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' SUPPLEMENTAL MEMORANDUM

Pursuant to the court's minute order of December 12, 2013, Plaintiffs hereby file this memorandum in response to Defendants' Supplemental Memorandum [Doc. No. 31] regarding the consequences of the challenged contraceptive services mandate in light of the fact that because Plaintiffs *will not, and cannot*, pursuant to their sincerely held religious beliefs, endorse, facilitate, support, or enable in any way the government's objective of "increas[ing] access to and utilization of" contraceptive services, including by *affirmatively* authorizing coverage of such services for its healthcare plan participants and beneficiaries via the "self-certification" requirement of the so-called accommodation,[1] the government will nonetheless force Priests for

[1] As Plaintiff Father Pavone testified 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 [Doc. No. 19-2]) (emphasis added).

Life to pay for such services via its insurer,[2] thereby placing Plaintiffs in the same position as the plaintiffs in *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),[3] except that there is no dispute that Priests for Life *does* have free exercise rights. Thus, *Gilardi* compels *a fortiori* a ruling in Plaintiffs' favor.

Indeed, as a direct consequence of this provision of the challenged mandate, Plaintiffs will continue to face a Hobson's choice: Plaintiffs can either violate their sincerely held religious beliefs by enabling coverage for contraceptive services via *payment*[4] for such coverage or be forced out of the healthcare market, which will directly harm the organization and the individual Plaintiffs. (*See, e.g.*, Pls.' SMF at ¶¶ 94-97 [Doc. No. 8-1]).

In their supplemental memorandum, Defendants repeat their factually and legally incorrect "de minimis" argument: that complying with the so-called accommodation does not violate the teachings of the Catholic Church and thus the religious beliefs of Plaintiffs. (*See* Defs.' Mem. at 1 [stating that "Priests for Life has the option to avail itself of an accommodation" and incorrectly concluding that "this option does not impose a substantial

[2] According to Defendants and in effect, should Plaintiffs fail to execute the self-certification and thus refuse to accept what Defendants term an "accommodation" to Plaintiffs' religious objection to the challenged mandate, the mandate will nonetheless force Priests for Life to provide the objectionable coverage in its plan via its insurer. (*See* Defs.' Mem. at 1-2 [citing 42 U.S.C. § 300gg-13]). Apparently, the penalties imposed upon the insurer are in addition to the penalties that Priests for Life would be subject to for failing to comply with the mandate. *See* 26 U.S.C. § 4980D(e).

[3] As of the drafting of this memorandum, page references to the Federal Reporter for *Gilardi* and *Korte* were not available on Lexis. Consequently, Plaintiffs will continue to use the Lexis citations.

[4] Contraceptive services are immoral *regardless of their cost*—an inconvenient fact that the government consistently ignores. (*See* Pls.' SMF at ¶ 90 ["Plaintiffs object to the federal government forcing Priests for Life to purchase a health care plan that provides its employees with access to contraception, sterilization, and abortifacients, all of which are prohibited by their religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Plaintiffs. Contraception, sterilization, and abortifacients are immoral regardless of their cost." [Doc. No. 8-1]). Consequently, the substantial burden imposed upon Plaintiffs' religious exercise *is precisely the same* whether Defendants are forcing Plaintiffs to authorize, enable, endorse, and facilitate "access to and utilization of" contraceptive services for Priests for Life's plan participants and beneficiaries via signing a "self-certification" or via payment to Priests for Life's insurance carrier.

burden on Priests for Life's religious exercise"]). By doing so, Defendants seek to reduce (and thus impermissibly modify) Plaintiffs' religious objection to the mandate (and, therefore, its theological basis) to simply an objection to the requirement "to contract, arrange, pay, or refer for contraceptive coverage." Having done so, *Defendants then assert that the so-called "accommodation" frees Plaintiffs of any moral complicity*. But Defendants are wrong, and they are wrong fundamentally.[5] Indeed, Defendants' argument purports to resolve the religious question underlying this case: does authorizing coverage for contraceptive services for Priests for Life's plan participants and beneficiaries via the "accommodation" scheme impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church and, concomitantly, the moral consciences of Plaintiffs? No civil authority can decide that question. And *Plaintiffs' answer* is unequivocal: such cooperation violates their religious beliefs.[6] (*See e.g.*, Pls.' SMF at ¶ 89 ["Plaintiffs are morally prohibited based on their sincerely held religious convictions from cooperating, directly or indirectly, with evil."] [Doc. No. 8-1]); *compare Kaemmerling v. Lappin*, 553 F.3d 669, 679-80 (D.C. Cir. 2001) (finding no RFRA violation where the plaintiff did "not allege that his religion requires him *not* to cooperate with collection

[5] The government presented a similar argument in *Gilardi*, claiming to know better than the plaintiffs what their religion required of them. The D.C. Circuit properly rejected the government's argument, as this court must do so here. *See Gilardi*, 2013 U.S. App. LEXIS 22256, at *24-*27 (rejecting the "government's foundational premise"). In short, the government was wrong then, and it is wrong now.

[6] In addition to the objective Catholic Church teachings on this matter which are binding on the consciences of the faithful, including Plaintiffs, and which are violated by the challenged mandate and its so-called accommodation, there are objective consequences (aside from the dire consequences associated with committing a gravely sinful act) that would follow for Priests for Life if it were to "cooperate with evil" as Defendants urge here. (*See, e.g.*, Pls.' SMF at ¶ 100 ["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 runs counter to Priest for Life's mission, goals, and message—the very basis for the donation in the first instance."]). In sum, the substantial burden caused by the contraceptive services mandate, including its so-called "accommodation," is not merely a "say so," it is a fact.

of a fluid or tissue sample"; therefore, he was *not* "put to a choice . . . between criminal sanctions and personally violating his own religious beliefs") (emphasis added).

The judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether Plaintiffs' understanding of their faith is mistaken. The question for this court is not whether compliance with the challenged mandate and its so-called "accommodation" can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for Plaintiffs. And Plaintiffs have concluded that their legal and religious obligations are incompatible: the contraception mandate, including its so-called "accommodation," forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, as the D.C. Circuit recently acknowledged in *Gilardi*. Indeed, the court flatly rejected the argument Defendants present here:

> 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*." . . . 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.

Gilardi, 2013 U.S. App. LEXIS 22256, at *27; *see also Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 U.S. App. LEXIS 22748, at *81-*82 (7th Cir. Nov. 8, 2013) ("[T]he judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken. . . . The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood."). Thus, the

substantial burden exists in this case not simply because "plaintiffs say so," as Defendants claim. The substantial burden exists because, *as the D.C. Circuit said*, the government is forcing Plaintiffs to do what their religion tells them they must not do and then giving them "a Hobson's choice." In short, Defendants claim that Plaintiffs have three options—but every "option" forces Plaintiffs to either violate their religious beliefs or be subjected to substantial harm (crippling penalties or being forced to drop health insurance coverage altogether) (*i.e.*, a "Hobson's choice").[7] Thus, contrary to Defendants' view of Catholic Church teaching, there are no available options for complying with this law that do not substantially burden Plaintiffs' religious exercise. *See Zubik v. Sebelius*, Nos. 13cv1459 & 13cv0303, 2013 U.S. Dist. LEXIS 165922, at *88 (W.D. Pa. Nov. 21, 2013) (concluding "that the religious employer 'accommodation' places a substantial burden on Plaintiffs' right to freely exercise their religion").

Respectfully submitted,

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[7] Indeed, the government's entire argument for the Affordable Care Act is premised upon the importance of healthcare coverage. Thus, Defendants can hardly be in a position to argue that forcing Priests for Life to drop its coverage because of the challenged mandate is not a substantial burden.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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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