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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

> Sir Thomas More: "And when we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me, for fellowship?"
>
> Robert Bolt, *A Man for All Seasons* 132 (1960)

For people of faith, matters of morality and conscience are not *de minimis*—they are serious concerns that directly and materially affect a person's soul and thus eternal salvation, which is far more important than a person's physical health and thus exponentially more important than increasing the use of contraceptive services—services the government promotes under the guise of healthcare. It is evident that neither Defendants nor the American Civil Liberties Union[1] ("ACLU") apprehend this fundamental precept of religion. Consequently, they fail to understand the *substantial* burden imposed upon Plaintiffs' religious beliefs by the contraceptive services mandate and instead dismissively treat Plaintiffs' adherence to their religious convictions as *de minimis*. Dismissive treatment of religious beliefs might be common amongst those *without* religious convictions (or those who *oppose* religion simply), but the Constitution and the Religious Freedom Restoration Act ("RFRA") prohibit such treatment by the federal government.

As Defendants acknowledge in their filings, there is only one *true* exemption from the immoral proscriptions of the contraceptive services mandate—a mandate which was created for the very purpose of promoting the government's goal of "increas[ing] access to and utilization of" contraceptive services—and Priests for Life does not qualify for this exemption because it

[1] The ACLU filed an *amicus curiae* brief in this case (Doc. No. 18), which essentially parrots the "de minimus" argument advanced by Defendants. Consequently, to avoid the unnecessary repetition that often accompanies responses to such *amicus* briefs, Plaintiffs ask the court to treat the arguments presented herein as equally applicable to the ACLU's brief.

(and its employees, such as Plaintiffs Father Pavone, Alveda King, and Janet Morana) are apparently not *religious* enough.[2]

Moreover, Defendants tacitly admit that there *is* something *substantively* different between the "exemption" from the challenged mandate for some "religious employers" and Defendants' so-called "accommodation" for religious employers that do not make the cut. And that difference is this: the participants and beneficiaries of Priests for Life's healthcare plan (unlike the participants and beneficiaries of the healthcare plans of exempt religious employers) will now have coverage for contraceptive services under the mandate, and they will have such coverage *precisely because Priests for Life authorized by self-certification the provider of its healthcare plan to provide the coverage*. Thus, as a direct result of the contraceptive services mandate, Priests for Life will face a Hobson's choice: either willingly participate in the government's gravely immoral scheme of promoting access to and utilization of contraceptive services by authorizing its healthcare insurer to provide contraceptive services coverage for its healthcare plan participants and beneficiaries *or* face crippling fines of $100 per employee per day. The only alternative to this grave moral dilemma is for Priests for Life to drop its healthcare coverage altogether and then face the dire consequences of that unacceptable choice. Thus, by any man's measure (and any honest review of the applicable case law), the contraceptive services mandate is imposing a substantial burden on Plaintiffs' religious beliefs.

[2] As noted here and in Plaintiffs' previous filings, Defendants rejected considering a "broader exemption" from the challenged mandate to include religious organizations such as Priests for Life because the government contends, without empirical evidence, that such organizations "do not primarily employ employees who share the religious tenets of the organization" and "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." Thus, according to Defendants, "[i]ncluding 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).

As set forth in Plaintiffs' prior filings and further below, the contraceptive services mandate violates the United States Constitution and RFRA. Consequently, Plaintiffs are entitled to a judgment and an order immediately enjoining its enforcement. *See* Fed. R. Civ. P. 56 & 65.

SUMMARY OF MATERIAL FACTS

The following material facts, when viewed in light of the applicable law, compel one conclusion: the contraceptive services mandate violates the United States Constitution and RFRA.

- Priests for Life is a nonprofit religious organization that was founded in 1991 to do one of the most important tasks in the Catholic Church today: to help spread the Gospel of Life to people throughout the world. (Pls.' Statement of Material Facts at ¶¶ 52-53 [Doc. No. 8-1]) (hereinafter referred to as "Pls.' SMF").
- 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. Plaintiffs share this fundamental religious belief. (Pls.' SMF at ¶ 54).
- Based on Plaintiffs' sincerely held religious beliefs, 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. (Pls.' SMF at ¶¶ 54, 55, 80-82).
- Providing access to or utilizing contraceptive services is morally prohibited by Plaintiffs' religious beliefs. (Pls.' SMF at ¶¶ 54, 55, 60, 66, 75, 80-82, 86-90, 100).
- Plaintiff Father Pavone is the National Director of Priests for Life, Plaintiff King is the Pastoral Associate and Director of African-American Outreach, and Plaintiff Morana is

the Executive Director. All of these Plaintiffs are covered under Priests for Life's healthcare plan. (Pls.' SMF at ¶¶ 56, 61, 63, 67, 71, 76).

- Plaintiffs Father Pavone, King, and Morana associate with Priests for Life for the very purpose of advancing and promoting its religious mission, including engaging in expressive activity to spread the Gospel of Life. This activity is a religious exercise for Plaintiffs. (Pls.' SMF at ¶¶ 57-59, 64-65, 72-74).
- Plaintiffs are morally prohibited based on their sincerely held religious beliefs from cooperating, directly or indirectly, with evil. (Pls.' SMF at ¶ 89).
- Accordingly, Plaintiffs object to the federal government forcing Priests for Life to purchase a health care plan that provides its employees (*i.e.*, plan participants and beneficiaries) with access to contraception, sterilization, and abortifacients, all of which are prohibited by Plaintiffs' religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Plaintiffs. Contraception, sterilization, and abortifacients are immoral regardless of their cost. (Pls.' SMF at ¶ 90).
- The contraceptive services mandate operates by virtue of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (referred to as "Affordable Care Act" or "Act"). (Pls.' SMF at ¶ 1).
- Pursuant to 42 U.S.C. § 300gg-13, "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage *shall, at a minimum provide coverage for* and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional *preventive care* and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and

Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4) (emphasis added). (Pls.' SMF at ¶ 6).

- On July 19, 2010, the Department of Health and Human Services ("HHS"), along with the Department of Labor and the Department of the Treasury, published interim final regulations "implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services." 75 Fed. Reg. 41726 (July 19, 2010). (Pls.' SMF at ¶ 7).
- The interim final regulations required health insurers to cover "preventive care" for women as "provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 75 Fed. Reg. at 41759. (Pls.' SMF at ¶ 8).
- On July 19, 2011, the Institute of Medicine ("IOM") published a report of its study regarding preventive care for women. Among other things, IOM recommended that preventive services include "[t]he full range of Food and Drug Administration-approved contraceptive methods [and] sterilization procedures." (Pls.' SMF at ¶ 9).
- 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. (Pls.' SMF at ¶ 10).
- On August 1, 2011, HHS's Health Resources and Services Administration ("HRSA") announced that it was supporting "the IOM's recommendations on preventive services

that address health needs specific to women and fill gaps in existing guidelines." HRSA entitled the recommendations, "Women's Preventive Services: Required Health Plan Coverage Guidelines" (hereinafter "Guidelines"). (Pls.' SMF at ¶ 11).

- The Guidelines include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (Pls.' SMF at ¶ 12).
- On August 3, 2011, HHS, along with the Department of Labor and the Department of the Treasury, published interim final regulations which, among other things, mandate that every "group health plan, or a health insurance issuer offering group or individual health insurance coverage health plans . . . provide benefits for and prohibit the imposition of cost-sharing: . . . . With respect to women, preventive care and screening provided for in comprehensive guidelines supported by HRSA . . . which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines." 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 45 C.F.R. § 147.130. (Pls.' SMF at ¶ 13).
- The August 3, 2011, interim final regulations noted that "several commenters [to the July 19, 2010, interim final regulations] asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." Accordingly, "the Departments seek to provide for a religious accommodation that respects the unique relationship *between a house of worship* and its employees *in ministerial positions*. . . . [T]he Departments are amending the interim final rules to provide HRSA additional *discretion* to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46623 (emphasis added). (Pls.' SMF at ¶ 14).

- Defendants created a regulatory exemption to the contraceptive services mandate for a narrow category of religions organizations. 78 Fed. Reg. 39870, 39874 (July 2, 2013). (Pls.' SMF at ¶ 4).
- Defendants rejected considering a broader exemption from the contraceptive services mandate because they believe 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 Defendants, "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). (Pls.' SMF at ¶ 21).
- As stated by Defendants, the ultimate goal of the contraceptive services 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 "contraceptive services." 77 Fed. Reg. at 8728. (Pls.' SMF at ¶ 22; *see also* Defs.' Statement of Material Facts at ¶ 29 [Doc. 14-1] [acknowledging that the objective of the contraceptive services mandate is "*to increase access to and utilization of*" contraceptive services (emphasis added)]) (hereinafter referred to as "Defs.' SMF").

- According to Defendants, the "*primary predicted benefit*" of the contraceptive services mandate is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of ***disease***" (emphasis added). (Defs.' SMF at ¶ 28).
- Under the Affordable Care Act, grandfathered health care plans are exempt from the insurance mandates, including the contraceptive services mandate. *See* 42 U.S.C. § 18011 (grandfathering of existing health care plans). (Pls.' SMF at ¶ 3).
- On June 28, 2013, the Obama administration announced that it had issued final rules on contraceptive coverage and religious organizations, and these final rules were published in the Federal Register on July 2, 2013, and became effective on August 1, 2013. 78 Fed. Reg. at 39870. (Pls.' SMF at ¶¶ 23-24).
- With the exception of the amendments to the religious employer exemption, these final regulations apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. 78 Fed. Reg. at 39870. (Pls.' SMF at ¶ 25).
- Pursuant to the final regulations, the definition of "religious employer" for purposes of the ***only exemption*** from the contraceptive services mandate applicable to organizations that object to it on religious grounds includes only those religious organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. at 39874. (Pls.' SMF at ¶ 27).
- These "exempt" organizations are essentially churches and religious orders—a narrow class of religious organizations. *See* I.R.C. §§ 6033(a)(3)(A)(i) & (iii). (Pls.' SMF at ¶ 28).

- Priests for Life, while a nonprofit religious organization, does not qualify for this narrow exemption. (Pls.' SMF at ¶ 29).
- The final rules also provide a so-called "accommodation" for certain "eligible organizations." 78 Fed. Reg. at 39874. (Pls.' SMF at ¶ 30).
- An "eligible organization" 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 HHS, that it satisfies the criteria in (1) through (3) above, and makes such self-certification available for examination upon request by the first day of the first plan year to which the "accommodation" applies. This self-certification must be executed by a person authorized to make the certification on behalf of the organization, and the organization must retain a record of this self-certification. 78 Fed. Reg. at 39874, 39896. (Pls.' SMF at ¶ 31) (emphasis added).
- A group health plan established or maintained by an "eligible organization" that provides benefits through one or more group health insurance issuers complies with the "eligible organization" requirements by furnishing a copy of the self-certification to each issuer that would otherwise provide coverage in connection with the group health plan. 78 Fed. Reg. at 39896. (Pls.' SMF at ¶ 32).
- A group health plan issuer who receives a copy of the self-certification must, *inter alia*, (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 so long as they remain enrolled in the plan. 78 Fed. Reg. at 39896. (Pls.' SMF at ¶ 33).

- With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the "eligible organization," the group health plan, or plan participants or beneficiaries. 78 Fed. Reg. at 39896. (Pls.' SMF at ¶ 34).
- Consequently, should Priests for Life perform the affirmative act of executing and delivering a "self-certification" to its insurer, this act would trigger "separate payments for contraceptive services directly for plan participants and beneficiaries" of Priests for Life's healthcare plan. 78 Fed. Reg. at 39876; *see also* 78 Fed. Reg. at 39896. (Pls.' SMF at ¶ 35).
- These direct payments for contraceptive services required by the challenged mandate would continue only "for so long as the participant or beneficiary remains enrolled in [Priests for Life's] plan." 78 Fed. Reg. at 39876. (Pls.' SMF at ¶ 38).
- Based on its sincerely held religious beliefs, Priests for Life refuses to participate in this scheme to advance and facilitate the government's objective of promoting the use of contraceptive services—an objective which Priests for Life considers immoral. (Pls.' SMF at ¶ 37).
- 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 "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. (Priests for Life Supp. Decl. at ¶ 5 at Ex. 5).

- Plaintiffs' 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 Plaintiffs' faith, which requires them 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 "accommodation." (Priests for Life Supp. Decl. at ¶ 6 at Ex. 5).
- If Priests for Life does not authorize its insurer to provide insurance coverage for contraceptive services to its healthcare plan participants and beneficiaries by executing and delivering the required "self-certification," then Priests for Life will be subject to crippling fines of $100 per employee per day, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 29 U.S.C. § 1132, for failing to provide contraceptive services coverage under its healthcare plan. (Pls. SMF at ¶ 50).
- None of the exemptions from the contraceptive services mandate apply to Priests for Life. (Pls.' SMF at ¶ 4).

- Pursuant to the challenged regulations, an Anglican Church, for example, qualifies for the "religious employer" exemption even though Anglicans do not oppose the use of contraception, but yet Priests for Life, a Catholic organization which strongly opposes the use of contraception, does not qualify. (Muise Supp. Decl. at ¶ 5, Ex. D, at Ex. 6; *see also* Priests for Life Supp. Decl. at ¶ 8 at Ex. 5).
- Priests for Life will be subject to the contraceptive services mandate when its healthcare policy renews on January 1, 2014. (Pls.' SMF at ¶ 20).
- Plaintiffs object to the government forcing them into a moral and economic dilemma with regard to their relationship as employer and employees, which, in turn, adversely affects their association as an effective, pro-life organization. (Pls.' SMF at ¶ 91).
- 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 Plaintiffs King and Morana, or pay the fines associated with having a healthcare plan that does not include coverage for contraceptive services. These penalties will cripple Priests for Life financially. Consequently, the 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. (Priests for Life Supp. Decl. at ¶ 7 at Ex. 5).
- If Priests for Life is forced to drop its healthcare coverage to follow its sincerely held religious beliefs, many, if not all, of Priests for Life's employees, including Plaintiffs

King and Morana, will be forced to either purchase a costly individual plan pursuant to the "individual mandate" or pay the "penalty" tax for not having health insurance since they will no longer be eligible for the "employer-sponsored" health care plan exemption, *see* 26 U.S.C. § 5000A(f)(1)(B), thereby causing further harm to Plaintiffs. (Pls.' SMF at ¶¶ 96-97).

- The challenged mandate threatens the very existence of Priests for Life as an effective, pro-life organization (and association of pro-life supporters, including Plaintiffs Father Pavone, King, and Morana) that advocates for the culture of life. (Pls.' SMF at ¶ 51).
- Because of the contraceptive services mandate, Priests for Life must now make business decisions that will affect its ability to continue the services it provides. (Pls.' SMF at ¶ 98).
- As a nonprofit organization, Priests for Life funds its operations almost entirely through tax-deductible donations. (Pls.' SMF at ¶ 99).
- Priests for Life's donors will not support an organization that facilitates, supports, or cooperates in the government's immoral objective of promoting the use of contraceptive services—an objective that run counter to Priests for Life's mission, goals, and message—the very basis for the donations in the first instance. (Pls.' SMF at ¶ 100).
- The contraceptive services mandate is causing Plaintiffs to feel economic and moral pressure today as a result of the federal government imposing substantial burdens on their religious beliefs and practices. (Pls.' SMF at ¶ 101).
- In an official press statement released on January 20, 2012, Defendant Sebelius stated the following: "We intend to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services

are available at sites such as *community health centers*, *public clinics*, and *hospitals with income-based support*." (Muise Supp. Decl. at ¶ 3, Ex. B, at Ex. 6). Thus, according to Defendant Sebelius, the loss of coverage for contraceptive services caused by exempting from the mandate certain organizations with religious objections will be offset by providing such services through other channels, and this is either without cost or cost-neutral at the least. (*See* Pls.' SMF at ¶ 45).

ARGUMENT

I. The Individual Plaintiffs Have Standing.[3]

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. Thus, the existence of an "actual controversy" in a constitutional sense is necessary to sustain jurisdiction in this court. As stated by the Supreme Court:

> A *justiciable controversy* is . . . distinguished from a difference or dispute of a *hypothetical* or *abstract* character; from one that is *academic* or *moot*. The controversy must be definite and concrete, touching the legal relations of parties having *adverse legal interests*. It must be a *real and substantial controversy* admitting of specific relief *through a decree of a conclusive character*, as distinguished from *an opinion advising what the law would be upon a hypothetical state of facts*. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, *the judicial function may be appropriately exercised* . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted) (emphasis added).

Here, there is nothing "hypothetical," "abstract," "academic," or "moot" about the constitutional claims advanced by the individual Plaintiffs.[4] This case presents "a real and

[3] For ease of reference and in keeping with Defendants' practice (*see* Defs.' Mem. at 1 n.1[Doc. No. 13]), Plaintiffs will collectively refer to Plaintiffs Father Pavone, King, and Morana as the "individual Plaintiffs."

substantial controversy" between parties with "adverse legal interests," and this controversy can be resolved "through a decree of a conclusive character." *Id*. It will not require the court to render "an opinion advising what the law would be upon a hypothetical state of facts." *Id*. In sum, it presents a "justiciable controversy" in which "the judicial function may be appropriately exercised." *Id.*

In an effort to give further meaning to Article III's requirement, the courts have developed several justiciability doctrines, including "standing." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Here, the individual Plaintiffs have standing because they can demonstrate harm that is unquestionably traced to the challenged mandate and can be redressed by the requested declaratory and injunctive relief.

While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751; *cf. Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a

[4] Defendants do not dispute the fact that Priests for Life has standing to advance its constitutional and statutory claims challenging the contraceptive services mandate. Consequently, this court has jurisdiction to hear and decide the issues presented by this case. *Rumsfeld v. Forum for Academic & Institutional 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-or-controversy requirement."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing to invoke the Court's jurisdiction to hear and decide the case); *see also ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) ("[F]or purposes of the asserted declaratory judgment . . . it is only necessary that one plaintiff has standing.").

personal and individual way," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added), as in this case.

Indeed, the courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing). In *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997), for example, the Court held that "cognizable injury from unconstitutional discrimination against interstate commerce *does not stop at members of the class against whom a State ultimately discriminates*, and customers of that class may also be injured, as in this case where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." (emphasis added). Similarly here, the individual Plaintiffs will suffer a cognizable injury that affects them "in a personal and individual way" (the loss of healthcare benefits, which will also result in the imposition of a penalty/tax under the individual mandate, or the loss of salary/employment as a result of penalties that will financially cripple Priests for Life) (*see* Priests for Life Supp. Decl. at ¶ 7 at Ex. 5), and this injury is unquestionably traceable to the contraceptive services mandate being imposed upon their employer.[5] Moreover, an order from this court enjoining the enforcement of the challenged mandate against Priests for Life will plainly "redress" this injury.

In addition, the individual Plaintiffs associate with Priests for Life *for the very purpose* of opposing, through speech and other related First Amendment protected activities, the "services"

[5] This injury is "certainly impending," *see Whitmore v. Ark.*, 495 U.S. 149, 158 (1990), in that the challenged mandate will take full force against Priests for Life on January 1, 2014. (Pls.' SMF at ¶ 20). Indeed, Plaintiffs are feeling the economic and moral pressure now as a result of this impending deadline. (Pls.' SMF at ¶¶ 98-101).

that the government is forcing Priests for Life to authorize via self-certification through its healthcare plan. Thus, the contraceptive services mandate is compelling the "association" to engage in the very conduct for which it exercises its constitutional rights (through the activities of the individual Plaintiffs) to oppose. This compulsion is causing injury to the organization and those who participate in this "expressive association," specifically including the individual Plaintiffs. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Indeed, the contraceptive services mandate and its accompanying regulations are forcing Plaintiffs "to affirm in one breath that which they deny in the next." *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575-76 (1995) (quoting *Pac. Gas & Electric Co. v. Pub. Utilites Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

Finally, the individual Plaintiffs have standing to challenge the contraceptive services mandate and its accompanying regulations because these regulations discriminate amongst religions and convey the unmistakable message that the government disfavors the individual Plaintiffs' "religious choices" in violation of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 238-43 (1982) (holding that a church <u>*and its followers*</u> had standing to challenge the constitutionality of a state charitable contributions statute which exempted from its registration and reporting requirements only those religious organizations that received more than fifty percent of their total contributions from members or affiliated organizations).[6]

[6] Similar to the challengers in *Larson*, compliance with the mandate will adversely affect Plaintiffs' ability to solicit donations as a charitable, nonprofit organization. (Pls.' SMF at ¶¶ 99-100).

In sum, the individual Plaintiffs have standing because they have alleged a "personal injury" that is "fairly traceable" to the challenged mandate and is "likely to be redressed by the requested relief." *See Allen*, 468 U.S. at 751.

II. The Contraceptive Services Mandate Substantially Burdens Plaintiffs' Free Exercise of Religion in Violation of RFRA and the First Amendment.

Defendants' and the ACLU's argument can be summed up as follows: forcing Priests for Life under penalty of federal law to authorize the issuer of its healthcare plan to provide coverage for contraceptive services (and notice of that coverage) to Priests for Life's plan participants and beneficiaries (a requirement that was expressly designed "to increase access to and utilization of" contraceptive services) is an "inconsequential or *de minimis* burden" on Priests for Life's sincerely held religious beliefs. (Defs.' Mem. at 13-23; ACLU Br. at 6-12). Defendants and the ACLU are gravely mistaken. *See, e.g., Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) (holding 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 armaments was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion and further holding that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless <u>*substantial*</u>") (emphasis added); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment.") (emphasis added)

Indeed, through RFRA,[7] Congress 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

[7] Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the

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") (emphasis added).[8] And the right to free exercise of religion protected by the First Amendment and RFRA embraces two concepts: the freedom to believe and the freedom to act in accord with those beliefs. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

Consequently, under RFRA and the First Amendment, the government may not impose special restrictions, prohibitions, or regulations *on the basis of religious beliefs*. *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*.") (emphasis added). 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 added).[9]

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burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). However, 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).

[8] Because the contraceptive services mandate is not a neutral law of general applicability in that it targets for discriminatory treatment certain religious organizations, such as Priests for Life, and it provides exemptions from its proscriptions that are not available to Plaintiffs, as discussed in further detail in Plaintiffs' memorandum of points & authorities previously filed in this case (*see* Mem. of P. & A. in Supp. of Pls.' Mot. for Prelim. Inj. at 22-25 [Doc. No. 7]), the pre-*Smith* compelling interest test applies. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[9] Curiously, Defendants take issue with Plaintiffs' assertion that the majority of courts considering requests for injunctions in the for-profit cases have granted the injunctions (citing ten such cases) by citing to six cases. And in four of the cases cited by Defendants, either the appellate court granted the injunction pending appeal, *see Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (same); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (order granting motion for an injunction pending appeal), or the district court granted the injunction on remand, *Hobby Lobby Stores, Inc. v. Sebelius*, NO. CIV-12-1000-HE, 2013 U.S. Dist. LEXIS 107248 (W.D. Okla. July 19, 2013).

Indeed, based on Defendants' and the ACLU's argument, forcing a religious adherent under penalty of federal law to sign a "self-certification"—that is, "do next to nothing," (*see* Defs.' Mem. at 14)—that requires her to reject a central tenet of her religious beliefs by way of this affirmative act could not possibly violate (thus substantially burden) the free exercise rights of the adherent. Or, as in the case with Saint Thomas More referenced in the introduction, forcing Sir Thomas to simply acknowledge that the King of England is the head of the Church could not possibly violate any rights protected by the Free Exercise Clause or RFRA. These examples, per Defendants' and the ACLU's rendering of the law, represent simple, inconsequential, *de minimis* acts that "should take . . . a matter of minutes" (*see* Defs.' Mem. at 17) or even less, and that don't prohibit anyone from going to church on Sunday, saying her prayers, or engaging in virtually any other religious practice. And while this is certainly the likely view of those who care little (and understand less) about religion, it is not the view of religious adherents, such as Priests for Life, nor the proper view of the law (thankfully).

As testified to by Father Pavone on behalf of Priests for Life,

> 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 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).

Thus, while Defendants give a nod to the well-established principle of First Amendment jurisprudence that "[c]ourts are not arbiters of scriptural interpretation" (*see* Defs.' Mem. at 18 [quoting *Thomas*, 450 U.S. at 716]), they nonetheless invite this court to assume that role by arguing that the court should find that Plaintiffs' religious objection to the mandate and its so-called "accommodation" is nonsense (or *de minimis* or inconsequential—same effect). The court should reject this invitation for error. *See Hernandez v. Comm'r of Internal Revenue Serv.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular litigant's interpretation of those creeds."); *Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."); *United States v. Seeger*, 380 U.S. 163, 185 (1965) (acknowledging that the court's limited competence in this area extends to determining "whether the beliefs professed by [Plaintiffs] are sincerely held and whether they are, in [their] own scheme of things, religious"); *see also Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985) (noting that courts must be vigilant to "avoid any test that might turn on the factfinder's own idea of what a religion should resemble") (internal quotations and citation omitted); *Sample v. Lappin*, 424 F. Supp. 2d 187 (D.D.C. 2006) ("The Court's inquiry is limited to 'whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.'") (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (upholding the granting of a preliminary injunction under RFRA in a case in which the plaintiff refused to submit to a PPD test, claiming that accepting artificial substances into the body is a sin under the tenets of Rastafarianism)).

Here, there can be no question that Plaintiffs' beliefs regarding contraceptive services and their objection to the contraceptive services mandate (and its so-called "accommodation") are sincerely held, "rooted in religion," and thus protected by the First Amendment. *See Thomas*, 450 U.S. at 713 ("[B]eliefs rooted in religion are protected by the Free Exercise Clause. . . ."). And the choice presented by Defendants to Priests for Life is this: either violate your sincerely held religious beliefs or *suffer severe and financially crippling penalties*. And the only alternative to this Hobson's choice—an alternative which itself is unacceptable—is for Priests for Life to surrender the benefit of providing healthcare insurance to its employees (a bitterly ironic result in light of the fact that the government's alleged goal of the Affordable Care Act is to *increase* healthcare insurance coverage for individuals). In short, these burdens can only be viewed as "substantial" in light of the relevant case law.

Defendants (and the ACLU) assert that "Plaintiffs' RFRA challenge is similar to the claim that the D.C. Circuit rejected in" *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2001). (Defs.' Mem. at 16; *see* ACLU Br. at 9-10). They are mistaken. Indeed, the difference between these two cases helps to demonstrate the violation at issue here.

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[10]—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

[10] "Failure to cooperate in the collection of a sample is a misdemeanor offense." *Kaemmerling*, 553 F.3d at 673 (citing 42 U.S.C. § 14135a(a)(5)).

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 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 contraceptive services mandate puts Priests for Life to a choice between financially crippling penalties and violating its own religious beliefs, thereby imposing a substantial burden on Priests for Life's exercise of religion in violation of the Free Exercise Clause and RFRA. *See also Sherbert*, 374 U.S. at 404 (holding that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on

the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand"); *Thomas*, 450 U.S. 707 (1981) (denying unemployment compensation benefits because the employee voluntarily terminated his employment with a factory that produced armaments based on his religious beliefs placed a substantial burden on the employee's right to the free exercise of religion).

In sum, Plaintiffs' core religious beliefs forbid any act—including "speech" reduced to a writing and signed by the writer in the form of an authorizing "self-certification"—which directly triggers, and thus contributes to, a mortal sin. Indeed, the conduct compelled here under threat of penalty is an affirmative act that requires Plaintiffs to cooperate with evil and to engage in forbidden conduct that not only promotes that evil, but permits it to accomplish its immoral objective. Thus, the burden in the form of a federal mandate that coerces behavior contrary to Plaintiffs' sincerely held religious beliefs under penalty of severe fines is a burden prohibited by the Free Exercise Clause and RFRA. *See Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *10 (7th Cir. Dec. 28, 2012) ("The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.").

Having made the threshold showing of a "substantial burden," Defendants must now demonstrate that this burden *upon Plaintiffs' religious beliefs* furthers a compelling state interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546. As the Supreme Court stated, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is

being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006). Defendants cannot satisfy this standard.

In their statement of material facts, Defendants contend that Plaintiffs' claim that the challenged mandate is over-inclusive because the alleged governmental interest could be addressed by stopping short of forcing Priests for Life to comply with the mandate and setting up its own clinics to provide contraceptive services "is not feasible because it would impose considerable new costs and other burdens on the government and would otherwise be impractical." (*See* Defs.' SMF at ¶ 45; *see also* Defs.' Mem. at 29-31). However, in an official press statement released on January 20, 2012, Defendant Sebelius acknowledged the feasibility of offering alternative ways to obtain contraceptive services, stating the following: "We intend to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as *community health centers*, *public clinics*, and *hospitals with income-based support*." (Pls.' Resp. to Defs.' SMF at ¶ 45). Thus, according to Defendant Sebelius, the loss of coverage for contraceptive services caused by exempting from the mandate certain organizations with religious objections will be offset by providing such services through other channels, and this is either without cost or cost-neutral at the least. (*See* Pls.' SMF at ¶ 45). In short, Defendants cannot satisfy strict scrutiny in this case.[11]

III. The Contraceptive Services Mandate Violates Plaintiffs' Rights to Freedom of Speech and Expressive Association Protected by the First Amendment.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations

[11] Indeed, the government apparently finds no *compelling interest* to force objecting churches and religious orders (*i.e.*, qualified "religious employers") to "self-certify" and thus trigger conduct offensive to the objectors' religious beliefs in order to promote the government's goal of increasing access to and the use of contraceptive services.

omitted). As the Supreme Court stated, "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

Here, Plaintiffs associate as Priests for Life *for the very purpose* of expressing a pro-life message that *rejects* the promotion and use of contraceptive services, such as those mandated by the federal government. The contraceptive services mandate, therefore, directly harms this association by (1) forcing it to cooperate with, and engage in behavior that promotes, the government's immoral objective—an objective that is antithetical to the very reason for the existence of the association, (2) forcing it to choose between engaging in the impermissible behavior and cooperating in the immoral objective *and* its very existence as an expressive association, (3) compelling it to engage in speech that is antithetical to its very reason for existence, and (4) forcing it into a moral and economic dilemma with regard to Priests for Life's (the association) and the individual Plaintiffs' (its members) relationship as employer and employees, which, in turn, adversely affects the association as an effective, pro-life organization. (*See* Pls.' SMF at ¶ 91). In short, the challenged mandate has a chilling effect on, and directly threatens the very existence of, the expressive association, in violation of the First Amendment. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.").

Defendants claim that "the preventive services coverage regulations do not compel speech." (Defs.' Mem. at 35). Once again, they are mistaken. As discussed throughout (and as admitted by Defendants), the very purpose for—and the government's objective behind—the

contraceptive services mandate and the so-called "accommodation" is "to increase access to and utilization of" contraceptive services. (*See* Defs.' SMF at ¶ 29). To further this immoral objective, the regulations make certain that employees, including employees of religious organizations such as Priests for Life, are not "subject" to the religious beliefs of their employers regarding such services. (*See* Pls.' SMF at ¶ 22). And to accomplish the government's immoral objective, Defendants are compelling Plaintiffs to engage in an affirmative act (*i.e.*, submitting a "self-certification") that forces Plaintiffs to promote and cooperate with this objective (*i.e.*, it authorizes coverage of the contraceptive services—which includes "education and counseling" regarding such services—and notice of such coverage directly to its plan participants and beneficiaries).[12] This affirmative act *is* an expressive act—the same way in which casting a vote or signing a petition are expressive acts that support a particular political candidate or political position. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010) ("An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'"). Thus, by casting its lot, Priests for Life is affirming the government's immoral objective by ensuring, *inter alia*, that it is accomplished. Thus, the contraceptive services mandate and its accompanying regulations are forcing Plaintiffs "to affirm in one breath that which they deny in the next," s*ee Hurley*, 515 U.S. at 575-76 (quoting *Pac. Gas & Electric Co.*, 475 U.S. at 16), in violation of the First Amendment.

[12] The contraceptive services mandate requires that Priests for Life's plan participants and beneficiaries receive written notice of, *inter alia*, the availability of separate payments for contraceptive services, including information that the issuer provides coverage for contraceptive services and contact information for questions about the contraceptive services coverage. *See* 78 Fed. Reg. at 39897.

Additionally, as noted previously, the contraceptive services mandate forces coverage not only for immoral contraceptive services, but for *related education and counseling* that advocates for and promotes the use of such services contrary to the very message expressed by Father Pavone and Plaintiffs King and Morana on behalf of Priests for Life. Defendants contend, however, that Plaintiffs should not fear that the mandated "education and counseling" will "be 'in favor of' any particular contraceptive service, or even in support of contraception in general." (Defs.' Mem. at 36). Defendants' assurance is hardly convincing.

As noted throughout, Defendants' primary objective for imposing the contraceptive services mandate in the first instance is "to increase access to and utilization of" contraceptive services. (*See* Defs.' SMF at ¶ 29). And Defendants incessantly extol the alleged "benefits" of such services and how liberating and egalitarian it is for a woman to have sex without the "consequence" of bearing a child. (*See* Defs.' SMF at ¶¶ 1, 3, 4, 28, 29, 31-36). Indeed, Defendants treat pregnancy as a disease that can be prevented via the mandated contraceptive services. (Defs.' SMF at ¶ 28 [asserting that the "*primary predicted benefit*" of the contraceptive services mandate "is that 'individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of <u>*disease*</u>" (emphasis added)]). Thus, to assert that the "education and counseling for women with reproductive capacity" required by the mandate will <u>not</u> include "education and counseling" that promotes the use of contraception is simply not credible (and Plaintiffs are not willing to take that chance—the costs are too great).

In sum, the contraceptive services mandate compels speech, it forces Priests for Life to engage in expressive conduct that is contrary to the very purpose of the organization—a purpose for which Father Pavone and Plaintiffs King and Morana associate with the organization—and it

threatens the very survival of Priests for Life as an effective association of advocates for the culture of life. Consequently, the mandate violates Plaintiffs' rights to freedom of speech and expressive association protected by the First Amendment.

IV. The Contraceptive Services Mandate Violates the Equal Protection Guarantee of the Fifth Amendment and the Establishment Clause.

Contrary to Defendants' assertion, the contraceptive services mandate and associated regulations *do* "discriminate among religions," in violation of the equal protection guarantee of the Fifth Amendment and the Establishment Clause.[13] (*See* Defs.' Mem. at 40).

Indeed, such discrimination is "presumptively invidious" and subject to strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (stating that for purposes of the equal protection guarantee, the Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right')"; *see generally Skinner v. Okla.*, 316 U.S. 535, 541 (1942) ("The guarantee of equal protection of the laws is a pledge of the protection of equal laws."). Accordingly, discrimination on the account of religion or among religions or that impinges upon the exercise of a fundamental right, such as the free exercise of religion—invidious classifications under the law—is subject to strict scrutiny.

Here, the government is deciding which religious groups are sufficiently "religious" to grant an exemption from a regulation that it knows burdens religious beliefs. Consequently,

[13] The ACLU's "gender equality" argument fares no better. (ACLU Br. at 12-19). In essence, the ACLU is arguing that the "right" of a woman to avoid pregnancy by having access to government-mandated contraceptive services deserves greater constitutional protection than the right to free exercise of religion. But what is further alarming about this flawed position is that the ACLU is not arguing that it is the *government* preventing women from having access to contraception (thus triggering constitutional concerns as a result of state action), but rather it is arguing that the *government* should be able *to force private organizations* to provide the access. Thus, the ACLU's argument turns the Bill of Rights on its head by using it as a government sword against private citizens rather than what it is intended to be: a private citizen's shield against the abusive power of government.

Defendants grant an exemption from the contraceptive services mandate for organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. at 39874. And these "exempt" organizations are essentially churches and religious orders—a narrow class of nonprofit religious organizations. *See* I.R.C. §§ 6033(a)(3)(A)(i) & (iii). And while Priests for Life is a nonprofit religious organization—one that *strongly* opposes contraceptive services on religious grounds—it does not qualify for this exemption.

Defendants rejected a broader exemption that would have included religious organization such as Priests for Life because Defendants claim that such organizations "do not primarily employ employees who share the religious tenets of the organization" and are thus "more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." Consequently, according to Defendants, "[i]ncluding 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).

Indeed, pursuant to the challenged regulations, the Anglican Church, for example, which does not profess a religious objection to the use of contraceptives, would *automatically* qualify for the "religious employer" exemption from the contraceptive services mandate without any authorizing "self-certification." Yet, Priests for Life, a religious organization that follows the precepts of the Catholic Church and thus strongly opposes the use of contraceptive services, does not qualify. Not only does the government not have a compelling reason for this disparate and thus discriminatory treatment amongst religions, such discrimination does not pass rational basis review under the Equal Protection Clause.

Turning now to the Establishment Clause claim, Defendants' objection is predicated upon the misapprehension that this constitutional provision only applies when the government discriminates amongst religious "denominations" and that the challenged mandate and accompanying regulations do not in fact discriminate amongst such "religions." (Defs.' Mem. at 38 [emphasizing "denomination" and claiming that the challenged "regulations do not grant any denominational preference or otherwise discriminate among religions"]).

As the Court noted in *Epperson v. Ark.*, 393 U.S. 97, 104 (1968), "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." Indeed, even *subtle departures* from this neutrality are prohibited. *See, e.g., Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534. Consequently, laws that discriminate—even if the discrimination is "subtle"—between religions, such as the challenged mandate (as demonstrated above and further below), do run afoul of the First Amendment (as well as the equal protection guarantee of the Fifth Amendment, as argued previously).

Indeed, in *Larson v. Valente*, 456 U.S. 228 (1982), a case in which the plaintiff challenged the constitutionality of a state charitable contributions statute which exempted from its registration and reporting requirements only those religious organizations that received more than fifty percent of their total contributions from members or affiliated organizations, the Court found that the statute violated the Establishment Clause and rejected similar arguments presented here by Defendants, stating:

> Appellants urge that § 309.515, subd. 1(b), does not grant such preferences, but is merely "a law based upon secular criteria which may not identically affect all religious organizations." . . . They accordingly cite *McGowan v. Maryland*, 366 U.S. 420 (1961), and cases following *Everson v. Board of Education*, 330 U.S. 1 (1947), for the proposition that a statute's "disparate impact among religious organizations is constitutionally permissible when such distinctions result from application of secular criteria." . . . We reject the argument. Section 309.515, subd. 1(b), is not simply a facially neutral statute, the provisions of which happen

> to have a "disparate impact" upon different religious organizations. On the contrary, § 309.515, subd. 1(b), makes explicit and deliberate distinctions between different religious organizations. We agree with the Court of Appeals' observation that the provision effectively distinguishes between "well-established churches" that have "achieved strong but not total financial support from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members," on the other hand. . . . This fundamental difference between § 309.515, subd. 1(b), and the statutes involved in the "disparate impact" cases cited by appellants renders those cases wholly inapplicable here.

Id. at 247 n.23.

Here, Defendants expressly give preference to and thus exempt from the contraceptive services mandate one class of "religious employers," but yet refuse to extend this very same exemption to another class of "religious employers," such as Priests for Life. Consequently, like the statute held unconstitutional in *Larson*, the challenged mandate "makes explicit and deliberate distinctions between different *religious* organizations" in violation of the Establishment Clause.

In addition to the mandate's unconstitutional disparate impact on religious organizations, the mandate violates the Establishment Clause for yet another reason: it conveys an official government message of disapproval of Plaintiffs' "religious choices." As the Supreme Court admonished, "*Every government practice* must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (emphasis added). And the Court "has made clear that, when evaluating the effect of government conduct under the Establishment Clause, [the court] must ascertain whether 'the challenged governmental action is *sufficiently likely to be perceived*'" as an endorsement or disapproval of an individual's "religious choices." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (citations omitted) (emphasis added); *Am. Atheists, Inc. v.*

Duncan, 637 F.3d 1095, 1119 (10th Cir. 2010) ("[A]ctions which have the effect of communicating governmental endorsement or disapproval, whether intentionally or unintentionally, make religion relevant, in reality or public perception, to status in the political community.") (internal punctuation, quotation, and citations omitted).

Here, through the contraceptive services mandate and its implementing regulations, Defendants have conveyed the unmistakable message that the government opposes the religious beliefs of certain organizations (such as Priests for Life) which object on religious grounds to providing their employees with coverage for contraceptive services (and thus object to the government's expressed objective of providing greater access to and use of contraceptive services). As Defendants acknowledge in their own regulations, the government refuses to provide an exemption to the contraceptive services mandate for organizations such as Priests for Life because doing so "*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). Consequently, the government, as a matter of federal law, is *opposing* the religious beliefs of organizations such as Priests for Life, thereby sending a clear message to Priests for Life and to those who associate with Priests for Life, such as Father Pavone and Plaintiffs King and Morana, that the federal government disapproves of their "religious choices" in violation of the Establishment Clause.

V. Irreparable Harm and the Public Interest.

The parties do not dispute that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); (*see* Defs.' Mem. at 41). And Defendants cannot reasonably dispute "that

irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA." *Jolly*, 76 F.3d at 482; *Hobby Lobby*, 2013 U.S. App. LEXIS 13316, at *79 ("[E]stablishing a likely RFRA violation satisfies the irreparable harm factor."); (*see* Defs.' Mem. at 41 ["assuming arguendo that the same rule applies to a statutory claim under RFRA"]).

Here, absent injunctive relief and as argued above and in Plaintiffs' prior filings, the contraceptive services mandate will compel Plaintiffs to violate their sincerely held religious beliefs by promoting, facilitating, and cooperating with the government's immoral objective "*to increase access to and utilization of*" contraceptive services, in violation of the United States Constitution and RFRA. This mandate will apply in full force to Plaintiffs on January 1, 2014. Consequently, Plaintiffs have established irreparable harm sufficient to warrant injunctive relief as a matter of law.

The public interest inquiry turns in large part on whether Plaintiffs' constitutional and statutory rights are violated by the challenged mandate. As courts have noted, "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("[T]the Court notes that it is in the public interest to uphold a constitutionally guaranteed right.").

Thus, because the contraceptive services mandate violates Plaintiffs' fundamental constitutional and statutory rights, it is in the public interest to enter judgment in Plaintiffs' favor and grant the requested injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that the court grant their motion and enter judgment in Plaintiffs' favor, declaring the contraceptive services mandate unconstitutional and enjoining its enforcement.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 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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