accept their legal conclusion that their purported involvement in that scheme qualifies as a substantial burden under RFRA. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that Kaemmerling does not allege facts sufficient to state a

substantial burden on his religious exercise."). Appellants' participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive. *See id.* at 678 ("An inconsequential or de minimis burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme."). At bottom, then, Appellants' religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required Appellants themselves to take. But Appellants have no right to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious organizations are required to file many forms with the government, such as applications for tax exemptions, even though they may have religious objections to a whole host of government policies and programs. Nothing in RFRA empowers such organizations to leverage their own minimal interaction with the government to force the government to act in conformance with their religious beliefs—however sincerely held.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:13-cv-01261-EGS

[Filed September 19, 2013]

PRIESTS FOR LIFE, *et al*.,

Plaintiffs,

-v-

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

DECLARATION OF FATHER FRANK PAVONE AND PRIESTS FOR LIFE

I, Father Frank Pavone, make this declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge. I also make this declaration on behalf of Priests for Life and thus based on information known by me and information provided to me by the organization.

1. I am an adult citizen of the United States and a plaintiff in this case.

2. I am an ordained, Roman Catholic priest and the National Director of Priests for Life. I am currently covered under Priests for Life's health care plan.

3. Priests for Life is a nonprofit corporation that is incorporated under the laws of the State of New York. It is recognized by the Internal Revenue Service as a Section 501(c)(3) organization. Priests for Life is a religious organization. However, it is not a church or a religious order. In short, it is not an organization that is referred to in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Consequently, Priests for Life is not a "religious employer" for purposes of the contraceptive services mandate of the Patient Protection and Affordable Care Act (hereinafter "Affordable Care Act" or "Act") and is therefore not exempt from the contraceptive services mandate.

4. As part of its commitment to Catholic social teaching, Priests for Life promotes the health and well-being of its employees. In furtherance of this commitment, Priests for Life provides health insurance for its employees through an insurer.

5. Priests for Life's health care plan is not a "grandfathered" plan under the Affordable Care Act for multiple reasons, including, but not limited to, the following: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Priests for Life does not take the position that its health care plan is a grandfathered plan and thus does not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010.

6. Priests for Life ensures that its insurance policies do not cover, promote, or provide access to

drugs, devices, services, or procedures inconsistent with its faith, including contraception.

7. Priests for Life cannot provide health insurance that supports, whether directly or indirectly, artificial contraception, sterilization, abortifacients, abortion, or related education and counseling without violating its sincerely held religious beliefs.

8. Priests for Life cannot provide health insurance that provides access to and makes available contraception, sterilization, abortifacients, abortion, or related education and counseling without violating its sincerely held religious beliefs.

9. Priests for Life cannot provide information or guidance to its employees about other locations at which they can access artificial contraception, sterilization, abortifacients, abortion, or related education and counseling without violating its sincerely held religious beliefs.

10. In sum, neither Priests for Life nor I can facilitate, promote, or support in any way, whether directly or indirectly, the federal government's objective of promoting and increasing the use of contraceptive services without violating our sincerely held religious beliefs.

11. Priests for Life is funded almost exclusively through tax-deductible donations. Donors who give to Priests for Life do so with an understanding of Priest for Life's mission and with the assurance that Priests for Life will continue to adhere to, disseminate, and report reliable Catholic teaching on the sanctity of life and human sexuality.

12. Priests for Life cannot use donated funds for purposes known to be morally repugnant to its donors and in ways that would violate the implicit trust of the purpose for their donations, such as using these funds to facilitate, promote, or support in any way the use of contraceptive services.

13. Priests for Life's next plan year will commence on January 1, 2014.

14. Through my association with Priests for Life, I engage in various expressive activities to advance and promote Priests for Life's religious mission, which includes, at its core, spreading the Gospel of Life. This activity is a religious exercise for me, as I am called by my priestly vocation to evangelize and spread the Gospel of Life.

15. The Gospel of Life, which is an expression of the Catholic Church's position and central teaching regarding the value and inviolability of human life, affirms and promotes the culture of life and actively opposes and rejects the culture of death. Contraception, sterilization, abortifacients, and abortion are all instruments of the culture of death, and their use can never be approved, endorsed, facilitated, promoted, or supported in any way.

16. The contraceptive services mandate of the Affordable Care Act requires coverage for, and promotes the use of, all Food and Drug Administration ("FDA") approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. FDA approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices,

Plan B (also known as the "morning after pill"), and ulipristal (also known as "ella" or the "week after pill"). Plan B and ella, as well as certain intrauterine devices ("IUD"), can prevent the implantation of a human embryo in the wall of the uterus and can thus cause the death of an embryo, thereby operating as abortifacients. See a true and correct copy of the FDA's Birth Control Guide, attached to this declaration as Exhibit A. All of these FDA approved methods and procedures are gravely immoral and contrary to Priests for Life's and my sincerely held religious beliefs.

17. To advance the mission of Priests for Life and, ultimately, the mission of the Church, I often use the media of television, radio, and the printed press to promote the culture of life. For example, I host the *Defending Life* television series on the Eternal Word Television Network (EWTN). Indeed, my life and my vocation are dedicated to spreading the Gospel of Life and thus building a culture of life.

18. Consequently, I strongly object to the federal government forcing Priests for Life, the organization with which I associate and through which I tirelessly work to build the culture of life, to provide or facilitate, whether directly or indirectly, any support for, or access to, contraception, sterilization, and abortifacients and related education and counseling based on my sincerely held religious beliefs. Further, I strongly object to the federal government forcing Priests for Life to facilitate, support, or cooperate in any way with the government's immoral objective of promoting the use of contraceptive services—an objective that is squarely at odds with my religious

beliefs and which directly undermines the very work that I do.

19. Priests for Life is a private association of the faithful, recognized and approved under the Canon Law of the Catholic Church. It works in harmony with the goals of the Bishops' Pro-Life Committee and the local diocesan respect life offices.

20. Priests for Life was founded in 1991 to do one of the most important tasks in the Church today: to help spread the Gospel of Life.

21. The mission of Priests for Life is to unite and encourage all clergy to give special emphasis to the life issues in their ministry. It also seeks to help them take a more vocal and active role in the pro-life movement. Priests for Life exists to fight the culture of death.

22. Pursuant to its Mission Statement, Priests for Life seeks to: (1) unite, encourage, and provide ongoing training to priests and deacons who give a special emphasis to the "life issues," especially abortion and euthanasia, in their ministries; (2) instill a sense of urgency in all clergy to teach about these issues and to mobilize their people to help stop abortion and euthanasia; (3) assist clergy and laity to work together productively for the cause of life; and (4) provide ongoing training and motivation to the entire pro-life movement.

23. Priests for Life offers a wide range of audios, videos, and brochures, and regularly uses the media of television, radio, and the printed press to spread the message of life.

24. As the National Director of Priests for Life, I, along with my associates, including Dr. Alveda King and Ms. Janet Morana, travel the country full time to meet with priests, pro-life groups, and others to express, teach, and spread the Gospel of Life.

25. As the primary spokesman for Priests for Life, I use the media of television, radio, and the printed press to spread Priests for Life's message of life. Through my media appearances and other expressive activities, I promote the culture of life and actively oppose the culture of death and its support for contraception, sterilization, abortifacients, and abortion.

26. Priests for Life, a Catholic organization, is morally prohibited based on its sincerely held religious convictions from cooperating with evil. Priests for Life objects to being forced by the federal government to purchase a health care plan that provides its employees with access to contraceptives, sterilization, and abortifacients, all of which are prohibited by its religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life. Contraception, sterilization, and abortifacients are immoral regardless of their cost. And Priests for Life objects to the federal government forcing it into a moral dilemma with regard to its relationship with its employees and associates, including Dr. King, Ms. Morana, and me. Indeed, the contraceptive services mandate of the federal government threatens the very survival of Priests for Life as an effective, pro-life organization.

27. Priests for Life has a moral and religious obligation to resist and oppose actions designed to

advance and promote the use of contraceptive services. As such, Priests for Life will not submit to any requirements imposed by the federal government that will promote the use of contraceptive services, including any requirement to provide a "self-certification" to its insurer that will then trigger the insurer's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries" of Priests for Life's health care plan.

28. Pursuant to its moral and religious obligations, Priests for Life will not provide any notice or information to its insurer, its employees, or to the beneficiaries of its health care plan that is designed to promote or facilitate the use of contraceptive services.

29. Therefore, by refusing to cooperate with, and thus facilitate, the government's immoral contraceptive services scheme and objective and by further refusing to provide coverage in its health care plan for immoral contraceptive services and related education and counseling required by the mandate, all based on its sincerely held religious beliefs, Priests for Life will be subject to crippling fines of $100 per day per employee.

30. Priests for Life and I hold and actively profess religious beliefs that include traditional Christian teaching on the nature and purpose of human sexuality. In particular, in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, we believe that human sexuality has two primary purposes: to "most closely unit[e] husband and wife" and "for the generation of new lives." We believe and actively profess the Catholic Church teaching that "[t]o use this divine gift destroying, even if only partially, its meaning and purpose is to contradict the nature both

of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His Will." Therefore, we believe and teach that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception and sterilization—is a grave sin.

31. Priests for Life and I believe, as Pope Paul VI prophetically stated in *Humanae Vitae*, that "man, growing used to the employment of anticonceptive practices, may finally lose respect for the woman and, no longer caring for her physical and psychological equilibrium, may come to the point of considering her as a mere instrument of selfish enjoyment, and no longer as his respected and beloved companion." Consequently, we believe and profess that the contraceptive services mandate harms women physically, emotionally, morally, and spiritually.

32. Priests for Life and I also hold and actively profess religious beliefs that include traditional Christian teaching on the sanctity of life. We believe and teach that each human being bears the image and likeness of God, and therefore all human life is sacred and precious from the moment of conception. Consequently, we believe and teach that abortion, which includes abortifacients, ends a human life and is a grave sin.

33. Further, we subscribe to authoritative Catholic teaching about the proper nature and aims of healthcare and medical treatment. For example, we believe, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "'[c]ausing death' can

never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life."

34. Based on the teaching of the Catholic Church, and our own sincerely held beliefs, Priests for Life and I do not believe that contraception, sterilization, abortifacients, or abortion are properly understood to constitute medicine, healthcare, or a means of providing for the wellbeing of persons. Indeed, we believe these procedures involve gravely immoral practices.

35. Priests for Life's health care policy must be renewed by January 1, 2014, and at that time it will be subject to the contraceptive services mandate of the Affordable Care Act, which will then force Priests for Life and me through my association with Priests for Life to facilitate, support, and provide access to coverage for contraception, sterilization, and abortifacients and to further facilitate, support, and cooperate in the government's immoral objective of promoting the use of contraceptive services.

36. Consequently, as of January 1, 2014, Priests for Life will be required by the federal government to provide contraceptive, sterilization, and abortifacient coverage as part of its health care plan contrary to Priests for Life's and my sincerely held religious beliefs.

37. Priests for Life and I are morally prohibited based on our sincerely held religious convictions from cooperating, directly or indirectly, with evil. Thus, we strongly object to the federal government forcing Priests for Life to purchase a health care plan that

provides its employees with access to contraceptives, sterilization, and abortifacients, all of which are prohibited by our religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life or me. Contraception, sterilization, and abortifacients are immoral regardless of their cost. And Priests for Life and I strongly object to the government forcing us into a moral and economic dilemma with regard to Priests for Life's relationship as employer with its employees and those who associate with Priests for Life for the purpose of promoting its religious mission. Moreover, Priests for Life and I object to being forced by the government to facilitate, support, and promote the government's immoral objective of promoting the use of contraceptive services—an objective that is directly at odds with the mission and purpose of Priests for Life and with our sincerely held religious beliefs.

38. In addition, if Priests for Life were forced out of the healthcare market, many of its employees, including Dr. King and Ms. Morana, would be forced to purchase a costly, individual insurance plan as a result of the "minimum coverage" provision of the Affordable Care Act. As a result, these employees will now be forced to purchase, and thus contribute to, contraception coverage because this mandate applies to individual plans.

39. In sum, the federal government is now forcing religious employers, including Priests for Life, out of the healthcare market because of their sincerely held religious beliefs, which is both a direct harm in and of itself and an indirect harm in that it will put

Priests for Life at a competitive disadvantage vis-à-vis employers offering health care plans in the employee marketplace.

40. Because of the contraceptive services mandate, including the so-called "accommodation," Priests for Life must now make business decisions that will affect its ability to continue the services it provides. As a nonprofit organization, Priests for Life funds its operations almost entirely through tax-deductible donations, including planned giving. Priests for Life must make business decisions now based on what it expects to receive in donations in the future. This requires Priests for Life to look several years ahead to determine what its budget will be and thus what services it will be capable of providing. Priests for Life's donors will not support an organization that provides its employees with access to contraception, sterilization, or abortifacients—practices that run counter to Priests for Life's mission, goals, and message—the very basis for the donations in the first instance.

41. Indeed, the current mandate with its limited religious employer exemption and so-called "accommodation" will force Priests for Life out of the market for health care services and thus adversely affect it as an organization. Many of Priests for Life's valued employees, without whom Priests for Life could not provide its much needed services, may be forced to leave Priests for Life and seek other employment that provides health care benefits.

42. The contraceptive services mandate is causing Priests for Life and me to feel economic and

moral pressure today as a result of the federal government imposing substantial burdens on our religious beliefs and practices.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 12th day of September, 2013.

/s/ Fr. Frank Pavone
Father Frank Pavone

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:13-cv-01261-EGS

[Filed October 31, 2013]

PRIESTS FOR LIFE, *et al*.,

Plaintiffs,

-v-

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

SUPPLEMENTAL DECLARATION OF PRIESTS FOR LIFE

I, Father Frank Pavone, make this declaration pursuant to 28 U.S.C. § 1746. This supplemental declaration is made on behalf of Priests for Life and thus based on information known by me and information provided to me by the organization.

1. I am an adult citizen of the United States, a Roman Catholic priest, and a plaintiff in this case.

2. I am the National Director of Priests for Life, which is a nonprofit corporation that is incorporated under the laws of the State of New York. It is

recognized by the Internal Revenue Service as a Section 501(c)(3) organization.

3. Priests for Life is a religious organization that follows the teachings of the Roman Catholic Church. However, Priests for Life is not a church or a religious order and thus not an organization that is referred to in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. As a result, Priests for Life does not qualify for the "religious employer" exemption from the contraceptive services mandate, which is the subject of this litigation.

4. This supplemental declaration is made to ensure that there is no mistake regarding Priests for Life's religious objection to the contraceptive services mandate and its so-called "accommodation."

5. Priests for Life cannot and will not submit to *any* requirement imposed by the federal government that has the purpose or effect of providing access to or increasing the use of contraceptive services. This specifically includes the requirement under the so-called "accommodation" that Priests for Life provide its healthcare insurer with a "self-certification" that will then trigger the insurer's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries" of Priests for Life's health care plan. This "self-certification" is the moral and factual equivalent of an "authorization" by Priests for Life to its insurer to provide coverage for contraceptive services to its plan participants and beneficiaries. Priests for Life is prohibited based on its sincerely held religious beliefs from cooperating in this manner with the federal government's immoral objectives.

6. These sincerely held religious beliefs, which prohibit Priests for Life from executing the "self-certification," are neither trivial nor immaterial, but rather central to the teaching and core moral admonition of our faith, which requires us to avoid mortal sin. Thus, neither Plaintiffs nor Priests for Life can condone, promote, or cooperate with the government's illicit goal of increasing access to and utilization of contraceptive services—the express goal of the challenged mandate and the government's so-called "accommodation."

7. Because Priests for Life cannot and will not authorize coverage for contraceptive services to its plan participants and beneficiaries via the government's "self-certification" requirement, Priests for Life will have to decide whether to drop its healthcare coverage, which will adversely affect it as an organization and its employees, including Dr. Alveda King and Ms. Janet Morana, both of whom are plaintiffs in this case, or pay the fines associated with having a healthcare plan that does not include coverage for contraceptive services. These penalties, which I understand to be $100 per day per employee, will cripple Priests for Life financially. Consequently, these penalties will not only adversely affect Priests for Life as an organization, they will adversely affect Priests for Life's employees, either through a drastic reduction in their salaries or the loss of employment simply because Priests for Life will no longer be able to sustain itself financially.

8. Finally, the government's refusal to truly accommodate Priests for Life's religious objections to the contraceptive services mandate by exempting the organization from its requirements altogether is

confounding, and this particularly true since the Anglican Church, for example, which does not oppose contraceptive services, is automatically eligible for the "religious employer" exemption, but Priests for Life is not. This is religious discrimination pure and simple.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 29th day of October, 2013.

/s/ Fr. Frank Pavone
Father Frank Pavone