IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRIESTS FOR LIFE, *et al.*,

Plaintiffs,

-v-

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*.,

Defendants.

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

SUPPLEMENTAL MEMORANDUM REGARDING THE IMPACT OF *GILARDI v. U.S. DEP'T OF HEALTH & HUMAN SERVICES*

Pursuant to the court's minute order of November 1, 2013, Plaintiffs hereby file this supplemental memorandum discussing the impact of *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013), on this case. Plaintiffs contend that *Gilardi* compels a ruling that the challenged contraceptive services mandate violates the Religious Freedom Restoration Act (and the First Amendment, *see infra* n.5).

In *Gilardi*, the court framed the legal question presented and its answer to that question as follows: "[W]e must determine whether the contraceptive mandate imposed by the Act trammels the right of free exercise—a right that lies at the core of our constitutional liberties—as protected by the Religious Freedom Restoration Act. We conclude it does." *Id.* at *3-*4. This court is asked to resolve the same legal question, and it should reach the same conclusion.

I. The *Gilardi* Challengers and Their Dilemma Caused by the Mandate.

The challengers to the contraceptive services mandate in *Gilardi* were two brothers (the Gilardis) and two for-profit, secular companies (Freshway Foods and Freshway Logistics). The brothers were equal owners of the companies, which are "closely-held corporations that have elected to be taxed under Subchapter S of the Internal Revenue Code." *Id*. at *4. The companies

collectively employed "about 400 employees and [they] operate a self-insured health plan through a third-party administrator and stop-loss provider." *Id.*

Similar in many respects to Plaintiffs here, "[a]s adherents of the Catholic faith, the Gilardis oppose contraception, sterilization, and abortion. Accordingly, the two brothers—exercising their powers as owners and company executives—exclude coverage of products and services falling under these categories." *Id.*

After reviewing the various exemptions to the contraceptive services mandate, including the exemption "for grandfathered plans," the court noted that "the Freshway companies do not fall into any of these categories." Consequently, "the Gilardis were faced with two choices: adjust their companies' plans to provide the mandated contraceptive services in contravention of their religious beliefs, or pay a penalty amounting to over $14 million per year." *Id*. at *5. Thus, "[f]inding themselves on the horns of an impossible dilemma, the Gilardis and their companies filed suit in district court, alleging the contraceptive mandate violated their rights under" RFRA. *Id*. Plaintiffs here similarly find themselves on the "horns of an impossible dilemma," prompting this challenge.

II. Do Corporations Have Free Exercise Rights?

A preliminary question presented by the *Gilardi* case was framed by Judge Brown's majority opinion as follows: "do corporations enjoy the shelter of the Free Exercise Clause? Or is the free-exercise right a 'purely personal' one, such that it is 'unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals'?"[1] *Id*. at *9-*10. Because the case at bar involves a religious

[1] Judge Brown stated, "[W]e have no basis for concluding a secular organization can exercise religion." *Id*. at *20. Judge Randolph stated that the court need not "reach the potentially far-reaching corporate free-exercise question." *Id*. at *46 (concurring in part and concurring in the judgment). Judge Edwards stated that "[a]lthough the Supreme Court has long recognized Free Exercise protection for individuals

organization (Priests for Life) and its members (who also happen to be officers and directors of the organization),[2] we need not pause for long on this question. Indeed, the *Gilardi* court, which was addressing the question from the perspective of a "non-religious" corporation, reaffirmed a "foundational principle" of First Amendment jurisprudence—a principle that Defendants do not contest here:[3] "that religious bodies—representing a communion of faith and a community of believers—are entitled to the shield of the Free Exercise Clause." *Id*. at *13. As the *Gilardi* court noted, the Supreme Court has "heard free-exercise challenges from religious entities and religious organizations. It has listened to the grievances of religious sects and member organizations. It has even entertained claims by religious and educational institutions." *Id*. (citing cases) (internal citations omitted). In short, it cannot be gainsaid that a religious organization such as Priests for Life—an expressive association created for the very purpose of spreading the Gospel of Life, which itself is a religious exercise—"enjoy[s] the shelter of the Free Exercise Clause." *See also id.* at *17 ("When it comes to corporate entities, only religious organizations are accorded the protections of the Clause.").

III. Do the Individual Plaintiffs Have Standing to Assert Their Free Exercise Rights?

We turn now to the court's discussion of the free exercise rights of the Gilardis—a discussion which, as a threshold matter, demonstrates the standing of the individual Plaintiffs (*i.e.*, Father Pavone, Alveda King, and Janet Morana) in the present case.

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and religious organizations, 'the nature, history, and purpose' of the Clause counsel against extending the right to non-religious corporate entities." *Id*. at *54-*55 (concurring in part and dissenting in part).

[2] Plaintiff Father Pavone is the National Director of Priests for Life, and Plaintiff Morana is the Executive Director. (Pls.' SMF at ¶¶ 56, 71 [Doc. No. 8-1]).

[3] (*See, e.g.*, Defs.' SMF at ¶ 11 ["The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services."], at ¶ 16 [defining an "eligible organization" as, *inter alia*, one that "holds itself out as a religious organization"] [Doc. No. 14-1]; Defs.' Mem. at 21 [referring to Priests for Life as a "religious organization"] [Doc. No. 14]).

Similar to the Gilardis, the individual Plaintiffs "have no difficulty satisfying the threshold inquiry to which their enterprises succumbed; they are, most assuredly, 'persons' under RFRA. . . . And there is no dispute that the mandate, as directed to [Plaintiffs], is a palpable and discernible infringement of free exercise." *Id*. at *20. The majority opinion, while concluding that the Gilardis had standing to pursue their RFRA claim (rejecting the shareholder-standing rule and concerns about prudential standing as barriers to standing in the case), does not address the issue with much depth and, in fact, refers to the concurring opinion of Judge Edwards—an opinion which provides greater treatment of the issue. *See id.* at *21 n.3 ("We agree with Judge Edwards that the Gilardis' Article III standing is indisputable."). We turn now to Judge Edwards' concurring opinion on standing.

Judge Edwards begins his discussion on standing by rejecting the government's argument (a similar argument advanced by the government in the present case) that the "obligations [of the Affordable Care Act] lie with the corporations themselves" and "[*t*]*he Gilardis cannot even establish standing to challenge the contraceptive-coverage requirement, much less demonstrate that the requirement may be regarded as a substantial burden on their personal exercise of religion*." *Id*. at *56-*57 (Edwards, J., concurring). In doing so, Judge Edwards states that "[i]t appears that the Government has conflated the requirements of Article III standing with the merits of Gilardis' claim under RFRA." *Id*. at *57.

After citing the familiar Article III standing requirements (*i.e.*, an "injury in fact" that is fairly traceable to the challenged action and that is likely to be redressed by a favorable decision), Judge Edwards concludes that the Gilardis, as sole owners of the companies, "are inextricably tied to Freshway. They therefore suffer injury in fact because they cannot operate their businesses according to their faith. . . . Furthermore, the Gilardis' injury is imminent and

concrete, it is caused by the Mandate, and it will be redressed by a favorable judicial decision. Therefore, the Gilardis have Article III standing to pursue a cause of action under RFRA." *Id*. at *58.

Similarly here, the individual Plaintiffs "are inextricably tied to" Priests for Life. They "therefore suffer an injury in fact because they cannot operate their [organization] according to their faith. Furthermore, [the individual Plaintiffs'] injury is imminent and concrete, it is caused by the Mandate, and it will be redressed by a favorable judicial decision. Therefore, the [individual Plaintiffs] have Article III standing to pursue a cause of action under RFRA."

Judge Edwards also rejected the argument that the asserted injury is based on the government regulating a third party, noting that "[t]here is no such third-party standing problems with respect to the Gilardis' claim." *Id*. at *58-*59. Judge Edwards noted that while the companies and the Gilardis are separate legal entities, they "are otherwise inextricably connected. The Gilardis control the corporations and feel a concomitant responsibility to manage the companies' business activities consistent with their Catholic faith." *Id*. at *59. Judge Edwards observed, "We have upheld standing in cases involving Government regulation of third parties where the connection between the Government action and the third-party conduct was less clear than it is in this case." *Id*. (citing *Tozzi v. U.S. Dep't of Health & Human Servs*., 271 F.3d 301, 309-10 (D.C. Cir. 2001)). Thus, Judge Edwards concludes, "There is no question here that the Mandate compels Freshway to take action that the Gilardis challenge under RFRA. Therefore, causation and redressability are satisfied." *Id*. at *60.

Here, the connection between Priests for Life and the individual Plaintiffs is even closer. It is through Priests for Life and its pro-life activities—activities which are protected by the First Amendment (as opposed to simply commercial activities engaged in for the purpose of

generating revenue) and at the core of its corporate *raison d'être*—that the individual Plaintiffs exercise their religion. Thus, this "connection" between Priests for Life and the individual Plaintiffs is truly "*inextricable*." And there is no question that the contraceptive services mandate compels Priests for Life "to take action" that the individual Plaintiffs "challenge under RFRA." "Therefore, causation and redressability are satisfied" in this case as well.

Finally, Judge Edwards notes that "because RFRA provides that 'standing to assert a claim or defense under [the Act] shall be governed by the general rules of standing under article III of the Constitution, ' 42 U.S.C. § 2000bb-1(c), the Gilardis clearly have met the *only* requirements for standing that are set forth in RFRA." *Id*. at *60. The same is true here.

Judge Edwards sums up his concurring opinion on standing as follows: "The Mandate applying to their companies touches the Gilardis religious exercise rights under RFRA. The touching is not substantial, but it is sufficient to satisfy the requirements of Article III." *Id*. at *66. Here, it is indisputable that the contraceptive services mandate "applying" to Priests for Life "touches" the individual Plaintiffs' "religious exercise rights under RFRA . . . sufficient to satisfy the requirements of Article III." Thus, under the reasoning of *Gilardi*, the individual Plaintiffs have standing to pursue their claims.

IV. The "Heart" of the RFRA Claim.

The majority begins its analysis by "explaining what is *not* at issue. This case is not about the sincerity of the Gilardis' religious beliefs, nor does it concern the theology behind Catholic precepts on contraception. The former is unchallenged, while the latter is unchallengeable." *Id*. at *24. The court further states, "Equally uncontroverted is the nature of the Gilardis' religious exercise: they operate their corporate enterprise in accordance with the tenets of their Catholic faith." *Id*. The same is true for the present case. No one can dispute the

sincerity of Plaintiffs' religious objection to the mandate or Plaintiffs' theological basis for the objection. Moreover, it is uncontroverted that Plaintiffs want to operate Priests for Life in accordance with the tenets of the Catholic faith.

Thus, similar to the present case, the "only dispute touches on the characterization of the burden." *Id*. at *24. Similar to the present case, the government in *Gilardi* argued that the "burden is too remote and too attenuated."[4] *Id*. And similar to the *Gilardi* court, this court ought to reject the "government's foundational premise." *Id*. As the *Gilardi* court noted, "The burden on religious exercise does not occur at the point of contraceptive purchase; . . . the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." *Id*. at *24-*25.

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.").
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> From thence sprang the idea that the right to free exercise necessarily prohibits the government from "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves." . . . And that prohibition has plainly manifested itself throughout the years as an integral component of the free-exercise guarantee. 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

[4] (*See* Defs.' Mem. at 21 ["Any burden on Priests for Life, which is eligible for the accommodations for non-profit religious organizations, is *a fortiori* too attenuated to be substantial."] [Doc. No. 14]).

> because they hold religious views abhorrent to the authorities." *Id.* at 402 (citations omitted).
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> The contraceptive mandate demands 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—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 Gilardis 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.

Id. at *25-*27 (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 promotes and endorses the government's immoral objective "*to increase access to and utilization of*" contraceptive services] or paying onerous penalties." This directly violates the Supreme Court's admonition in *Sherbert*: "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals because they hold religious views abhorrent to the authorities." *See id*. at *26-*27 (quoting *Sherbert*, 374 U.S. at 402). As the *Gilardi* court 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.* at *27. 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."

V. The Government Cannot Satisfy Strict Scrutiny.

A. No Compelling Interest.

In *Gilardi* (and similarly here), the government's "articulated concerns range from 'safeguarding the public health' to 'protecting a woman's compelling interest in autonomy' and promoting gender equality." *Id*. at *33. After careful analysis, the court rejected the government's stated interests as either "too broadly formulated to satisfy the compelling interest test," "nebulous[]," "tenuous," lacking "precision," or "unconvincing." Indeed, the court stated, "Even giving the government the benefit of the doubt, the health concerns underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but it does not rank as compelling, *and that makes all the difference*." *Id*. at *37 (emphasis added). Finally, the court noted that "'gender equality' is a bit of a misnomer, perhaps the government labeled it as such for the veneer of constitutional importance attached to the term. More accurately described, the interest at issue is resource parity—which, in the analogous abortion context, the Supreme Court has rejected as both a fundamental right and as an equal-protection issue." *Id*. at *39. In short, the *Gilardi* court was not convinced that the government's stated interests were compelling, and this court should conclude the same.

B. Not the Least Restrictive Means.

As the *Gilardi* court concluded, even assuming that the government's stated interests for imposing the mandate are "compelling," "we cannot see how the mandate is 'the least restrictive

means of furthering that . . . interest.'" *Id*. (quoting 42 U.S.C. § 2000bb-1). As the court observed, "there are viable alternatives . . . that would achieve the substantive goals of the mandate while being sufficiently accommodative of religious exercise." *Id*. at *40. Indeed, as the court noted, "a broader religious exemption would have so little impact on so small a group of employees that the argument [that such an exemption would render the entire statutory scheme unworkable] cannot be made." *Id*.

Moreover, as the court noted, "the mandate is self-defeating."

> When a government regulation "fail[s] to prohibit nonreligious conduct that endangers [its asserted] interests in a similar or greater degree" than the regulated conduct, it is underinclusive by design. *See Lukumi*, 508 U.S. at 543. And that underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation. In this case, small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers are exempt either from the mandate itself or from the entire scheme of the Affordable Care Act. *Therefore, the mandate is unquestionably underinclusive*.

Id. at *40-*41 (emphasis added).

In the final analysis, for all of the reasons the government failed to meet its burden to satisfy strict scrutiny in *Gilardi*, the government has similarly failed here.

CONCLUSION

As binding precedent, *Gilardi* compels the conclusion that Defendants have violated RFRA. Therefore, in light of *Gilardi*, the court should enter judgment in Plaintiffs' favor[5] and enjoin the contraceptive services mandate.

[5] For similar reasons, Plaintiffs should also prevail on their First Amendment free exercise claim. As the *Gilardi* court makes clear, the mandate is not a neutral law of general applicability because it "fails to prohibit nonreligious conduct that endangers its asserted interests in a similar or greater degree than the regulated conduct." *Id*. at *40 (citation omitted). Therefore, the Free Exercise Clause analysis is the same as the RFRA analysis here. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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