[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRIESTS FOR LIFE, *et al.*, Plaintiffs-Appellants, -v- DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants-Appellees.	Appeal No. 13-5368

PLAINTIFFS-APPELLANTS' *EMERGENCY* MOTION FOR INJUNCTION PENDING APPEAL *BEFORE JANUARY 1, 2014*

AMERICAN FREEDOM LAW CENTER
Robert J. Muise, Esq.
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756

David Yerushalmi, Esq.
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
Tel: (646) 262-0500

Counsel for Plaintiffs-Appellants

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INTRODUCTION

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 8, Priests for Life, an international, 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 "Plaintiffs"), hereby move this court for the entry of an order *before January 1, 2014*,[1] granting an injunction pending appeal that enjoins the enforcement of the contraceptive services mandate of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and associated regulations as applied to Priests for Life and its healthcare plan and insurer.[2] The challenged mandate requires, *inter alia*, Priests for Life, a

[1] The challenged mandate will apply against Priests for Life on January 1, 2014.

[2] Because the challenged mandate also imposes obligations upon Priests for Life's insurer, *see*, *e.g.*, 42 U.S.C. § 300gg-13, Plaintiffs request that the court enter an order that would include language similar to the following:

> Defendants are hereby enjoined from taking any enforcement action against Plaintiffs, their group health plans, or the group health insurance coverage provided in connection with such plans, for not covering in the health plans any contraceptive services required to be covered by 42 U.S.C. § 300gg-13, Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, Section 9815(a)(1) of the Internal Revenue Code, or any other regulation or provision of law as added by the Patient Protection and Affordable Care Act.
>
> This order specifically enjoins Defendants from enforcing against Plaintiffs, their employee health plans, the group health insurance coverage provided in

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. Thus, the contraceptive services mandate *compels* Plaintiffs to endorse, facilitate, and cooperate in the government's immoral objective of "increas[ing] access to and utilization of" contraceptive services in direct violation of Plaintiffs' sincerely held religious beliefs, thereby *substantially* burdening Plaintiffs' religious exercise in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq*.

An injunction pending appeal will preserve the *status quo*, protect Plaintiffs' religious exercise, and not harm the interests of Defendants or the public while this court resolves the significant legal issues presented by this important case involving the right to religious freedom.[3]

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connection with such plans, and/or their insurers the statutes and regulations that require insurance coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as well as any penalties, fines, assessments, or any other enforcement actions for noncompliance.

[3] Because the district court denied Plaintiffs' cross-motion for summary judgment, which was consolidated with Plaintiffs' motion for preliminary injunction [*see* Minute Order of 9/25/2013], thereby effectively denying Plaintiffs the relief requested here, and in light of the impending January 1, 2014, date when the mandate will apply against Plaintiffs, thus compelling them to violate their religious beliefs, requesting an injunction pending appeal first in the district court would have been "impracticable." *See* Fed. R. App. P. 8(a)(2)(A)(i)(ii); D.C. Cir.

LEGAL STANDARD

When deciding whether to grant the requested injunction, this court will consider the following factors: "(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest. D. C. Cir. R. 8(a); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same). And as this court stated in *Wash. Metro. Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977):

> An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Thus, as set forth further below, an order granting the requested injunction and thereby maintaining the *status quo* while this appeal is pending is warranted. Indeed, this court's reasoning in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), compels granting the requested injunction.

R. 8(a)(1). Additionally, Plaintiffs' counsel notified opposing counsel on December 19, 2013, which was the date of entry of the district court order that serves as the basis for this appeal, that this motion would be filed the following day (December 20, 2013). Thus, Defendants' counsel received immediate notice of this motion in advance of its filing. Moreover, as a result of this notice, Defendants' counsel immediately filed their entries of appearance to ensure that they would be served with this motion electronically as soon as it was filed. *See* Fed. R. App. P. 8(a)(2)(C); D.C. Cir. R. 8(a)(2). Defendants oppose this motion.

STATEMENT OF FACTS

I. The Contraceptive Services Mandate & "Accommodation."[4]

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,[5] [the regulations are] expected to *increase access to and utilization of these services*, which are not at optimal levels today." 75 Fed. Reg. 41726, 41733 (July 19, 2010) (emphasis added).

Pursuant to the final regulations, the *only 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. 39870, 39874 (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—an organization which exists *for the very purpose* of opposing what

[4] The statutory and regulatory background of the challenged mandate is set forth in detail in the district court's memorandum opinion. (Mem. Op. at 5-9 at Ex. 4).

[5] The "preventive services" required by the challenged mandate include "all Food and Drug Administration approved contraceptive methods [and] sterilization procedures." (*See* Mem. Op. at 5-6 at Ex. 4). 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. (Fr. Pavone Decl. at ¶ 16, Ex. A, at Ex. 1).

the government seeks to do through the challenged mandate—it does not qualify for the *only* exemption from the mandate. (Fr. Pavone Decl. at ¶ 3 at Ex. 1).

The government rejected considering a "broader exemption" from the challenged mandate because it believes, without any empirical evidence, 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]." 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. 8725, 8728 (Feb. 15, 2012) (emphasis added). 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. *Id*.

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 devised a so-called "accommodation" scheme for "eligible organizations"—a scheme that has the *purpose and effect* of advancing the government's objective of "increas[ing] 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 39896.

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 39892-93. 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 39896.

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 39876.

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 39897.

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 Plaintiffs' religious beliefs. (*See* Fr. Pavone Decl. at ¶¶ 7-10, 12, 26-29, 40, 41 at Ex. 1; King Decl. at ¶¶ 8, 19-22 at Ex. 2; Morana Decl. at ¶¶ 7, 20-23 at Ex. 3).

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 Plaintiffs because it compels them to violate their sincerely held religious beliefs. (*See* Fr. Pavone Decl. at ¶¶ 7-10, 12, 26-29, 40, 41 at Ex. 1; King Decl. at ¶¶ 8, 19-22 at Ex. 2; Morana Decl. at ¶¶ 7, 20-23 at Ex. 3).

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 offered by the government is for Priests for Life to drop its healthcare coverage altogether, which will directly harm the individual Plaintiffs and Priests for Life as an organization. (Fr. Pavone Decl. at ¶¶ 18, 26-29, 35-42 at Ex. 1; King Decl. at ¶¶ 12, 20-22 at Ex. 2; Morana Decl. at ¶¶ 11, 21-23 at Ex. 3).

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

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

> Priests for Life cannot and will not submit to <u>*any*</u> 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 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."

(Priests for Life Supp. Decl. at ¶¶ 5-6 at Ex. 5) (emphasis added).

Indeed, Priests for Life, a Catholic organization, is morally prohibited based on its sincerely held religious convictions from cooperating with evil. Thus, Priests for Life objects to being forced by the federal government to purchase a healthcare 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." (Fr. Pavone Decl. at ¶ 26 at Ex. 1). Consequently, the burden imposed upon Plaintiffs' religious exercise by the challenged mandate *is precisely the same* whether the government is forcing Plaintiffs 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 "self-certification" or via payment to Priests for Life's insurance carrier.

ARGUMENT

I. The Challenged Mandate & "Accommodation" Substantially Burden Plaintiffs' Religious Exercise in Violation of RFRA.[6]

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"). Thus, we turn now to free exercise of religion jurisprudence.

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[6] While the challenged mandate violates the U.S. Constitution in addition to RFRA, particularly since the mandate not only burdens the free exercise of religion, it unlawfully discriminates amongst religious organizations, *see Larson v. Valente*, 456 U.S. 228 (1982), due to space constraints, Plaintiffs will focus on the RFRA claim for purposes of this motion since this claim is dispositive.

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) (emphasis). And while the district court below apparently fails to apprehend this fundamental principle, this circuit understands it well, as evidenced by its recent decision in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), which, in turn, relied upon *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). We turn now to these controlling cases.

In *Gilardi*, the majority began its analysis by "explaining what is *not* at issue. This case is not about the sincerity of the [plaintiffs'] religious beliefs, nor does it concern the theology behind Catholic precepts on contraception. The former is unchallenged, while the latter is unchallengeable." *Gilardi*, 733 F.3d at 1216; *see also Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."). The court in *Gilardi* further stated, "Equally uncontroverted is the nature of the [plaintiffs'] religious exercise: they operate their corporate enterprise in accordance with the tenets of their Catholic faith." *Gilardi*, 733 F.3d

at 1217. The same is true in spades for the present case. No one can dispute the sincerity of Plaintiffs' religious objection to the mandate and its so-called accommodation or Plaintiffs' theological basis for the objection (which includes a prohibition on cooperating with the government's illicit objective by executing and submitting the "self-certification").[7] Moreover, it is uncontroverted that Plaintiffs

[7] Consequently, contrary to the district court's conclusion, this case is not *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2001). In *Kaemmerling*, the plaintiff (a federal prisoner) sought to enjoin the application of the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act"), alleging, *inter alia*, that the DNA Act violated RFRA. More specifically, the plaintiff had no objection to the Federal Bureau of Prisons (BOP) taking fluid, hair, or tissue samples—samples from which DNA information would subsequently be extracted and stored by the FBI. Instead, the plaintiff objected, on religious grounds, to the subsequent extraction and storage of his DNA—*an activity for which he played no role whatsoever*. *Id*. at 679. Thus, *Kaemmerling* is unlike the present case in that here the coverage for the morally objectionable contraceptive services 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 payment for 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). Indeed, in *Kaemmerling*, the court found that the plaintiff "objects only to the collection of the DNA information from his tissue or fluid sample, *a process the criminal statute does not address*, and he does not allege that his religion requires him *not* to cooperate with collection of a fluid or tissue sample. . . . The criminal statute [which provides a penalty 'for failure to cooperate' in the collection of 'a tissue, fluid, or other bodily sample'] is therefore no inducement for [the plaintiff] to cooperate and potentially violate his beliefs, because he alleges that collection of his DNA sample would violate his convictions whether or not he acquiesces in the process. Thus, [the plaintiff] *does not allege that he is put to a choice . . . between criminal sanctions and personally violating his own religious beliefs*." *Id*. at 679 (citations omitted) (emphasis added). In this case, the challenged mandate puts Priests for Life to a choice between financially crippling penalties and violating its

want to operate Priests for Life in accordance with the tenets of the Catholic faith, which the challenged mandate prohibits them from doing.

Thus, as in *Gilardi*, the "only dispute touches on the characterization of the burden." *Id*. at 1217. And as the court noted in *Gilardi*, "The burden on religious exercise does not occur at the point of contraceptive purchase; . . . the [plaintiffs] are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." *Id*.

At this point, a lengthy citation to the majority opinion is in order:

> The Framers of the Constitution clearly embraced the philosophical insight that government coercion of moral agency is odious. Penalties are impertinent, according to Locke, if they are used to compel men "to quit the light of their own reason, and oppose the dictates of their own consciences." . . . Madison described conscience as "the most sacred of all property,". . . and placed the freedom of conscience prior to and superior to all other natural rights. Religion, he wrote, is "the duty which we owe to our Creator . . . being under the direction of reason and conviction only, not of violence or compulsion," . . . "precedent" to "the claims of Civil Society," . . .; *see also United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("[I]n the forum of conscience, duty to a moral power higher than the state has always been maintained. . . . The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."). . . .
>
> 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

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own religious beliefs, thereby imposing a substantial burden on Priests for Life's exercise of religion in violation of RFRA. Indeed, if the district court's reading of *Kaemmerling* is correct, then *Kaemmerling* violates *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). *See infra*.

> because they hold religious views abhorrent to the authorities." *Id.* at 402 (citations omitted).
>
> The contraceptive mandate demands that owners like the [plaintiffs] meaningfully *approve and endorse* the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. *Such an endorsement—procured exclusively by regulatory ukase*—is a "*compel[led] affirmation of a repugnant belief*." *See id*. That, standing alone, is a cognizable burden on free exercise. And *the burden becomes substantial because the government commands compliance by giving the* [*plaintiffs*] *a Hobson's choice*. They can either abide by the sacred tenets of their faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, *or they become complicit in a grave moral wrong*. *If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," we fail to see how the standard could be met*. *See Thomas,* 450 U.S. at 718.

Gilardi, 733 F.3d at 1218 (internal citations omitted) (emphasis added).

In the current case, Plaintiffs "are pressured to choose between violating their religious beliefs in managing their selected plan [*i.e.*, authorizing via self-certification the coverage of contraceptive services *to the participants and beneficiaries of Priests for Life's healthcare plan*—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." As the court in *Gilardi* concluded, "Such an endorsement—procured exclusively by regulatory ukase—is a 'compelled affirmation of a repugnant belief . . . [t]hat, standing alone, is a cognizable burden on free exercise." *Id.* And similar to the *Gilardi* case, this "burden becomes

substantial because the government commands compliance by giving [Priests for Life] a Hobson's choice." *Id.* Plaintiffs 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. In sum, "[i]f that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' [Plaintiffs] fail to see how the standard could be met."

And if *Gilardi* does not forcefully close the door on the substantial burden issue in favor of Plaintiffs, then *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981), nails it shut. Indeed, the district court's dismissive treatment of *Thomas* mirrors its inappropriate and dismissive treatment of Plaintiffs' religious beliefs. In *Thomas*, 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 dismisses *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." (Memo. Op. at 27-28 at Ex. 4). 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: Plaintiffs 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 Plaintiffs' motion for summary judgment 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 Plaintiffs' religious beliefs is perfectly consonant with Plaintiffs' 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. Plaintiffs 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 "increas[ing] access to and utilization of" contraceptive services) contrary to Plaintiffs' 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, the Court in *Thomas* credited Thomas' religious beliefs for determining how direct or indirect an enabler or facilitator Thomas could be before he violated his religious beliefs. Neither a federal court nor a government regulation may decide how direct an enabler or facilitator Thomas could be for war

waging. And the same is true here with regard to the contraceptive services coverage.[8]

In this case, Plaintiffs 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. Unlike,

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[8] The Seventh Circuit in *Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 U.S. App. LEXIS 22748, at *80-*1 (7th Cir. Nov. 8, 2013) (emphasis added), echoed this principle in yet another successful challenge to the mandate:

> 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*.

See also 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) (permanently enjoining the contraceptive services mandate and "accommodation" as applied to non-exempt, religious organizations); *Zubik v. Sebelius*, Nos. 13cv1459 & 13cv0303, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013) (preliminarily enjoining mandate as applied to non-exempt, religious organizations).

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 Thomas) enabling of war in an armament factory, Plaintiffs have no ambiguity about their religious faith. By executing the self-certification, Plaintiffs would be directly and with certainty "*impermissibly assist[ing] 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 Plaintiffs' religious faith forbids because of its *purpose and effect* no less, and even more so, than the act in *Thomas*.

In sum, there can be no question that the burden in the form of a federal mandate that coerces Plaintiffs to violate their sincerely held religious beliefs is a substantial burden prohibited by RFRA.[9]

II. Plaintiffs Will Be Irreparably Harmed without the Injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); Indeed, "[c]ourts have persuasively found that irreparable harm

[9] *Gilardi* is controlling for yet another reason—one in which Defendants concede: the government cannot satisfy the compelling interest test. (*See* Defs.' Reply in Supp. of Mot. to Dismiss or, in the Alternative, for Summ. J. at 13 ["Moreover, even if the challenged regulations were deemed to impose a substantial burden on plaintiff's religious exercise, the regulations satisfy strict scrutiny because they are narrowly tailored to serve compelling governmental interests in public health and gender equality. . . . However, defendants recognize that a divided panel of the D.C. Circuit rejected similar arguments in *Gilardi*, and that this Court is bound by that decision. Defendants raise the arguments here merely to preserve them for appeal."] [Doc. No. 23]).

accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996).

III. The Balance of Hardships Weighs in Favor of Granting the Injunction.

The likelihood of harm to Plaintiffs without the injunction is substantial because the injunction would maintain the *status quo* and protect Plaintiffs from being forced by the government to engage in conduct that substantially burdens their fundamental rights, thereby causing irreparable injury. *See supra*. On the other hand, if Defendants are restrained from enforcing the mandate *against Plaintiffs*, they will suffer no harm because the exercise of protected rights can never harm any of Defendants' legitimate interests.

IV. The Public Interest Favors Granting the Injunction.

The impact of the injunction on the public interest turns in large part on whether Plaintiffs' rights are violated by the challenged mandate. As this court has noted, "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013). Thus, because the contraceptive services mandate violates Plaintiffs' fundamental right to religious exercise, it is in the public interest to grant the requested injunction.

CONCLUSION

Plaintiffs hereby request that the court grant their motion and enjoin the enforcement of the contraceptive services mandate pending this appeal.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756

/s/ David Yerushalmi
David Yerushalmi, Esq. (D.C. Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901