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 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs Priests for Life, Father Frank Pavone, Alveda King, and Janet Morana (collectively referred to as "Plaintiffs") hereby move the court for the entry of a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure to enjoin the enforcement of the contraceptive services mandate of the Patient Protection and Affordable Care Act, particularly as applied to Plaintiffs.

As set forth more fully in Plaintiffs' memorandum of points and authorities in support of this motion, the contraceptive services mandate violates the First and Fifth Amendments to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"). Indeed, Defendants' stated purpose for the contraceptive services mandate—to increase the "use of contraceptive services"—directly contradicts the Gospel of Life that is professed by Plaintiffs as a core religious belief that cannot be violated directly *or* indirectly. In short, Plaintiffs' sincerely held religious beliefs prohibit them from providing *any* support for the use of contraceptive services—the very services mandated by Defendants as a matter of federal law. Consequently, the contraceptive services mandate places a substantial burden on Plaintiffs' sincerely held

religious beliefs and the government does not have a compelling reason for doing so in violation of the United States Constitution and RFRA.

The contraceptive services mandate will apply in full force to Plaintiffs on January 1, 2014. As a result, and as set forth more fully in the accompanying memorandum, Plaintiffs have and will continue to suffer irreparable harm, warranting the requested injunction. *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.").

Pursuant to Local Rule 7(m), counsel for the parties discussed this motion. Defendants' counsel stated that the government opposes it and that the government intends to file a response that will ask the court to dismiss the case on its merits.

WHEREFORE, Plaintiffs hereby request that the court grant their motion and issue the requested injunction.

Respectfully submitted,

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PRIESTS FOR LIFE, *et al.*, Plaintiffs, -v- DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*., Defendants.	Case No. 1:13-cv-01261-EGS

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Priests for Life, an international, Catholic organization; Father Frank Pavone, the National Director of Priests for Life; Alveda King, the niece of civil rights leader Martin Luther King, Jr. and the Pastoral Associate and Director of African-American Outreach for Priests for Life; and Janet Morana, the Executive Director of Priests for Life (collectively referred to as "Plaintiffs"), challenge the implementing regulations 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) (hereinafter "Affordable Care Act" or "Act"), which require certain employers, including Priests for Life, to provide insurance plans that include coverage for, or access to, contraception, sterilization, abortifacients, and related education and counseling (hereinafter also referred to as "contraceptive services mandate"). The contraceptive services mandate compels Plaintiffs to promote, facilitate, and cooperate in the government's immoral objective to increase the use of contraceptive services in direct violation of Plaintiffs' sincerely held religious beliefs.

As set forth below, this mandate violates the United States Constitution and the Religious Freedom Restoration Act ("RFRA"). Consequently, Plaintiffs are entitled to an order immediately enjoining its enforcement.[1] *See* Fed. R. Civ. P. 65.

[1] The vast majority of courts that have reviewed requests for preliminary injunctions in the for-profit cases challenging the contraceptive services mandate have granted the injunctions. *See, e.g., Annex Med., Inc. v. Sebelius*, No. 13-118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (same); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same); *Hobby Lobby Stores, Inc. v. Sebelius*, NO. CIV-12-1000-HE, 2013 U.S. Dist. LEXIS 107248 (W.D. Okla. July 19, 2013) (granting preliminary injunction); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (same); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (same); *Monaghan v. Sebelius*, No.

STATEMENT OF FACTS

I. The Contraceptive Services Mandate.

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."[2] 42 U.S.C. § 300gg-13(a)(4) (emphasis added).

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

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12-15488, 2013 U.S. Dist. LEXIS 35144 (E.D. Mich. Mar. 14, 2013) (same); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (same), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012); *see also Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order). For many of the same reasons, the court should grant the requested injunction in this case, which involves a challenge to the contraceptive services mandate on behalf of a nonprofit, religious organization that does not qualify for any exemption.

[2] The contraceptive services mandate operates by virtue of the Affordable Care Act. However, under the Act, there are exemptions from the insurance requirement for certain religions, *see* 26 U.S.C. § 5000A(d)(2)(a)(i) & (ii) (providing that the mandate to purchase insurance does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds), and for certain individuals, *see* 26 U.S.C. § 5000A(d)(3) & (4) (providing that the mandate to purchase insurance does not apply to "[i]ndividuals not lawfully present" and "[i]ncarcerated individuals"). Moreover, grandfathered health care plans are exempt from the mandate. *See* 42 U.S.C. § 18011 (grandfathering of existing health care plans). And Defendants created a regulatory exemption to the mandate for a narrow category of religions organizations. 78 Fed. Reg. 39870, 39874 (July 2, 2013). None of these exemptions apply to Priests for Life. (*See* Fr. Pavone Decl. at ¶ 3 at Ex. 1). Consequently, as argued further in the text above, the contraceptive services mandate is not generally applicable because Congress and Defendants permit exemptions from the insurance requirements for some individuals and organizations, but not others. *See generally Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 U.S. App. LEXIS 13316, at *70 (10th Cir. June 27, 2013) (finding that "the contraceptive-coverage requirement presently does not apply to tens of millions of people").

individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services." 75 Fed. Reg. 41726 (July 19, 2010). Among other things, the interim final regulations required health insurers to cover "preventive care" for women "as provided for in guidelines supported by the Health Resources and Services Administration." 75 Fed. Reg. at 41759.

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 "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." (*See* IOM, Clinical Preventive Services for Women: Closing the Gaps (2011)). FDA approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the "morning after pill"), and ulipristal (also known as "ella" or the "week after pill"). Plan B and ella, as well as certain intrauterine devices ("IUD"), can prevent the implantation of a human embryo in the wall of the uterus and can thus cause the death of an embryo, thereby operating as abortifacients. (*See,e,g*, Fr. Pavone Decl. at ¶ 16, Ex. A [FDA Birth Control Guide], at Ex. 1).

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." Among other things, HRSA's Guidelines include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (*See* http://www.hrsa.gov/womensguidelines).

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 (Aug. 3, 2011); 45 C.F.R. § 147.130.

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."[3] 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (emphasis added).

Despite this announcement,[4] Defendants rejected considering a "broader exemption" from the challenged mandate because they believe that such an exemption "would lead to more

[3] For purposes of this *earlier* version of the "discretionary" exemption, a "religious employer is one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii)." 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130. Priests for Life did not qualify for this exemption. (*See* Fr. Pavone Decl. at ¶ 3 at Ex. 1).

[4] Defendants also introduced a "temporary enforcement safe harbor" provision, which is a self-

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). Thus, as stated by Defendants, the ultimate goal of the 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." *Id*.

II. The Revised Mandate for Religious Organizations.

On June 28, 2013, the Obama administration announced that it had issued final rules on contraceptive coverage and religious organizations.[5] These final rules were published in the Federal Register on July 2, 2013, and became effective on August 1, 2013. 78 Fed. Reg. 39870 (July 2, 2013).

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imposed stay by the government that is not binding as a matter of law. *See* 77 Fed. Reg. 16501, 16504 (Mar. 21, 2012). The "safe harbor" was revised on August 15, 2012, *see* HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012), and again on July 2, 2013, as part of the recently announced rules for non-exempt religious organizations, *see* 78 Fed. Reg. 39870, 39872 (July 2, 2013). Pursuant to the recent revision, the "safe harbor" was extended to encompass plan years beginning on or after August 1, 2013, and before January 1, 2014. 78 Fed. Reg. at 39872. Consequently, Priests for Life will be subject to the mandate when its policy renews on January 1, 2014. (Fr. Pavone Decl. at ¶¶ 13, 36 at Ex. 1).

[5] *See* http://www.hhs.gov/news/press/2013pres/06/20130628a.html (last visited on Sept. 11, 2013).

With the exception of the amendments to the religious employer exemption (described below), which apply to group health plans and health insurance issuers for plan years beginning on or after August 1, 2012, 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. Accordingly, Defendants extended the "temporary enforcement safe harbor" to encompass plan years beginning on or after August 1, 2013, and *before* January 1, 2014. 78 Fed. Reg. at 39872.

Pursuant to these final regulations, the definition of "religious employer" for purposes of the *only exemption* from the contraceptive services mandate for organizations that object to it on religious grounds includes only those organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. at 39874. These organizations are essentially churches and religious orders—a very narrow class of nonprofit organizations. Priests for Life, while a nonprofit religious organization, does not qualify for this narrow exemption. (Fr. Pavone Decl. at ¶ 3 at Ex. 1).

The final rules also provide a so-called "accommodation" for certain "eligible organizations." 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.

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.

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*. 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.

Consequently, should Priests for Life deliver a "self-certification" to its insurer, this would trigger the insurer's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39896. Additionally, Priests for Life would have to identify its employees to its insurer for the distinct purpose of enabling and facilitating the government's objective of promoting the use of contraceptive services (and related education and counseling) pursuant to the mandate. However, based on its sincerely held

religious beliefs, Priests for Life refuses to participate in this scheme to advance and facilitate the government's immoral objectives. (*See* Fr. Pavone Decl. at ¶¶ 27-29 at Ex. 1).

The insurer's obligation to make direct payments for contraceptive services pursuant to the 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. Consequently, Priests for Life will be required to coordinate with its insurer when adding or removing employees and beneficiaries from its health care plan to ensure that these individuals receive coverage for contraceptive services under the challenged mandate. (*See, e.g.*, Fr. Pavone Decl. at ¶¶ 27-29 at Ex. 1).

For each plan year to which the "accommodation" applies, an issuer required to provide payments for contraceptive services must provide to Priests for Life's plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify, *inter alia*, that the issuer provides coverage for contraceptive services, and it must provide contact information for questions and complaints. 78 Fed. Reg. at 39897. This provision, therefore, requires Priests for Life to directly coordinate with its insurer to further the government's objective of promoting the use of contraceptive services required by the mandate. (*See* Fr. Pavone Decl. at ¶ 28 [objecting to providing notice or information] at Ex. 1).

Thus, even under the "accommodation," Priests for Life will play a central and indispensable role in facilitating the government's objective of promoting the use of contraceptive services required by the mandate, contrary to Plaintiffs' sincerely held religious

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

Consequently, because Priests for Life provides its employees with a health care plan, the government mandate forces Priests for Life to provide the means and mechanism by which contraception, sterilization, and abortifacients (and related education and counseling) are provided to its employees (and beneficiaries), which is unacceptable to Plaintiffs because it violates their sincerely held religious beliefs. (*See* Fr. Pavone Decl. at ¶¶ 7-10, 12, 26-29, 40, 41 at Ex. 1; King Decl. at ¶¶ 8, 19-22 at Ex. 2; Morana Decl. at ¶¶ 7, 20-23 at Ex. 3).

There is no logical, moral, or legally relevant distinction between the extant contraceptive services mandate, with its limited religious employer exemption, and the "accommodation" for certain "eligible organizations." Employers who offer health insurance do not pay for individual benefits and products as they are provided. Rather, they pay a premium for a policy that gives their employees access to covered benefits and products when they need them.[6] Under the "accommodation," all non-exempted health care plans must include contraceptive services among their covered benefits. Consequently, religious employers, such as Priests for Life, are

[6] Defendants claim that providing payments for contraceptive services under the challenged mandate will *eventually* be "cost neutral for issuers." 78 Fed. Reg. at 39877. However, even if payments *over time* become cost neutral, it is undisputed that there will be up-front costs for making the payments. *See, e.g.*, 78 Fed. Reg. at 39877-78 (discussing ways in which insurers can cover such costs). Moreover, if cost savings arise that make it cheaper for an employer to insure an employee, one would expect those savings to be passed on to the employer by way of a reduced premium. However, Defendants suggest that in order to maintain this "cost neutrality," the insurers should retain such savings by "set[ting] the premium for an eligible organization's large group policy as if no payments for contraceptive services had been provided to plan participants." 78 Fed. Reg. at 39877. This encourages insurers to artificially inflate the eligible organization's premiums. Consequently, under this methodology, the eligible organization will ultimately bear the cost of the required payments for the mandated contraceptive services.

still paying an insurer to provide their employees (and beneficiaries) access to a product (*i.e.*, contraceptives, sterilization, and abortifacients) that violates their religious convictions.[7]

Therefore, by refusing to cooperate with, and thus refusing to facilitate, Defendants' contraceptive services scheme and objective and by further refusing to provide coverage in its health care plan for contraceptive services and related education and counseling required by the mandate, all based on its sincerely held religious beliefs, Priests for Life will be subject to crippling fines of $100 per employee per day, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d. Consequently, the contraceptive services mandate threatens the very existence of Priests for Life as an effective, pro-life organization (and association of pro-life supporters, including Father Pavone and Plaintiffs King and Morana) that advocates for the culture of life. (*See* Fr. Pavone Decl. at ¶¶ 27-29 at Ex. 1; King Decl. at ¶12 at Ex. 2; Morana Decl. at ¶ 11 at Ex. 3).

III. Plaintiffs' Sincerely Held Religious Beliefs.

Priests for Life is a non-profit corporation. It 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. The Gospel of Life, which is an expression of the Catholic Church's position and central teaching regarding the value and inviolability of human life, affirms and promotes the culture of life and actively opposes and rejects the culture of death. Contraception, sterilization, abortifacients, and abortion are all instruments of the culture of death, and their use

[7] Insurance companies do not donate products and services to covered employees. Drug makers will still charge insurers for birth control pills, IUD's, and other contraceptive devices. Doctors will still bill insurers for reproductive treatment. The reality, as with all mandated benefits, is that these costs will be borne eventually via higher premiums. Insurers may amortize the cost differently over time, but eventually prices will find equilibrium. Thus, Priests for Life will still pay for contraceptive services, including abortifacients, even if it is nominally carried by a third-party corporation—its health insurance provider.

can never be approved, endorsed, facilitated, promoted, or supported in any way. (Fr. Pavone Decl. at ¶¶ 3, 6-10, 14-16, 18, 26-37 at Ex. 1; King Decl. at ¶ 5 at Ex. 2; Morana Decl. at ¶ 5 at Ex. 3).

Father Pavone is the National Director for Priests for Life. In that capacity and through Priests for Life and those who associate with Priests for Life for the purpose of advancing and promoting its religious mission, Father Pavone engages in expressive activity to spread the Gospel of Life. This activity is a religious exercise for Father Pavone. (Fr. Pavone Decl. at ¶¶ 2, 14, 17 at Ex. 1).

Father Pavone is the "face" of Priests for Life, and he uses the media of television, radio, and the printed press to spread Priests for Life's message of life. For example, Father Pavone hosts the *Defending Life* television series on the Eternal Word Television Network (EWTN). (Fr. Pavone Decl. at ¶¶ 17, 24, 25 at Ex. 1).

Based on his sincerely held religious beliefs, Father Pavone objects to the government forcing Priests for Life to provide, whether directly or indirectly, any support for, or access to, contraception, sterilization, and abortifacients, and he objects to the government forcing Priests for Life to facilitate, support, and cooperate in the government's immoral objective of promoting the use of contraceptive services. (Fr. Pavone Decl. at ¶¶ 18, 37 at Ex. 1).

Father Pavone is covered under Priests for Life's health care plan. (Fr. Pavone Decl. at ¶ 2 at Ex. 1).

Plaintiff King is a full-time employee of Priests for Life. She is currently the Pastoral Associate and Director of African-American Outreach. Plaintiff King is also a voice for the Silent No More Awareness Campaign, which is the world's largest mobilization of women and men who have lost children to abortion, sharing her testimony of two abortions, God's

forgiveness, and healing. Through Priests for Life and those who associate with Priests for Life for the purpose of advancing and promoting its religious mission, Plaintiff King engages in expressive activity to spread the Gospel of Life. This activity is a religious exercise for Plaintiff King. (King Decl. at ¶¶ 2-4 at Ex. 2).

Plaintiff King uses the media of television, radio, and the printed press to spread Priests for Life's message of life. (King Decl. at ¶¶ 6, 9 at Ex. 2).

Based on her sincerely held religious beliefs, Plaintiff King objects to the government forcing Priests for Life to provide, whether directly or indirectly, any support for, or access to, contraception, sterilization, and abortifacients, and she objects to the government forcing Priests for Life to facilitate, support, and cooperate in the government's immoral objective of promoting the use of contraceptive services. (King Decl. at ¶¶ 5, 8, 10-14, 16-19 at Ex. 2).

Plaintiff King is currently covered under Priests for Life's health care plan, which is an "employer-sponsored" plan under the Affordable Care Act. If Priests for Life were forced out of the health care market, Plaintiff King, as well as many other Priests for Life employees, would be forced to purchase a costly, individual insurance plan as a result of the "individual mandate" provision of the Act. This individual health care plan will necessarily include the immoral contraceptive services coverage because the mandate applies to individual plans. (King Decl. at ¶ 3 at Ex. 2).

Plaintiff Janet Morana is a full-time employee of Priests for Life. She is currently the Executive Director, and she is also the Co-Founder of the Silent No More Awareness Campaign. Through Priests for Life and those who associate with Priests for Life for the purpose of advancing and promoting its religious mission, Plaintiff Morana engages in expressive activity to

spread the Gospel of Life. This activity is a religious exercise for Plaintiff Morana. (Morana Decl. at ¶¶ 2, 4, 5 at Ex. 3).

Plaintiff Morana uses the media of television, radio, and the printed press to spread Priests for Life's message of life. She is featured on Father Pavone's *Defending Life* television series and is the co-host of the *The Catholic View for Women*, also seen on EWTN. Plaintiff Morana is a weekly guest on EWTN Global Catholic Radio with Teresa Tomeo and numerous other media outlets. (Morana Decl. at ¶¶ 6, 8 at Ex. 3).

Based on her sincerely held religious beliefs, Plaintiff Morana objects to the government forcing Priests for Life to provide, whether directly or indirectly, any support for, or access to, contraception, sterilization, and abortifacients, and she objects to the government forcing Priests for Life to facilitate, support, and cooperate in the government's immoral objective of promoting the use of contraceptive services. (Morana Decl. at ¶¶ 7, 9-13, 17-23 at Ex. 3).

Plaintiff Morana is covered under Priests for Life's health care plan. If Priests for Life were forced out of the health care market, Plaintiff Morana would be forced to purchase a costly, individual insurance plan as a result of the "individual mandate" provision of the Act. This individual health care plan will necessarily include the immoral contraceptive services coverage because the mandate applies to individual plans. (Morana Decl. at ¶ 3 at Ex. 3).

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

both of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His Will." Therefore, Plaintiffs believe and teach that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception and sterilization—is a grave sin. (*See* Fr. Pavone Decl. at ¶ 30 at Ex. 1; King Decl. at ¶ 13 at Ex. 2; Morana Decl. at ¶ 12 at Ex. 3).

Plaintiffs believe, as Pope Paul VI prophetically stated in *Humanae Vitae*, that "man, growing used to the employment of anticonceptive practices, may finally lose respect for the woman and, no longer caring for her physical and psychological equilibrium, may come to the point of considering her as a mere instrument of selfish enjoyment, and no longer as his respected and beloved companion." Consequently, Plaintiffs believe that the contraceptive services mandate harms women physically, emotionally, morally, and spiritually. (*See* Fr. Pavone Decl. at ¶ 31 at Ex. 1; King Decl. at ¶ 14 at Ex. 2; Morana Decl. at ¶ 13 at Ex. 3). Indeed, Plaintiffs King and Morana have firsthand experience regarding the harmful effects of contraception. (*See* King Decl. at ¶ 15 at Ex. 2; Morana Decl. at ¶14-16 at Ex. 3).

Additionally, Plaintiff King, who is the niece of civil rights leader Martin Luther King, Jr., is someone who has witnessed up close the civil rights movement in this country. Accordingly, she firmly believes that the contraceptive services mandate is an affront to civil rights. As noted by Plaintiff King, efforts to control the population always target minority and lower-income groups. Consequently, there are racist and eugenic roots to policies and programs that promote contraceptive services, such as the federal government's mandate at issue here. (*See* King Decl. at ¶ 7 at Ex. 2).

Plaintiffs also hold and actively profess religious beliefs that include traditional Christian teaching on the sanctity of life. They believe and teach that each human being bears the image and likeness of God, and therefore all human life is sacred and precious from the moment of conception. Consequently, Plaintiffs believe and teach that abortion ends a human life and is a grave sin. (*See* Fr. Pavone Decl. at ¶ 32 at Ex. 1; King Decl. at ¶ 16 at Ex. 2; Morana Decl. at ¶ 17 at Ex. 3).

Further, Plaintiffs subscribe to authoritative Catholic Church teaching about the proper nature and aims of healthcare and medical treatment. For example, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae,* that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." (*See* Fr. Pavone Decl. at ¶ 33 at Ex. 1; King Decl. at ¶ 17 at Ex. 2; Morana Decl. at ¶ 18 at Ex. 3).

Based on the teaching of the Catholic Church, and their own sincerely held beliefs, Plaintiffs do not believe that contraception, sterilization, or abortion are properly understood to constitute medicine, healthcare, or a means of providing for the well-being of persons. Indeed, Plaintiffs believe these procedures involve gravely immoral practices. (Fr. Pavone Decl. at ¶ 34 at Ex. 1; King Decl. at ¶ 18 at Ex. 2; Morana Decl. at ¶ 19 at Ex. 3).

Plaintiffs are morally prohibited based on their sincerely held religious convictions from cooperating, directly or indirectly, with evil. Accordingly, 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. And 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. Moreover, Plaintiffs object to being forced by the government to facilitate, support, and cooperate in its immoral objective of promoting the use of contraceptive services—an objective that is directly at odds with the mission and purpose of Priests for Life and Plaintiffs' sincerely held religious beliefs. (*See* Fr. Pavone Decl. at ¶ 26-29, 37 at Ex. 1; King Decl. at ¶ 19 at Ex. 2; Morana Decl. at ¶ 20 at Ex. 3).

Priests for Life's health care policy must be renewed by January 1, 2014, and at that time it will be subject to the contraceptive services mandate, which will then force Plaintiffs to support and provide access to coverage for contraception, sterilization, and abortifacients (as well as related education and counseling) and to further facilitate, support, and cooperate in the government's immoral objective of promoting the use of contraceptive services in violation of its sincerely held religious beliefs. Priests for Life can only avoid this consequence by either paying crippling fines or leaving the health care insurance market altogether, both of which threaten the very survival of Priests for Life as an effective, pro-life organization. (Fr. Pavone Decl. at ¶¶ 13, 18, 26-29, 35-42 at Ex. 1; King Decl. at ¶¶ 12, 20-22 at Ex. 2; Morana at ¶¶ 11, 21-23 at Ex. 3).

In sum, Defendants are forcing Priests for Life to either leave the healthcare market or face crippling fines because of its sincerely held religious beliefs, both of which constitute a direct harm in and of themselves and an indirect harm in that the option of leaving the market will put Priests for Life at a competitive disadvantage vis-à-vis employers offering health care plans in the employee marketplace. Additionally, leaving the healthcare market will directly harm Priests for Life's employees, including Plaintiffs King and Morana, since they will no

longer receive health care insurance from their employer and will, therefore, be forced to either purchase a costly individual plan pursuant to the "individual mandate" or pay a penalty.[8] (Fr. Pavone Decl. at ¶¶ 29, 38-42 at Ex. 1). Thus, 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.[9] (Fr. Pavone Decl. at ¶¶ 35-42 at Ex. 1; King Decl. at ¶¶ 21-22 at Ex. 2; Morana at ¶¶ 22-23 at Ex. 3).

ARGUMENT

I. Standard for Issuing a Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs satisfy each of these considerations.

As an initial matter, Congress, through RFRA, intended to bring Free Exercise Clause jurisprudence back to the test established prior to *Emp't Div. v. Smith*, 494 U.S. 872 (1990). *See, e.g.*, 42 U.S.C. § 2000bb (enacting RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to

[8] As noted previously, 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 subject to 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.

[9] 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. As a nonprofit organization, Priests for Life funds its operations almost entirely through tax-deductible donations. 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. (Fr. Pavone Decl. at ¶ 40 at Ex. 1).

guarantee its application in all cases where free exercise of religion is substantially burdened"). Consequently, because Free Exercise Clause jurisprudence informs a claim advanced under RFRA, we turn to that jurisprudence first.

A. The Contraceptive Services Mandate Violates the Free Exercise Clause.

The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. And this right to the free exercise of religion embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id*. at 626. 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). In short, when the government burdens religious beliefs, the Free Exercise Clause is implicated.

1. Plaintiffs' Sincerely Held Religious Beliefs.

"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." *Hernandez v. Comm'r of Internal Revenue Serv.*, 490 U.S. 680, 699 (1989); *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."). Consequently, 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." *United States v.*

Seeger, 380 U.S. 163, 185 (1965); *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)).

Here, there can be no question that Plaintiffs' beliefs regarding contraceptive services and their objections to the contraceptive services mandate are sincerely held, rooted in religion, and thus protected by the First Amendment. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (finding that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause).

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981), the Supreme Court stated that "beliefs rooted in religion are protected by the Free Exercise Clause. . . ." The Court further confirmed that "[c]ourts are not arbiters of scriptural interpretation." *Id*. at 716. Thus, what matters for a free exercise claim is whether the record is clear that the person asserting the claim acted "for religious reasons." *Id.*

As in *Thomas*, the record in this case is undisputed: Plaintiffs' objections to the contraceptive services mandate and the government's concomitant immoral objective of promoting the use of contraceptive services through this mandate are advanced "for religious reasons" and rooted in their sincerely held religious beliefs.

2. The Substantial Burden on Plaintiffs' Religious Beliefs.

In *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), the Court held 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."

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), the Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a factory that produced armaments, claiming that the production of armaments was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. By denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the State imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id*. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a Wisconsin law compelling school attendance beyond eighth grade impermissibly burdened the religious practices of the Amish); *United States v. Lee*, 455 U.S. 252, 256-59 (1982) (demonstrating that the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs and thus conducting an analysis that (1) recognizes the belief, (2) accepts that the government was imposing a burden, and then (3) analyzes the strength of the government's interest for the burden in a case deciding "whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish"); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 U.S. App. LEXIS 13316, at *60-*70 (10th Cir. June 27, 2013) (applying the substantial burden test) (hereinafter "*Hobby Lobby*").

Indeed, in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), the Court stated, "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); *see also Jolly*, 76 F.3d at 477 (forcing the plaintiff to choose between submitting to a screening test for "latent" tuberculosis or adhering to his religious beliefs constitutes a substantial burden on the free exercise of religion).

Similar to *Sherbert*, *Thomas*, and *Yoder*, the government here is coercing Plaintiffs to engage in conduct that violates their sincerely held religious beliefs. Plaintiffs' refusal to participate in the government's contraceptive services scheme and to support the government's objective of promoting the use of contraceptives would subject Priests for Life to crippling fines and penalties of $100 per day for each employee not properly covered, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d. The alternative for Priests for Life would be to drop its health care coverage, which would then harm the organization and its employees, including Plaintiffs King and Morana. Either way, the contraceptive services mandate is presenting Priests for Life with a Hobson's choice that threatens its very existence as an effective, pro-life organization.

In sum, there can be no question that the burden in the form of a federal mandate that coerces behavior contrary to Plaintiffs' sincerely held religious beliefs is a burden prohibited by the Free Exercise Clause. *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.").

3. *Smith* Does Not Preclude Finding a Free Exercise Violation.

In 1990, the Supreme Court decided *Emp't Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court was faced with the issue of whether the Free Exercise Clause could prohibit the application of Oregon drug laws to the ceremonial ingestion of peyote and thus prohibit the State from denying unemployment compensation for work-related misconduct based on the use of this drug. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and *neutral law* of *general applicability* on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879 (quotations and citation omitted) (emphasis added). This was considered by Congress and others to be a departure from the Court's prior precedent. *See, e.g.*, 42 U.S.C. § 2000bb (enacting the RFRA "to restore the compelling interest test"); *but see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363 (3rd Cir. 1999) (Alito, J.) ("The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them.") (citing *Smith*, 494 U.S. at 881-84).

In 1993, the Court again addressed a free exercise claim in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court preliminarily found that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause. The Court ultimately held that the law at issue burdened this religious practice in violation of the First Amendment.

In *Lukumi*, the Court stated that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Id*. at 546. The Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishment for "whoever . . . unnecessarily . . . kills any animal"—a facially neutral

ordinance. *Id*. at 537. Upon rejecting the government's argument that the law was permissible because it was facially neutral, the Court gave the following relevant explanation:

> We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "*forbids subtle departures from neutrality*," . . . and "*covert suppression of particular religious beliefs*." . . . *Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality*. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

Id. at 534 (internal citations omitted).

The Court also stated, "As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 537 (internal quotations and citation omitted).

In short, a law that targets religious conduct or beliefs, even if facially neutral, "is not neutral or not of general application [and] must undergo the most rigorous scrutiny." *See id.* at 546. Moreover, when the government permits exemptions from a regulation, its refusal to extend an exemption for religious reasons must also survive strict scrutiny.

As stated by the Supreme Court:

> To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance '*interests of the highest order*' and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] down' but really means what it says. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation *will survive strict scrutiny only in rare cases*.

Id. at 546 (internal quotations, punctuation, and citations omitted) (emphasis added).

Here, the record shows that the contraceptive services mandate was designed to target employers who refuse to provide contraceptive services to their employees based on the

employers' religious beliefs. 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).

Also, Congress has permitted exemptions from the requirements of the Act, which necessarily include the contraceptive services mandate, for certain religions—notably, not the Catholic religion because it does not oppose health insurance in general—and for certain individuals. *See* 26 U.S.C. § 5000A(d)(2)(a)(i) & (ii) (providing that the mandate to purchase insurance does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(3) & (4) (providing that the mandate to purchase insurance does not apply to "[i]ndividuals not lawfully present" and "[i]ncarcerated individuals"). Moreover, grandfathered health care plans are exempt from the contraceptive services mandate. *See* 42 U.S.C. § 18011 (grandfathering of existing health care plans). And Defendants created a regulatory exemption to the contraceptive services mandate for a narrow category of religions organizations. 78 Fed. Reg. at 39874; *see Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 367 (Alito, J.) (holding that the police department's policy regarding the prohibition on the wearing of beards was unconstitutional under the Free Exercise Clause because the department made exceptions from its policy for secular reasons, such as medical reasons, but refused to exempt officers

whose religious beliefs prohibited them from shaving their beards); *see also Hobby Lobby*, 2013 U.S. App. LEXIS 13316, at *10-*13 (noting exemptions).

Consequently, because the contraceptive services mandate is not a neutral law of general applicability, Defendants' enforcement of the mandate against Plaintiffs must survive strict scrutiny, which it cannot. As noted above, a regulation that burdens religious beliefs and practices, such as the mandate at issue here, "will survive strict scrutiny only in rare cases"—and this is not one of them.

4. Defendants' Burden on Religion Does Not Survive Strict Scrutiny.

Having made the threshold showing of a substantial burden on Plaintiffs' religious beliefs, Defendants must now demonstrate that the application of this burden furthers a compelling state interest and is the least restrictive means of furthering that interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546.

As an initial matter, what is the governmental interest "of the highest order" that is advanced *by forcing Priests for Life* to provide access to contraception for its employees and its plan beneficiaries? Is it really a "compelling interest" of the government to ensure that the employees (and beneficiaries) of Priests for Life have access to free birth control pills or diaphragms? Nonetheless, even accepting, *arguendo*, that the interest is broadly construed as "public health" (or even "gender equality," as the government is prone to argue in cases such as this), *see Hobby Lobby*, 2013 U.S. App. LEXIS 13316, at *70 (discussing the government's asserted interests in "[1] public health and [2] gender equality" and concluding that they are not sufficient to justify the burden on the plaintiffs' religious beliefs caused by the contraceptive services mandate), and that this interest is compelling, the contraceptive services mandate is not

narrowly tailored to advance this interest in that it is both over-inclusive and under-inclusive in relation to the interest it purportedly serves.

The mandate is over-inclusive because the governmental interest could be addressed by stopping far short of forcing Priests for Life, a private religious employer, to provide very broad coverage for contraception services. Indeed, if providing contraception was an "interest of the highest order," the government could set up its own clinics to hand out free diaphragms or birth control pills, or whatever favored contraceptive service it prefers.

The mandate is also under-inclusive in that if providing contraceptive services was such a compelling interest, there would be no reason to exclude "grandfathered" plans from providing such coverage, and there would be no reason to provide any exceptions, including an exception for ***some*** religious organizations, but not others.

In sum, as the Supreme Court concluded in *Lukumi*:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. ***Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices***. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 547 (emphasis added).

Similarly here, the contraceptive services mandate was "enacted contrary to these constitutional principles" and is thus "void." Therefore, Plaintiffs are entitled to an immediate injunction.

B. The Contraceptive Services Mandate Violates RFRA.

Under RFRA, which, as noted previously, was passed in response to *Emp't Div. v. Smith*, 494 U.S. 872 (1990), the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). This general prohibition is not without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). In other words, Congress passed RFRA "to restore the compelling interest test" to neutral laws of general applicability that substantially burden religion. *See* 42 U.S.C. § 2000bb(b).

Under RFRA, "exercise of religion" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4) (referencing 42 U.S.C. § 2000cc-5(7)(A)). As noted above, Plaintiffs' sincerely held religious beliefs at issue in this case are protected by the First Amendment and thus fall within the protections afforded by RFRA. Consequently, the burden now shifts to Defendants to justify under strict scrutiny the burden imposed by the contraceptive services mandate upon Plaintiff's religious beliefs.

Assuming, *arguendo*, that the application of the contraceptive services mandate to Plaintiffs and all other similarly situated persons and organizations affected by the mandate furthers a compelling governmental interest, that argument does not justify a substantial burden *on Plaintiffs' free exercise of religion*. 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). As noted above, any such argument is defeated by the existence of numerous exemptions to the contraceptive services mandate already provided by the government. These exemptions undermine any compelling interest in applying the mandate to Plaintiffs in this case. *See Hobby Lobby*, 2013 U.S. App. LEXIS 13316, at *70 (rejecting the government's asserted interests as "insufficient under *O Centro* because they are broadly formulated interests justifying the general applicability of government mandates" and "because the contraceptive-coverage requirement presently does not apply to tens of millions of people") (internal quotations omitted). Consequently, it is impossible for Defendants to satisfy their burden here. *See also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547 ("[A]law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."). Therefore, Plaintiffs are entitled to an injunction under RFRA.

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

There can be little doubt that Plaintiffs' expressive activities are fully protected by the First Amendment. *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal quotations and citations omitted); *see also Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[Religious expression] is as fully protected under the Free Speech Clause as secular private expression.").

Moreover, "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of

speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). Indeed, "[a]n 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); *see also NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). Therefore, courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—*speech*, assembly, petition for the redress of grievances, and *the exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Roberts*, 468 U.S. at 618 (emphasis added). 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.

Furthermore, it is well established that the government may not compel speech, particularly speech that is contrary to a private citizen's core beliefs. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.").

In *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), for example, the Court stated,

> [T]the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to

> decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

Id. at 714 (internal citations omitted); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a state statute that placed an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized).

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995), the Court upheld the right of a right of a parade organizer to exclude participants from the parade based on "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."

In *Hurley*, the Court acknowledged that

> [s]ince *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say. Although the State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information, outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . .

Id. at 573 (internal citations and quotations omitted). The Court made the further relevant observation:

> Indeed, in *Pacific Gas & Electric Co.* [*v. Pub. Utilites Comm'n of Cal.*, 475 U.S. 1 (1986)], we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." [475 U.S. at 15] (plurality opinion) (citation omitted). The plurality made the further point that if "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, *for the government could require speakers to affirm in one breath that which they deny in the next*." [*Id*. at 16]. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

Hurley, 515 U.S. at 575-76 (emphasis added).

Here, the government is forcing Plaintiffs "to affirm in one breath that which they deny in the next." Indeed, the contraceptive services mandate forces Priests for Life to facilitate, support, and cooperate in the government's immoral objective of promoting the use of contraceptive services contrary to the *very purpose* of Priests for Life and the *very purpose* for which Father Pavone and Plaintiffs King and Morana associate with the organization.

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 contraceptive services contrary to the very message expressed by Father Pavone and Plaintiffs King and Morana on behalf of Priests for Life.

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. Thus, the contraceptive services mandate compels Priests for Life to engage in conduct and speech that is contrary to its sincerely held religious beliefs and contrary to the message that Father Pavone and Plaintiffs King and Morana express on behalf of, and pursuant to, their association with Priests for Life.

And, as noted previously, the contraceptive services mandate forces Priests for Life into a Hobson's choice that *threatens its very survival* as an effective, pro-life organization and association of pro-life advocates.

In sum, the contraceptive services mandate compels speech, it forces Priests for Life to engage in 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.

D. The Contraceptive Services Mandate Violates the Equal Protection Guarantee of the Fifth Amendment.

The Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). Consequently, case law interpreting the Equal Protection Clause of the Fourteenth Amendment is applicable when reviewing an equal protection claim arising under the Fifth Amendment, as in this case.

According to the Court, "The Equal Protection Clause was intended as a restriction on [government] action inconsistent with elemental constitutional premises. Thus [the Court has] treated as presumptively invidious those classifications that *disadvantage* a '*suspect class*,' *or* that *impinge upon the exercise of a 'fundamental right*.'" *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (emphasis added); *see Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (striking down a city ordinance that restricted speech and stating that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities violates the Equal Protection Clause); *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.") (quotations and citation omitted); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that "a classification of persons undertaken for its own

sake" is not permitted by the Equal Protection Clause); *Lawrence v. Tx.*, 539 U.S. 558 (2003) (striking down a law under rational basis review that discriminated on account of sexual preferences).

Consequently, laws that discriminate on the basis of religious beliefs or that impinge upon the exercise of fundamental rights, such as the rights to freedom of speech, expressive association, and the free exercise of religion, violate the "pledge of the protection of equal laws" guaranteed by the Fifth and Fourteenth Amendments. Here, the government's contraceptive services mandate unlawfully discriminates in both respects: it targets for discriminatory treatment certain religious employers, such as Priests for Life, who object to the government's immoral objective of promoting the use of contraceptive services, and it forces Plaintiffs as a matter of federal law to endorse, facilitate, and cooperate in the government's immoral objective in violation of their rights to freedom of speech, expressive association, and the free exercise of religion. Such discriminatory treatment is prohibited by the equal protection guarantee of the Fifth Amendment.

E. The Contraceptive Services Mandate Violates the Establishment Clause.

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). Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (holding that the State's defining of "kosher" as "prepared in accordance with orthodox Hebrew religious

requirements" violated the First Amendment because it suggested a "preference for the views of one branch of Judaism").

The Supreme 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).

As Justice O'Connor explained in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> Endorsement *sends a message* to nonadherents that they are outsiders, not full members of the political community, and an *accompanying message* to adherents that they are insiders, favored members of the political community. Disapproval *sends the opposite message*.

Id. at 688 (O'Connor, J., concurring) (emphasis added). As the Tenth Circuit observed,

> [G]overnments may not make adherence to a religion relevant *in any way* to a person's standing in the political community. And actions 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.

Am. Atheists, Inc. v. Duncan, 637 F.3d 1095, 1119 (10th Cir. 2010) (internal punctuation, quotation, and citations omitted) (emphasis added).

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 contraception and thus object to the government's expressed objective of providing greater access to and use of contraceptive services as a matter of federal law. 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 *condemning* the religious beliefs of organizations such as Priests for Life. Indeed, there can be no dispute that the contraceptive services mandate sends a clear message to organizations such as 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." Such official condemnation and disapproval violate the Establishment Clause.

II. Plaintiffs Will Be Irreparably Harmed without the Injunction.

As the Supreme Court has long held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *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, "[c]ourts have persuasively found 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 (finding irreparable harm based on the plaintiff's substantial likelihood of demonstrating a violation of his right to the free exercise of religion under RFRA); *Hobby Lobby*, 2013 U.S. App. LEXIS 13316, at *79 ("[E]stablishing a likely RFRA violation satisfies the irreparable harm factor.").

Here, absent injunctive relief, the contraceptive services mandate will compel Plaintiffs to promote, facilitate, and cooperate in the government's immoral objective to increase the use of

contraceptive services in direct violation of Plaintiffs' sincerely held religious beliefs. This mandate will apply in full force to Plaintiffs on January 1, 2014. Consequently, as set forth above, Plaintiffs are currently harmed by the mandate, and this harm will continue unless the court grants the requested injunction. *See generally Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011) (finding that present behavior to comply with a future mandate requirement causes a present injury in fact in a case challenging the "individual mandate" provision of the Affordable Care Act). In sum, 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, (Fr. Pavone Decl. at ¶ 42 at Ex. 1; King Declaration at ¶ 22 at Ex. 2; Morana Decl. at ¶ 23 at Ex. 3), thereby causing irreparable harm.

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

In this case, the likelihood of harm to Plaintiffs without the injunction is substantial because the injunction would maintain the *status quo* and protect Plaintiffs from being forced by the federal government to engage in conduct that substantially burdens their fundamental rights. The deprivation of their fundamental rights, even for minimal periods, constitutes irreparable injury. *See* sec. II. B., *supra*.

On the other hand, if Defendants are restrained from enforcing the contraceptive services mandate *against Plaintiffs*, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' legitimate interests. Moreover, the government's creation of numerous exemptions from the contraceptive services mandate undermines any claim *that forcing Plaintiffs to comply* with this mandate will cause the government any harm whatsoever.

IV. The Public Interest Favors Granting the Injunction.

The impact of the injunction on the public interest 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 grant the requested injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that the court grant their motion and enjoin the enforcement of the contraceptive services mandate.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 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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