NO. 13-1092 AND 13-1093

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

LEGATUS; WEINGARTZ SUPPLY COMPANY; AND DANIEL WEINGARTZ, PRESIDENT OF WEINGARTZ SUPPLY COMPANY,
Plaintiffs-Appellees/Cross-Appellant,

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY, UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE ROBERT H. CLELAND
Civil Case No. 2:12-cv-12061

APPELLEES/CROSS-APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellees/Cross-Appellants Legatus, Weingartz Supply Company, and Daniel Weingartz (hereinafter "Plaintiffs") state the following:

None of the Plaintiffs are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this court hear oral argument. This case presents for review important questions of law arising under the Religious Freedom Restoration Act, and the First and Fourteenth Amendments to the United States Constitution.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

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STATEMENT OF JURISDICTION

On May 7, 2012, Plaintiffs filed their initial Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the United States Constitution, the Religious Freedom Restoration Act, and 42 U.S.C. § 1983. (R-1: Compl.). The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On August 15, 2012, Plaintiffs filed a motion for preliminary injunction, (R-13: Pls.' Mot. for Prelim. Inj.), Defendants responded on August 29, 2012, (R-14: Defs.' Opp'n), and Plaintiffs replied on September 6, 2012, (R-19: Pl.'s Rep.).

On October 31, 2012, the court entered its memorandum opinion granting Plaintiffs' motion for preliminary injunction for Plaintiffs Daniel Weingartz and Weingartz Supply Company and denied Plaintiffs' motion for preliminary injunction for Plaintiff Legatus. (R-39: Op.). The order was subsequently entered in favor of Plaintiffs Weingartz Supply Company and Daniel Weingartz. (R-42: Or.).

On January 14, 2013, Defendants filed a timely notice of appeal. (R-47). Plaintiff filed a timely notice of cross-appeal also on January 14, 2013 (R-48), seeking review of the district court's opinion. This Court has jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

PRELIMINARY STATEMENT

It is not surprising that in our country founded by individuals who sought refuge from religious persecution, the Supreme Court has succinctly avowed,

> 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 *or force citizens to confess by word or act their faith therein*.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added). The statement written by Justice Jackson in his majority opinion is considered one of the Court's greatest statements about our fundamental freedoms established by the Bill of Rights. It is against this backdrop, and resting upon this body of jurisprudence built upon deference to the inalienable freedom of religion, that the constitutionality of the H.H.S. Mandate must be decided.

Plaintiffs Legatus, Weingartz Supply Company, and Daniel Weingartz brought this motion for a preliminary injunction to enjoin the unconstitutional and illegal directives of the H.H.S. Mandate. Currently, the Defendants are forcing businesses and organizations which hold sincerely held religious beliefs to violate those beliefs by supplying contraceptive and abortifacient coverage. Such action blatantly disregards religious freedom and the right of conscience, and is nothing short of irreconcilable with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. and the First Amendment.

The burden forced on the Plaintiffs cannot be justified by the Defendants as using the least restrictive means or furthering a compelling interest. The Defendants offer numerous secular and even religious exemptions to the H.H.S. Mandate, but fail to offer the same respect to the Catholic beliefs of the Plaintiffs—showing that Defendants either care so little about those professing religious beliefs that they will not be bothered to address their concerns or that Defendants are blatantly discriminating and disrespecting those holding such religious beliefs. Neither provides the Defendants with a constitutional justification for violating the law. The scheme of exemptions imposed by the Defendants is not neutral nor generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 432-87 (2006).

Defendants' illegal mandate threatens the irreparably harm of the loss of Plaintiffs' constitutional freedoms. Under the H.H.S. Mandate, Plaintiffs are forced to choose between violating their religious beliefs or violating federal law. Plaintiffs Weingartz Supply Company and Daniel Weingartz face penalties for noncompliance of the law with fines of $2,000 per employee per year absent the District Court's injunction. (R-39: Op. at 5). The fines are even more onerous if Plaintiffs offered insurance without the objectionable coverage. Considering the imminent, irreparable harm to Plaintiffs' religious freedom and Constitutional

rights, the District Court properly granted injunctive relief to Plaintiffs Daniel Weingartz and Weingartz Supply Company. The lower court erred, however, in not finding associational standing for Plaintiff Legatus and also determining that Plaintiff Legatus' claim for injunctive relief was not ripe for judicial review.

STATEMENT OF THE ISSUES FOR REVIEW

I. Did the District Court act within its discretion in granting a preliminary injunction for Plaintiffs Daniel Weingartz and Weingartz Supply Company?

II. Should this Court reverse the District Court's findings as it pertains to Plaintiff Legatus because standing exists and its claims are ripe for review?

STATEMENT OF THE CASE

On May 7, 2012, Plaintiffs filed their initial Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Compl.). Specifically, Plaintiffs allege that Defendants violated their rights to free exercise of religion under the First Amendment and the Religious Freedom Restoration Act, violated their freedom of speech, and violated the Administrative Procedures Act by forcing business owners and their businesses to violate their sincerely held beliefs which forbid providing insurance coverage for contraception, abortion, and abortifacients.

On August 15, 2012, Plaintiffs filed a motion for preliminary injunction, (R-13: Pls.' Mot. for Prelim. Inj.). On October 31, 2012, the district court entered its memorandum opinion granting Plaintiffs' motion for preliminary injunction as to Plaintiffs Daniel Weingartz and Weingartz Supply Company and denied Plaintiffs' motion for preliminary injunction as to Plaintiff Legatus. (R-39: Op.). Defendants then appealed the district court's order. (R-47: Notice). This cross-appeal follows.

STATEMENT OF FACTS

The material facts are based on the Complaint and the sworn affidavits attached to the preliminary injunction motion (R-1; R-13), and were incorporated in the District Court's October 31, 2012 preliminary injunction opinion (R-39).

Plaintiff Legatus is an international, Catholic organization established for the purpose of promoting the study, practice, and spread of the Catholic faith in the business, professional, and personal lives of its members, comprised of Chief Executive Officers, Presidents, Managing Partners and Business Owners, with their spouses, from the business community and professional enterprises. (R-13: Hunt Decl. at ¶ 2; Weingartz Decl. at ¶ 11). Plaintiff Legatus is incorporated under the laws of Michigan. (*Id.* at Hunt Decl. at ¶ 1). Plaintiff Daniel Weingartz is a member of Legatus and the President of Weingartz Supply Company, a for-profit business incorporated under the laws of Michigan with over 50 full time employees. (*Id.* at Weingartz Decl. at ¶¶ 1-5, 9-10; Hunt Decl. at ¶¶ 9, 21-23;

DiCresce Decl. at ¶ 9). Plaintiff Weingartz Supply Company is a family-run, closely held "s" corporation. (R-43: Oral Arg. 27-28).

The members of Plaintiff Legatus, including Plaintiff Daniel Weingartz, follow the teachings, mission, and values of the Catholic faith. (R-13: Weingartz Decl. at ¶¶ 7, 10-13; Hunt Decl. at ¶¶ 6, 7). Plaintiff Legatus professes, educates, lectures, gives presentations, and engages in outreach amongst its members and in the community that contraception, abortion, and abortifacients violate the religious beliefs of Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz. (*Id.* at Hunt Decl. at ¶ 7). Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz, share sincerely held religious beliefs that forbid them from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients. (*Id.* at Hunt Decl. at ¶ 8). Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz, cannot provide, fund, or participate in health care insurance which covers artificial contraception, abortion, or abortifacients, or related education and counseling, nor provide information or guidance to its employees or its members for the purpose of supporting or providing artificial contraception, abortion, abortifacients, or related education and counseling, *without violating their deeply held religious beliefs*. (*Id.* at Hunt Decl. at ¶¶ 12, 13).

As practicing Catholics, the Plaintiffs align their beliefs with Pope Paul VI's 1968 encyclical Humanae Vitae, which states "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—is a grave sin. (*Id.* at Weingartz Decl. at ¶¶ 7, 10-13, 16; Hunt Decl. at ¶¶ 6, 7). Plaintiffs subscribe to authoritative Catholic teaching regarding the proper nature of health care and medical treatment. For instance, 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." *Id.* Plaintiffs do not believe that contraception or abortion properly constitute health care, and involve immoral practices and the destruction of innocent human life. (*Id.* at Weingartz Decl. at ¶ 16).

Due to these beliefs, Plaintiffs designed insurance policies which specifically exclude coverage for contraception, abortion, and abortifacients. (R *Id.* at Weingartz Decl. at ¶ 18; Hunt Decl. at ¶¶ 14, 15; Leipold Decl. at ¶ 8; DiCresce Decl. at ¶ 13; Ex. 5). Plaintiff Daniel Weingartz, on behalf of Plaintiff Weingartz Supply Company, worked with his insurance agent Brown & Brown of Detroit to design its group health insurance plan which specifically excludes

abortion, abortifcients, and contraception from its insurance plan. (*Id.* at DiCresce Decl. at ¶¶ 4-8; Weingartz Decl. at ¶¶ 16-18). Brown & Brown of Detroit was able to secure this plan design through a self-funded program, with Blue Cross/Blue Shield of Michigan providing third party administration and stop-loss insurance. (*Id.* at DiCresce Decl. at ¶ 6; Weingartz Decl. at ¶¶ 16-18).

Plaintiff Legatus receives its health insurance coverage through the Ave Maria Medical Plan, which is a fully insured medical plan provided by insurance issuer Blue Cross/Blue Shield of Michigan (*Id.* at Leipold Decl. at ¶¶ 5, 6; Hunt Decl. at ¶¶ 14-16). Plaintiff Legatus' insurance policy specifically excludes coverage from voluntary abortions and contraceptive drugs. (*Id.* at Leipold Decl. at ¶ 8; Hunt Decl. at ¶¶ 14-16).

On August 1, 2012, the Health and Human Services Mandate of the Affordable Care Act ("H.H.S. Mandate" or "mandate") went into effect and threatened to force Plaintiffs to pay, fund, contribute, or support artificial contraception, abortion, abortifacients, or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs. *See* 45 C.F.R. § 147.130 (a)(1)(iv), *as confirmed at* 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines) (R-13: Leipold Decl. at ¶¶ 7, 11; DiCresce Decl. at ¶¶ 10, 14; Hunt Decl. at ¶ 25-29; Weingartz Decl. at ¶ 26).

The Affordable Care Act called for health insurance plans to provide coverage and "not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines" and directed the Secretary of the United States Department of Health and Human Services, Defendant Sebelius, to determine what would constitute "preventative care." 42 U.S.C § 300gg-13(a)(4). Defendants United States Health and Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care Act, 75 Fed. Reg. 41726 (2010), requiring providers of group health insurance to cover "preventive care" for women as provided in guidelines to be published on a later date.[1] *Id.* Prior to adopting those guidelines, Defendants accepted public comments. Many comments were filed warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception, abortion, and abortifacients.

[1] Defendants directed the Institute of Medicine ("IOM") to compile recommended guidelines describing which drugs, procedures, and services should be covered as preventive care for women. (http://www.hrsa.gov/womensguidelines). IOM invited select groups to make presentations on the preventive care that should be mandated by all health plans. (http://www.nap.edu/openbook.php?record_id=13181&PAGE=217). No religious groups or groups opposing government-mandated coverage of contraception, abortion, and related education and counseling were invited to be presenters. Defendants adopted the IOM recommendations in full. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

On February 15, 2012, Defendant United States Department of Health and Human Services ("H.H.S.") promulgated the mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012 ("the H.H.S. Mandate" or "mandate"). *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines). All FDA-approved contraceptives included contraception, abortion, and abortifacients such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures. (http://www.hrsa.gov/womensguidelines). The H.H.S. Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity—despite the impact that paying for or providing such "services" violates one's consciences and deeply held religious beliefs.

The Affordable Health Care Act and the H.H.S. Mandate include a number of exemptions; however, Plaintiffs do not fall under any of these exemptions. (R-

13: Leipold Decl. at ¶¶ 7, 10; DiCresce Decl. at ¶¶ 9-14; Hunt Decl. at ¶¶ 17-20; Weingartz Decl. at ¶¶ 28-32). The allowable factors for receiving exemptions under the Affordable Health Care Act include: the age of the plan, 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140 (exempting plans that qualify for "grandfathered" status by meeting criteria such as abstaining from plan changes since the date of March 23, 2010); the size of employer, 26 U.S.C. § 4980H(c)(2)(A) (exempting employers with less than 50 employees); a non-profit company which qualifies as a "religious employer," 45 C.F.R. § 147.130 (a)(iv)(A) and (B) (exempting non-profit companies which adopt certain hiring practices and exist to further the organization's religious doctrine); and individuals of certain religions which disapprove of insurance in its entirety such as the Muslim or Amish religion, 26 U.S.C. § 5000A(d)(2)(A)(i)-(ii) (exempting members of "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds).

Neither of Plaintiffs' health insurance plans are "grandfathered" and would have been subject to the provisions of the H.H.S. Mandate as soon as August 1, 2012. (R-13: Leipold Decl. at ¶ 7; DiCresce Decl. at ¶¶ 10-12; Hunt Decl. at ¶ 18;

Weingartz Decl. at ¶ 30).[2] Furthermore, Plaintiffs do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130 (a)(iv)(A) and (B). The H.H.S. Mandate indicates that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Plaintiffs, such as Plaintiff Weingartz Supply Company and Daniel Weingartz, cannot be considered for such an exemption as Weingartz Supply Company is a for-profit business. (R-13: Weingartz Decl. at ¶¶ 3, 28-32). Due to the size of Plaintiff Weingartz Supply Company, after August 1, 2012, without an injunction in place, Plaintiffs faced per employee fines for non-

[2] Plaintiff Legatus' health care plan is not a grandfathered plan as: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Legatus does not take the position that its health care plan is a grandfathered plan and thus does not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140; (Hunt Decl. at ¶ 18).

Plaintiff Weingartz Supply Company's health care plan is not a grandfathered plan as: (1) Plaintiffs do not take the position that the plan is a grandfathered plan and do not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (2) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140; (DiCresce Decl. at ¶ 11). (*See also* R-13: DiCresce Decl. at ¶ 12 ("Plaintiff Weingartz Supply Company's health care plan is no longer grandfathered due to plan design changes. The plan in place on March 23, 2010 included a $2,000 deductible. The deductible now is $3,100.”))

compliance with the H.H.S. Mandate. 26 U.S.C. § 4980H; (*Id.* at Weingartz Decl. at ¶ 28; Hunt Decl. at ¶ 36; DiCresce Decl. at ¶ 9, 14).

On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption. (*Id.* at Ex. 6). She added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. *Id.* This announcement provided no relief to Plaintiffs Daniel Weingartz and Weingartz Supply Company. (*Id.* at Leipold Decl. at ¶¶7, 10; DiCresce Decl. at ¶¶ 10-12; Hunt Decl. at ¶¶ 28-34; Weingartz Decl. at ¶ 30).

At the same time, however, Sebelius announced that H.H.S. "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support," inherently acknowledging that contraceptive services are readily available without mandating Plaintiffs subsidize them. (*Id.* at Ex. 6). The District Court held that Plaintiff Legatus qualified for this one year temporary safe harbor. (R-39: Op. at 9-11). H.H.S. is considering "potentially" amending the final regulations published on February 15, 2012. 77 Fed. Reg. 16, 501 (Mar. 21,

2012). H.H.S. had accepted over 200,000 comments prior to issuing its final regulations as it pertains to non-profit such as Plaintiff Legatus. H.H.S. issued a Notice of Proposed Rulemaking on February 1, 2013, and claims that it may through voluntary cessation abandon its final regulations for non-profit companies—exhibiting that there needs to be a religious exemption for companies, although only addressing this need for non-profit companies. 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013). The proposed changes to the finalized regulations show the need for their judicial review. The proposed change calls for Plaintiff Legatus to again act against their Catholic beliefs and materially cooperate with evil by supplying names and facilitating contraceptive coverage for it employees.

Absent the injunction issued by the District Court and the one year temporary safe harbor provision, Defendants force the Plaintiffs to face this decision: comply with their deeply held religious beliefs or comply with federal law. (*Id.* at Weingartz Decl. at ¶¶ 33-39; Hunt Decl. at ¶¶ 28-34; DiCresce Decl. at ¶¶ 14-16).

SUMMARY OF THE ARGUMENT

Of the twenty-four rulings on the likelihood of success of RFRA challenges to the H.H.S. Mandate involving for-profit companies, eighteen of them have issued preliminary injunctions, including four injunctions from the Court of

Appeals.[3] The District Court did not abuse its discretion in siding with this clear majority as it pertains to Plaintiffs Daniel Weingartz and Weingartz Supply Company. The District Court ruling on this issue should be affirmed.

The government's appeal rests on the false premise which artificially constricts religious exercise: a business owner cannot exercise religion in business. There is *no* "business exception" in RFRA or the Free Exercise Clause. Nothing in the Constitution, precedent, or law requires—or even suggests—that a person forfeits religious liberty protection when he/she tries to earn a living by operating a business. The idea that "a corporation has no constitutional right to free exercise

[3] *Monaghan v. Sebelius*, No. 12-cv-15488, slip op. (E.D. Mich. Mar. 14, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. November 28, 2012); *Korte v. Sebelius*, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012), *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013); *Annex Med. Inc. v. Sebelius*, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013), *Am. Pulverizer Co. v. Dep't of Health & Human Servs*., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); *Newland v. Sebelius*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 12-92, slip op. (E.D. Mo. Dec. 31, 2012); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-36, order (W.D. Mo. Feb. 28, 2013); *Seneca Hardwood Lumber v. Sebelius*, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013); *Lindsay, Rappaport & Postel LLC v. Sebelius*, No. 13-1210, order (Mar. 20, 2013); *Gilardi v. Dep't of Health & Human Servs.*, No. 13-5069 , order (D.C. Cir. Mar. 29, 2013); *Bick Holding, Inc. v. Sebelius*, No. 13-462, order (E.D. Mo. Apr. 1, 2013); *Am. Manufacturing Co. v. Sebelius*, No. 13-295, slip op.(D. Minn. Apr. 2, 2013); *Hart Electric LLC v. Sebelius*, No. 13-2253, order (N.D. Ill. Apr. 18, 2013).

of religion" is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W. 2d 844, 850 (Minn. 1985).

The government proposes that specific limitations enacted in the Civil Rights Act, which is separate and distinct from RFRA, should constrain the meaning not only of RFRA but also the First Amendment itself. Of course, no statute can alter the First Amendment. Congress could have written into RFRA the government's proposed prohibition on free exercise of religion in business, but chose not to. Instead, RFRA protects "*any*" exercise of religion, and requires strict scrutiny when government tries to substantially burden that free exercise.

The H.H.S. Mandate forces Plaintiffs and the entity through which they act to choose between violating their religious beliefs, paying crippling fines on their property and livelihood, or abandoning business altogether. Strict scrutiny as required by RFRA cannot be satisfied where, as here, the government exempts so many other people and organizations. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 433 (2006). In Gonzales, the government's exemption of "hundreds of thousands" led the Supreme Court to require a RFRA exemption for a few hundred more. *Id.* Here, the government has exempted tens of millions of women from the mandate under its politically motivated "grandfathering" clause. *Newland*, slip op. at 14. The government cannot then claim that "paramount" interests will suffer from an injunction protecting

Plaintiffs' religious beliefs. The government incorrectly labels its grandfathering exclusion as temporary, but in fact it lasts *indefinitely* and encompasses millions more than the few religious objecting entities.

The government could fully accomplish its purported interests in giving women free contraception to achieve its purported goals by providing such items instead forcing the Plaintiffs to do so against their beliefs. The government seeks to neuter the least-restrictive-means test by not actually considering alternative options. This is incompatible with RFRA and precedent.

Due to Legatus member Daniel Weingartz satisfying standing, Plaintiff Legatus has associational standing. *Hunt v. Washington v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 342 (1977). The interests at stake in this litigation are germane to the purpose of Legatus, which was established for its members, who consist of business owners and leaders, to carry out the doctrine of the Catholic Church in all aspects of their lives. Furthermore, individual participation of the members of Legatus is not necessary as injunctive relief is being sought. *Id.* at 343. Lastly, Defendants finalized its rulemaking last year when it published its final regulations. 77 Fed. Reg. 16, 501 (Mar. 21, 2012). The Defendants should not be allowed to escape judicial review through voluntary cessation. *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-02542, slip op. (E.D. NY Dec. 5, 2012).

STANDARD OF REVIEW

Much deference is given to the lower court in its decision to grant a preliminary injunction. A district court's grant of a preliminary injunction is reviewed on appeal only for *abuse of discretion*. *See Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). Within that framework, this Court reviews fact findings for clear error and issues of law de novo. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). "This standard of review is 'highly deferential' to the district court's decision." *Id.* (*quoting Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007))(emphasis added)). "The injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also Hamilton's Bogarts, Inc. v. Michigan, 501 F.3d 644, 649 (6th Cir. 2007).

ARGUMENT

The District Court's ruling should be affirmed as it pertains to Plaintiffs Daniel Weingartz and Weingartz Supply Company, and reversed in favor of maintaining the status quo for Plaintiff Legatus. Such a holding would run consistent with the eighteen preliminary injunctions granted nationally for for-profit cases and address the concerns raised by Plaintiff Legatus as an association, and pursuant to *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-02542, slip op. (E.D. NY Dec. 5, 2012).

I. The District Court correctly enjoined the H.H.S. Mandate against Plaintiffs Daniel Weingartz and Weingartz Supply Company and did not commit an error of law

The District Court appropriately issued an injunction upon Plaintiffs making "some showing of a likelihood of success on the merits." (R-39: Op. at 27). The District Court weighed the likelihood of success on the merits with the other three factors to consider when granting an injunction: irreparable harm to the Plaintiffs, the probability the injunction would cause substantial harm to others, and whether the public interest was advanced by granting the injunction. *Id.* at 6 (quoting *Jones v. Caruso,* 569 F. 3d 258, 265 (6th Cir. 2009)). The Plaintiffs demonstrated that they would face irreparable harm absent an injunction: "The potential for harm to

Plaintiffs exists, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case at trial, it is properly characterized as irreparable." (R-39: Op. at 26). The District Court found that it would best serve the public interest to issue the injunction. *Id.* at 27. And lastly, the District held that when balancing whether the injunction would cause harm to others, the government faced "minimal harm" and "[t]he balance of harm tips strongly in Plaintiffs' favor." *Id.* at 28. Since the court found a likelihood of success on the merits and properly balanced the four determining factors in issuing a preliminary injunction, the District Court's grant of injunctive relief should not be disturbed.

II. The H.H.S. Mandate violates RFRA

Plaintiffs demonstrated a likelihood of success on the merits because the H.H.S. Mandate violates the Religious Freedom Restoration Act (RFRA). In its argument, the government seeks to judicially amend RFRA and the Free Exercise Clause. The government wants to exclude certain categories of individuals from the free exercise of religion that Congress and the Constitution did not exclude. The government falsely seeks to create a new distinction under RFRA: profit vs. non-profit activity, corporate vs. individual activity, direct vs. indirect activity. However RFRA presents this question: whether the government is imposing a substantial burden on the exercise of religion. 42 U.S.C. § 2000bb-1. RFRA requires strict scrutiny analysis. The Seventh and Eighth Circuits have echoed four

times that analogous cases presented "a sufficient likelihood of success on the merits." *See Annex Medical*; *O'Brien*; *Grote*; *Korte*. And the E.D. of Michigan in the case most factually analogous to the Plaintiffs Daniel Weingartz and Weingartz Supply Company's case, found the Plaintiffs established a "likelihood for succeeding on the merits of their RFRA claim." *Monaghan*, No. 12-15488, slip op. at 18.

Congress enacted the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq. (hereinafter "RFRA"), in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), purposefully adopting a statutory rule comparable to that rejected in *Smith*.

RFRA strictly prohibits the Federal Government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the Government can "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(b). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that RFRA applies to the federal government).

In its formulation of RFRA, Congress expressly adopted the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*,

406 U.S. 205 (1972). In both cases, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants." *Gonzales* at 431, *see also Yoder* at 213, 221, 236; *Sherbert* at 410. In *Sherbert*, 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." *Id.* at 404. In *Sherbert* the court held that the government could not impose the same kind of burden upon the free exercise of religion as it would impose a fine against noncompliant parties of the law. *Id.* at 402 ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.") (internal citations omitted).

In *Yoder*, Amish and Mennonite parents of teenaged children held religious beliefs that prohibited them from sending their children to high school in violation of Wisconsin law. *Yoder* at 207. Each parent was fined $5 per child for failing to comply with state law for not sending their children to school beyond the eighth

grade in accordance with their sincerely held religious belief that "higher learning tends to develop values they reject as influences that alienate man from God." *Id.* at 208-13. The Court held that the impact of Wisconsin law, while recognizing the "paramount" interest in education that the law sought to promote, impermissibly compelled the parents to perform acts undeniably at odds with the fundamental tenets of their religious beliefs. *Id.* at 218, 213, 221; *see also Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). The Court found that this compulsion "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent," *Yoder* at 218; the same constitutionally forbidden compulsion is before the Court in this case.

In accordance with the Supreme Court rulings in *Sherbert* and *Yoder*, and in light of the plain language of RFRA expressly enacted by Congress to protect religious freedom, the H.H.S. Mandate substantially burdens the Plaintiffs' sincere exercise of religion. Furthermore, the federal government cannot "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that interest." 42 U.S.C. § 2000bb-1(b).

A. Plaintiffs are protected under RFRA

Plaintiffs Daniel Weingartz does not lose all of his rights protected by Congress under RFRA by entering the workforce. RFRA protects "any" free

exercise of religion. 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5). Conduct constitutes the exercise of religion if it is based upon a religious belief that is both sincere and founded on an established religious tenet. *Yoder* at 210-19.

The government contends that Plaintiffs forfeit their rights to religious liberty by earning a living by running a corporation. Precedent proves to the contrary. In *United States v. Lee*, the Supreme Court explained that the inquiry of whether a business owner can exercise religious beliefs is a simple one: "Because the payment of the taxed or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." 455 U.S. 252, 257 (1982). The same is true here: because providing coverage of abortifacients and contraception violates beliefs that the government concedes are sincerely held, compulsory compliance with the H.H.S. Mandate interferes with the Plaintiffs' free exercise rights.

As in the many injunctions issued against the H.H.S. Mandate, multiple other courts have recognized that business owners can bring religious exercise claims, because they are impacted by government burdens on their businesses without a moral distinction between themselves and their companies.

The corporate form cannot be a reason to declare an entity incapable of exercising religion, consistent with Supreme Court precedent. Likewise, RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. §

1 includes corporations. The United States Code requires the conclusions that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profits cannot bring claims either under RFRA or under the Free Exercise Clause.

The Supreme Court has emphasized that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"). For-profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Just because Plaintiffs have entered the commercial marketplace, they have not abandoned their rights to the exercise of religion. The Supreme Court has recognized that an Amish business owner exercises religion in *United States v. Lee*, 455 U.S. 252, 257 (1982). Although that employer lost on other elements of the claim, the Court specifically recognized he exercised religion. *Id.* Other cases likewise show that a for-profit company can exercise religion and bring free exercise claims on behalf of itself or its owners. *McClure v. Sports and Health*

Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985) (finding that a health club and its owners could assert free exercise claims). The Ninth Circuit allowed two for-profit corporations to assert free exercise claims on behalf of their owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009) (pharmacy and its religious owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (manufacturer on behalf of its religious owners). In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), the Court allowed a kosher deli and its owners to bring Free Exercise and Establishment Clause claims, and the Court subjected each claim to the applicable level of scrutiny rather than declaring that the for-profit business and its owners were not capable of exercising religion. *Id.* at 200. *See also Tyndale House Publishers, Inc. v. Sebelius, et al.*, No. 12-1635, slip op. at *5-9 (D.D.C. Nov. 16, 2012).

Furthermore, the government is incorrect in asserting that substantial burden placed on Plaintiffs' free exercise is "too attenuated" because employees use the contraceptives. As the Court in *Tyndale* correctly noted, "Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Id.* at 13 (citing *Thomas*, 450 U.S. at 718).

The government is attempting to draw a line in the sand by arguing that one cannot exercise religion while engaging in business, but the free exercise clause has often involved the commercial sphere. In *Sherbert*, an employee's religious beliefs were burdened by not receiving unemployment benefits. 374 U.S. at 399. The same occurred in *Thomas v. Review Bd.*, 450 U.S. 707, 709 (1981). In *U.S. v. Lee*, the Court held that an employer's beliefs were burdened by paying taxes for workers. 455 U.S. at 257. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999)(Alito, J.), an employee's bid to continue his employment was burdened by discriminatory grooming rules.

Congress has rejected the government's argument in many ways. For example, the Affordable Care Act lets employers and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be nonprofits. 42 U.S.C. S 18023; *see* http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited Apr. 22, 2013). Congress has repeatedly authorized similar objections. *See*, *e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-C.F.R. § 1609.7001(c)(7). These protections cannot be reconciled with the government's now-stated view that religious exercise cannot occur in the

world of commerce. If facilities and health plans have conscience protections under federal law, so too should the Plaintiff family business.

The government's central argument seems to be that laws such as the Civil Rights Act prevent Plaintiffs from exercising religion under RFRA or the First Amendment. Many of the government's case citations interpret terms such as "religious employer" in Title VII—not "free exercise." This contention is a non sequitur. Congress cannot change the First Amendment by statute. RFRA's concept of "free exercise" is entirely coextensive with the First Amendment, and no justification exists for imposing Title VII's narrow scope on RFRA or the Free Exercise Clause.

The government states the RFRA was enacted upon the background principles in federal employment statutes which silently declared that Title VII of the Civil Right Act diminished the exercise of religion to exclude business. This misconstrues RFRA, Title VII, and ordinary canons of statutory interpretation. Title VII contains explicit language limiting its religious exemption from applying beyond "religious corporations." This background is an argument for, not against, the Plaintiffs' ability to exercise religion under RFRA. Congress, when enacting RFRA, easily could have used or adopted Title VII's language, but chose not to. Since these sections are so near each other in the U.S. Code (42 U.S.C. § 2000e & 2000bb), the term "religious employer" in Title VII should be given a different

meaning than "*any* exercise of religion" in RFRA. "Under accepted canons of statutory interpretation, we must . . . giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions . . . meaningless." *Lake Cumberland Trust, Inc. v. United States EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992). Moreover, RFRA explicitly declares that it trumps other statutes unless those statutes explicitly exempt themselves from RFRA. 42 U.S.C. § 2000bb-3. Title VII cannot be read to trump RFRA when RFRA insists the opposite. The fact that Congress felt the need in Title VII to explicitly limit its religious protections suggests that Congress believed that if it had not done so, the default of free exercise belonging to all would have ruled the day.

Furthermore the government tries to inflate its position by claiming that a "special solicitude" for only religious non-profits is reflected in "Acts of Congress." But it cites only one "Act of Congress," Title VII, which addresses only one issue, employment discrimination, among myriad ways businesses could exercise religion. Notably, RFRA is also an "Act" of Congress, giving "solicitude" to "any" exercise of religion in any context. Title VII has not been canonized into the Bill of Rights.

Furthermore, the government misconstrues the holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when it contends that only "religious organizations" can exercise religion. No Supreme

Court case, including *Hosanna-Tabor*, makes that assertion. In *Hosanna-Tabor* the Court made clear that religious corporations are protected by special Establishment Clause concerns relating to their selection of ministers, but the Court in no way limited religious exercise in its decision or concluded that no company has protection unless it is a religious nonprofit.

In trying to define religion as wholly separate from business, the government asserts a view best characterized as essentially theological and not supported by legal precedent. No case exists which holds that religious exercise should be confined to the four walls of a person's church, home, or mind. Religion is not an isolated category of human activity. Under the law, a person is not required to attend weekly mass, uphold the sacraments, and tithe before being able to hold religious beliefs as the government suggests. Therefore, such practices cannot then be required of a corporation. Religion is, among other things, a viewpoint from which people engage in any kind of activity or purpose, not excluding business. *See Goods News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001) (activities of any kind, whether "social," "civic," "recreational," or educational, are not different kinds of activities when religious, they are the same kind of activity simply done from a religious perspective). Religion is also not purely "personal" as the government argues. Many religions require exercise in groups, and guide believers in all their daily activities. American law protects religious exercise, not

religious subjectivism. No precedent exists which dictates that the confluence of two realities—corporate status and profit motive—make religious exercise impossible. The First Amendment has never contained a "dichotomy between religious and secular employers" and case law dictates the same. Corporations are no more purely "secular" or purely religious than are the people that run them. It is essential to freedom in America for its citizens to be able to live out their faith in their everyday lives, which includes such things as being employed and running a business.

B. Plaintiffs are directly burdened by the H.H.S. Mandate which forces Plaintiffs to provide insurance contrary to Plaintiffs' religious beliefs

The H.H.S. Mandate is an archetypal substantial burden, because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Plaintiffs exercise their religious beliefs in this case by refraining from covering abortifacient items, contraception, and related counseling in their employee health insurance plan. To outlaw that religious exercise and "compel a violation of conscience," as here is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

The government argues that because the H.H.S. Mandate applies to Plaintiff Weingartz Supply Company, its owner and president, Plaintiff Daniel Weingartz is isolated from its effect. *U.S. v. Lee*, *Stormans*, *Townley*, *Monaghan*, the other cases cited above, and the eighteen injunctions against the H.H.S. Mandate instead

recognize the commonsense view that an imposition on a family-business corporation is no less an imposition on the owner. This can be seen in the present case. Plaintiff Weingartz Supply Company is a closely held "s" corporation, subject to pass through taxation as if its income belongs to its owner as an individual. The H.H.S. Mandate can only be implemented by Plaintiff Daniel Weingartz, the owner and president of Weingartz Supply Company. The corporate papers cannot implement the H.H.S. Mandate, nor can its brick-and-mortar buildings.

The government's argument that since a corporation has limited liability it cannot exercise religion does not negate the right to free exercise of religion. Limited liability is only one characteristic of a corporation, and not morally relevant here. The duty imposed by the mandate falls directly onto Plaintiff Daniel Weingartz. The corporate form does not isolate Plaintiff Daniel Weingartz—it is actually the mechanism the H.H.S. Mandate uses to impose its burden. *See Monaghan*, slip op. at 9 ("The Court sees no reason why [the corporate Defendant] cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of Monaghan [its owner], while at the same time being an instrument through which Monaghan may assert a claim under RFRA.").

There is no factual basis for the notion that Plaintiffs forfeit their constitutional rights when they chose to conduct business through a business entity

authorized by state law. This is as it should be because any effort to make the Plaintiffs' surrender their fundamental rights in order to use the corporate form would itself be unconstitutional. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [First Amendment rights] even if he has no entitlement to that benefit"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government"). Here, the Plaintiffs seek to live out their religious faith, in part, in the way they conduct the business Plaintiff Daniel Weingartz owns and operates. To force Plaintiffs to violate their conscience or face ruinous fines for doing so substantially burdens the Plaintiffs' free exercise of religion under RFRA and the First Amendment.

RFRA protects "a person's exercise of religion." 42 U.S.C. § 2000bb-1. Under the basic rules of construction: "In determining the meaning of any Act of Congress, . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Unless the plain language excludes corporations, the inclusion of corporations runs consistent with the statutory scheme that laws

covering persons are construed to cover corporations. *See Bennett v. MIS Corp.*, 607 F. 3d 1076, 1085 (6th Cir. 2010) (applying 1 U.S.C. § 1). RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. § 1 includes corporations. The United States Code requires the conclusion that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profits cannot bring claims either under RFRA or under the Free Exercise Clause.

Reading the definition of person to cover corporations is consistent with the statutory scheme because corporations already benefit from other civil rights provisions and from the First Amendment Rights RFRA was designed to restore. *See, e.g. Thinket Ink. v. Sun Microsystems, Inc.*, 368 F. 3d 1053, 1058-60 (9th Cir. 2004)(corporations may bring § 1981 actions for racial discrimination); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 867 (9th Cir. 1984)(corporations may bring § 1983 actions and qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause); *NAACP v. Button*, 371 U.S. 415, 428-430 (1963)(corporations can assert the rights of others). Corporations qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause. *Id.* And corporations have brought free exercise cases before. *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993)(claim involving a "not-for-profit corporation

organized under Florida law"); *Okleveuha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012); *Mirdrash Sephardi, Inc. v. Town of Surfside*, 367 F. 3d 1214 (11th Cir. 2004); *see also Durham & Smith, 1 Religious Organizations and the Law* § 3:44 (2012) (explaining reasons religious organizations use the corporate form).

The Supreme Court has emphasized that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for contraception, abortion, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The H.H.S. Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception, abortion, and abortifacients—or in other words, *to change or violate their beliefs*. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on

religion. *Sherbert*, 374 U.S. at 403-04. By failing to provide an exemption for the Plaintiffs' religious beliefs, the H.H.S. Mandate not only exposes Plaintiff Weingartz Supply Company and Plaintiff Daniel Weingartz to substantial per employee fines for their religious exercise—roughly $2,000 annually per employee, a fine significantly more severe than the $5 per student fine struck down by the Court in *Yoder*—, but also exposes all Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs. 26 U.S.C. §§ 4980D & 4980H; see also *Sherbert* at 374 U.S. at 403-04 (finding "a fine imposed against appellant" to be a quintessential burden). The coercion here is even more direct than in *Sherbet* because it requires the Plaintiffs to purchase and provide coverage for medications and devices that can bring about early abortions and contraception. Not only is the religious belief of the Plaintiffs clear—that they cannot in good conscience facilitate such coverage—the substantial burden is also clear—penalties of at minimum $2,000 per year per employee. Weingartz Supply Company employs 170 full-time employees. (R-13: Decl. of Daniel Weingartz at ¶ 4). Therefore with the calculations of the Affordable Care Act and the mandate, Plaintiff will sustain a yearly penalty of $280,000. Such penalties are an intense burden on the sustainability of Plaintiff Weingartz Supply Company, as well as Plaintiff Daniel Weingartz's livelihood, property, employment, and family history. The H.H.S.

Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held religious beliefs and the teachings of the Catholic Church to which they belong.[4]

C. The H.H.S. Mandate is not narrowly tailored to advance a compelling governmental interest

i. The H.H.S. Mandate fails to use the least restrictive means and fails to justify a compelling interest

The H.H.S. Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as contraceptives are currently readily available through other means without forcing the Plaintiffs to provide them.

It is the Defendants, not the Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzalez*, 546 U.S. at 428-30. In order to prove that Defendants' substantial burden on the Plaintiffs' religious liberties is

[4] In *Thomas v. Review Board*, the plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714-16 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs. . . ." *Id.* Likewise here, it is plain legal error to contend that direct penalties are somehow not a "substantial" burden on an explicit religious belief (objecting to certain insurance coverage) because the government deems them theoretically attenuated.

justified, the Defendants would need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Defendants are charged to "specifically identify an 'actual problem' in need of solving" and show that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). The government bears the burden of proof and "ambiguous proof will not suffice." *Id.* at 2739.

Forcing the Plaintiffs to provide and fund health insurance which makes contraceptives and abortifacients available to their employees serves only an ambiguous, non-compelling interest, and *at best* would serve the interest of *marginally* increasing access to contraceptives and abortifacients. There is "no actual problem in need of solving," and forcing the Plaintiffs to violate their religious beliefs fails to offer any sort of "actually necessary solution." Defendant Kathleen Sebelius herself has admitted that contraceptive services are already readily available "at sites such as community health centers, public clinics, and hospitals with income-based support." (R-13 at Ex. 6). Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the H.H.S. Mandate to take the matter one step further by forcing employers, such as the Plaintiffs, objecting upon sincere religious grounds to subsidize these services through the insurance plans they sponsor. If the

Defendants were truly concerned with the lack of access to contraceptives and abortifacients in this country, the Defendants could provide those "preventative services" itself without burdening the Plaintiffs' religious beliefs.

Furthermore, the H.H.S. Mandate fails to provide the least restrictive means of furthering Defendants' stated interests of providing contraceptives and abortifacients, as Defendant Health and Human Services has carved out a number of exemptions for secular purposes such as size of employer, the age and grandfathered status of a health insurance plan, waivers for high grossing employers, *etc*. The H.H.S. Mandate imminently threatens violation of the Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

In *Church of the Lukumi*, *supra*, the City of Hialeah enacted an ordinance prohibiting the public sacrifice of animals. *Id.* at 527. The ordinance also contained exemptions for the slaughtering of animals raised for food purposes and for sale in accordance with state law. *Id.* at 528. The ordinance had the stated purpose of promoting "public health, safety, welfare, and the morals of the community" and carried a maximum fine of $500. *Id.* at 528. The ordinance, however, prevented members of the church of Santeria from engaging in a principle aspect of their religious worship, which was the public, sacrificial killing

of animals. *Id.* at 524-25. This practice was known to the Defendant prior to the enactment of the ordinance. *Id.* at 526-27.

Similarly here, the Defendants knew of Plaintiffs' Catholic beliefs prior to finalizing the mandate into law, but acted to impose a substantial burden on the plaintiffs' religious beliefs. As in both *Lukumi* and also *Gonzalez*, where the Court examined whether the law "infringe[d] upon or restrict[ed] practices because of their religious motivation," or "in a selective manner impose[d] burdens only on conduct motivated by religious belief," this Court should analyze whether a compelling interest exists under the same analysis. *Id.* at 533, 543. *Gonzalez* required that the government demonstrate a compelling interest *against* "granting specific exemptions to particular religious claimants." 546 U.S. at 431.

ii. By excluding tens of millions of women for various reasons, the government shows that its interest is not compelling

What radically undermines the government's alleged compelling interest is the massive number of people who the government has voluntarily decided to omit from its supposedly paramount health and equality interests. *Tyndale*, slip op. at 32-35; *Newland*, slip op. at 14. By design, the Defendants imposed the mandate on some religious companies or religious individuals but not on others, resulting in discrimination among religions. The Defendants have created a number of categorical exemptions and individualized exemptions, none of which

alleviate the chill imposed on the Plaintiffs' free exercise of religion. The Affordable Care Act and the H.H.S. Mandate include exemptions for:

- Individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as members of the Islamic faith or the Amish. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii).
- Employers with fewer than 50 full time employees. 26 USC § 4980H(c)(2)(B)(i). While employers with more than 50 full time employees must provide federal government-approved health insurance or pay substantial per-employee fines. 26 U.S.C. § 4980H.

- Employers with health care plans that are considered to be "grandfathered," which, amongst meeting other criteria, have been in place and remain unchanged since March 23, 2010. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. This exemption will cover *tens of millions* of women as far out as the government's data projects. 75 Fed. Reg. at 34,540-53.

- Non-profit employers who qualify under the narrow exemption of a "religious employer." 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

This scheme of exemptions flies in the face of the legal precedent that "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to the supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. No compelling interest exists when the government "fails to enact feasible measures to retract other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546-47.

If the government really possessed an interest "of the highest order" to justify coercing the Plaintiffs to violate their sincerely held religious beliefs, the

government could not voluntarily use grandfathering to omit tens of millions of women from the mandate. The pedestrian reason for the grandfathering exemption illustrates this point: it exists because "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'" (HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered" Health Plans," available at http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Apr. 21, 2013). Yet, Congress considered some of the Affordable Care Act's requirements (but not the H.H.S. Mandate) paramount enough to impose on grandfathered plans. See 75 Fed. Reg. at 34,542 (listing §§ 2704, 2708, 2711, 2712, 2715, 2718 as applicable to grandfathered plans). These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions and annual or lifetime limits. These requirements actually surround the mandate, § 2713, but Congress intentionally omitted the mandate from the requirements it made necessary for all plans. Moreover, Congress did not consider coverage for abortifacients and all FDA approved contraception important enough to list in § 2713. As far as Congress was concerned, the Affordable Care Act need not impose any mandate that employers provide abortifacients or contraception. The government even admits that Congress gave H.H.S. authority to exempt any religious objectors it

wanted to exempt from this mandate. 76 Fed. Reg. at 46,623-24; 77 Fed. Reg. at 8,726. As far as Congress is concerned, the government could have exempted the Plaintiffs. Congress deemed certain interests in the Affordable Care Act to be "of the highest order" for all health plans, but not the H.H.S. Mandate.

The government cannot claim that the grandfathering exclusion is transitory, as such a claim contradicts the text of the Affordable Care act which gives no expiration date for the grandfathering provision, the government's website and its own data. The government boasts that grandfathering "preserves the ability of the American people to keep their current plan if they like it" and that "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." (http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html) (last visited Apr. 21, 2013). There is no sunset on grandfathering status in the Affordable Care Act. Instead, the government affirmed that it is a "right" for a plan to maintain grandfathered status. 75 Fed. Reg. 34,538; 34,540; 34,558; 34,562; & 34,566.

The H.H.S. Mandate is not uniform, and RFRA is impatient with its insistence on uniformity:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA

> operated by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability."

Gonzalez, 546 U.S. at 436.

The government argues that the instant case is similar to *U.S. v. Lee* where the Court upheld a universal tax. The H.H.S. Mandate as shown is far from universal with its varied scheme of exemption. Lee was decided on the premise that a government cannot function without taxes. 455 U.S. at 260. First off, the U.S. government has functioned for in excess of two hundred years without a federal mandate demanding the employers provide free abortifacients and contraceptives to their employees. Secondly, this mandate is not a tax and not a "government program." Here, Plaintiffs do not fund the government but directly give specific services to private citizens. The government has decided not to pursue its goals with a governmental program, but instead to conscript religiously objecting citizens.

iii. The government failed to present evidence that its interests are compelling

It is the Defendants, not the Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzales*, 546 U.S. at 428-30. *See also Newland,* slip op. at 11 ("The initial burden is borne by the party challenging the law. Once that party establishes that the challenged law substantially burdens her

free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens.") (quoting *Gonzales*, 546 U.S. at 429). The government presents no evidence that the mandate will work or that it is necessary; therefore, the government's "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. Twenty eight states have similar mandates, but the government has cited zero evidence that health and equality has improved for women in any of those states, much less that one of those laws did so more than "marginal[ly]" as required by *Brown v. Entm't Merchs*. *Id.* at 2741.

The government points only to generic interests, marginal benefits, correlation not causation, and uncertain methodology. The Institute of Medicine ("IOM") report on which the mandate is based does not demonstrate the government's conclusions.[5] These studies lack the specificity required by *Gonzalez*, 546 U.S. 430-31. IOM does nothing to evidence that contraceptive use will increase, which would be a necessary corollary for the government's argument. Instead the IOM shows that most women are already practicing contraception, and lack of access or cost is not the reason the remaining women

[5] Inst. Of Med., *Clinical Preventative Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Apr. 21, 2013).

are not using contraceptives.[6] The studies cited at 2011 IOM pp. 109 referred to by the government do not show that cost leads to non-use generally, but instead relate only to women switching from one contraception method to another. The government also fails to make any correlation the mandate has any effect on its target population, women who are employed with health insurance. The government asserts that women incur more preventive care costs generally, 2011 IOM at 19-20, but IOM's studies don't say they specifically include contraception as part of that cost, nor at what percentage. There is no evidence that any preventive services cost gap exists at Weingartz Supply Company with their comprehensive insurance coverage.

The government cannot show that the mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotes

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[6] *See* The Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010), available at http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Apr. 21, 2013); R. Jones et al, Contraceptive Use Among U.S. Women Having Abortions, 34 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 294 (2002) (a Guttmacher Institute publication); Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births—Pregnancy Risk Assessment Monitoring System (PRAMS), 2004-2008, 61 MORBIDITY AND MORTALITY WEEKLY REPORT 25 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid+mm6102a1_e (last visited Apr. 21, 2013).

omitted). IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is cause by or merely associated with unwanted pregnancy." Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), *available at* http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited Apr. 21, 2013).

The 1995 IOM Report admits that no causal link exists for most of its alleged factors. For example, the government states that contraception and abortifacients should be provided free of charge because it helps reduce premature birth and low birth rate due to being able to lengthen intervals between pregnancy. However, several studies show no connection between contraception and pregnancy-spacing. *Id.* at 70-71. Further studies showed that in 48% of all unintended pregnancies, contraception was actually used. L.B. Finer & S.K. Henshaw, Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90(2006), *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited Apr. 22, 2013).

No evidence shows that the H.H.S. Mandate could not use a less restrictive method to provide contraception and abortifacients. Such evidence would not be possible as the effect of contraception does not differ based upon who has purchased it.

vi. The H.H.S. Mandate fails to employ the least restrictive means

The mandate is also not the least restrictive means of furthering the cited interests. In *Riley v. National Federation of the Blind*, 487 U.S. 781, 799–800 (1988), the Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective to achieve the goal.[7]

Defendants could further their interests without coercing Plaintiffs in violation of their religious exercise. As proffered, the government could subsidize contraception itself and give it to employees at exempt entities. This in and of itself shows the mandate fails RFRA's least restrictive means elements. *Gonzalez*, 546 U.S. at 428-30. The government could offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives,

[7] In *Riley*, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by punishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799-800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *Id.*

provide these services to citizens itself, or provide incentives for pharmaceutical companies to provide such products free of charge. The government does nothing to rebut these options other than providing conclusory statements that other options would not work. In fact the government *already* subsidizes contraception for certain individuals.[8] Indeed, of the various ways the government could achieve its interests; it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Plaintiffs. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

The government argues that Plaintiffs are asking the government to "subsidize private religious practices." This could not be further from the truth. Plaintiff seek for the government to leave them alone, not force them to violate their religious beliefs, and honor the freedoms granted by the First Amendment

[8] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

which protects our free exercise of religion. The Plaintiffs are not asking the government to subsidize them or any religious practice. They are not even asking the government to buy contraceptives and abortifacients. The Plaintiffs simply assert that if the government wants to give private citizens contraceptives and abortifacients free of charge, it can do so itself instead of forcing the Plaintiffs to do it. Such an alternative renders the mandate a violation of RFRA.

The government arguing that it is interested in women's health and equality is an exceptionally positive and innocuous goal. But then, the government claims that women's health and equality can only be achieved through free contraception. And then the government claims that women's health and equality are harmed depending on who gives them the free contraception—and this is what Defendants are arguing. There is no evidence that women are helped, by getting free contraception or by making sure that their religious employers are coerced into providing it for them. If women received free contraception from a difference source, there is no evidence these women would face grave or paramount harms. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative. *Gonzalez*, 546 U.S. at 435-37.

D. *Autocam* is Factually Dissimilar

Defendants continual reliance upon *Autocam* is misplaced as the two cases are factually distinguishable. *See Monaghan*, slip op. at 12. In *Autocam v.*

Sebelius, the W.D. of Michigan focused on the fact that those Plaintiffs "have not claimed that any such payment obligation [*the taxes and fines attached to noncompliance of the mandate*] would be ruinous." *Autocam v. Sebelius, et al.*, No. 12-1096, slip op. at 3 (W.D. Mich. Dec. 24, 2012). Here, Plaintiffs claim such payment obligation *would* be ruinous. *See* (R-13: Decl. of Daniel Weingartz at ¶¶ 41-53); (R-1: Compl. at ¶ 121-22) ("crippling"). Plaintiffs do not supply a health savings account that was determinative to the district court in *Autocam*. *See Monaghan* at 12. The Court in *Autocam* stated that those Plaintiffs were not compelled by the mandate "to do anything." *Autocam* at 7. However as the owner of Plaintiff Weingartz Supply Company, a closely held "s" corporation, Plaintiff Daniel Weingartz is compelled by the mandate to provide abortifacients and contraception that he morally objects to and will be individually responsible for penalties of noncompliance. Furthermore the Court in *Autocam* focused on the mandate's monetary sanctions and failed to focus on the true challenge at hand: the constitutional violation which tramples upon the free exercise of religion. The court employs an individualized factual inquiry when determining if a plaintiff's religious freedom is substantially burdened. *Living Water Church of God v. Charter Twp. Meridian*, 258 Fed. Appx. 729, 734 (6th Cir. 2007). Here, as the Court held in the analogous case *Monaghan v. Sebelius*, slip op. at 11-13, the instant case is distinguishable from *Autocam*.

E. Plaintiffs meet the other preliminary injunction qualifications

The government's Opening Brief does not argue for reversal on the basis that the injunction failed to meet the other factors pertaining to injunctive relief outside of arguing the likelihood of success on the merits; namely, those showing irreparable harm, a balance of equities, or the public interest. Therefore it is understood the government has waived these arguments. To any extent these arguments are not waived, the District Court did not abuse its discretion in its fact-finding or in its grant of injunctive relief for Plaintiffs Daniel Weingartz and Weingartz Supply Company. This case involves religious exercise and it is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, the injunction should remain untouched.

III. Plaintiff Legatus has standing to challenge the H.H.S. Mandate

A. Plaintiff Legatus has associational standing through its member Daniel Weingartz

Plaintiff Legatus is directly affected by the mandate both as an employer, qualifying for standing in its own right, but is also a Catholic organization which strictly follows and spreads the teachings of the Catholic Church and has *associational standing*.

An association may have standing to sue on behalf of its members even when the association has not itself suffered an injury. *Hunt v. Washington v.*

Washington State Apple Advertising Com'n, 432 U.S. 333, 342 (1977). "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. Here, members of Plaintiff Legatus, such as Plaintiff Daniel Weingartz, share its religious objections to the mandate and are required to supply health care pursuant to the mandate. *See* (R-13 at Hunt Decl., Weingartz Decl.); (R-1). The religious liberty interests that Plaintiff Legatus seeks to protect are germane to the organization's purpose which is the teaching and sharing of Catholic beliefs for business owners and leaders.

The lower court erroneously held "Plaintiffs have failed to provide sufficient facts about Legatus' members and companies to establish that members would have standing to sue in their own right or that their participation is not required." Plaintiffs provided in its pleadings all of the information necessary to establish associational standing. *See* (R-13: Hunt Decl. ¶¶ 2, 6, 7, 8, 9, 10, 11, 12, 13, 25-29, 38, 39, 40, 41, 43, 44, 45; Weingartz Decl. ¶¶ 1-28, 37-53).

Plaintiff Legatus was established for the purpose of promoting, practicing, and spreading the Catholic faith for business owners, Chief Executive Officers, Presidents, and Managing Partners. (R-13: Hunt Decl. ¶ 2, Weingartz Decl. ¶ 11).

The members of Plaintiff Legatus, including Plaintiff Daniel Weingartz, follow the teachings, mission, and values of the Catholic faith. (R-13: Weingartz Decl. at ¶¶ 7, 10-13; Hunt Decl. at ¶¶ 6, 7). Plaintiff Legatus professes, educates, lectures, gives presentations, and engages in outreach amongst its members and in the community that contraception, abortion, and abortifacients violate the religious beliefs of Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz. (*Id.* at Hunt Decl. at ¶ 7). Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz, share sincerely held religious beliefs that forbid them from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients. (*Id.* at Hunt Decl. at ¶ 8). Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz, cannot provide, fund, or participate in health care insurance which covers artificial contraception, abortion, or abortifacients, or related education and counseling, nor provide information or guidance to its employees or its members for the purpose of supporting or providing artificial contraception, abortion, abortifacients, or related education and counseling, *without violating their deeply held religious beliefs*. (*Id.* at Hunt Decl. at ¶¶ 12, 13). The H.H.S. Mandate affects the members of Legatus, including Daniel Weingartz, through its requirements for employers to provide abortifacients and contraceptives against their religious beliefs. 42 U.S.C. § 300gg-13(a)(1),(4).

Since Plaintiff Daniel Weingartz is a member of Legatus and he has standing to bring the claim, the requirement that members of Legatus have standing in their own right as an association is met. *See Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710 (6th Cir. 1995); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513 (6th Cir. 2001) (finding an organization "successfully obtained associational standing through" one named plaintiff). Plaintiffs satisfy associational standing through its members, including Daniel Weingartz, who are integral to Plaintiff's Catholic objectives and practice, and are similarly harmed by the mandate.

Participation of each individual member is unnecessary. Since this case presents a pure legal claim that seeks only prospective relief, the individuals are not required to participate in the action. *Hunt* at 343. Indeed, associational standing is particularly appropriatel where, as here, the Plaintiffs seek declaratory and injunctive relief. *Hunt* at 342-343 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)); *NHL Players' Ass'n v. Plymouth Whalers Hockey Club*, 166 F. Supp. 2d 1155, 1166-68 (E.D. Mich. 2001).

B. Plaintiff Legatus has standing because it has alleged a personal injury that is fairly traceable and likely to be redressed by this Court

Article III of the Constitution grants the federal courts the authority to adjudicate actual "cases" or "controversies." U.S. Const. art. III, § 2. As defined by the Supreme Court,

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted). Plaintiff Legatus' claims are not "hypothetical," "abstract," or "moot;" Plaintiff Legatus asserts "a real and substantial controversy." *Id.* Likewise, Plaintiff Legatus seeks from this Court "specific relief through a decree of a conclusive character." *Id.*

Defendants' mandate went into effect on August 1, 2012. It is inescapable that the mandate is the current and finalized law. Eighteen courts have already issued a preliminary injunction to enjoin its unconstitutional aims. Claiming that the mandate is somehow "hypothetical" at this point in time is incorrect. Defendants ask this Court to bestow them with blind trust and naïveté that the Defendants will change the current law and, despite their track record, their future

actions will be constitutional. Previously, Defendants publicly disavowed making any future amendments to the mandate. *See* (R-13 at Ex. 6) (declaring that the final rule will require insurance plans to cover contraceptive services and that temporary safe-harbor provision only provides time for qualifying organizations to adapt to the imminent violation of their constitutional rights: "This additional year will allow these organizations more time and flexibility to adapt to this new rule."). Defendants argue that a change in the current law "may" "potentially" occur at some point in the future, but what has been proposed still infringes upon Plaintiff Legatus' rights as it calls for Plaintiff Legatus to knowingly facilitate contraceptive and abortifacient coverage by working with their insurance company to achieve this end. 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013)

Defendants incorrectly contend that Plaintiff Legatus alleges an injury at some indefinite future time. (R-14 at 10). Plaintiff Legatus clearly states that it is subject to the mandate as of January 1, 2014, when the temporary safe harbor provision expires. *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-02542, slip op. at 23 (E.D. NY Dec. 5, 2012) ("Here, the temporary enforcement safe harbor does nothing to reduce the certainty that plaintiffs will suffer injury from the [H.H.S. Mandate] in the future. All the safe harbor does is postpone the date by which plaintiffs must comply . . . or suffer penalties. That deadline is looming and certain."). Nothing about this date certain renders Plaintiff Legatus'

injury "hypothetical." The mere fact that Defendants *may* change the finalized law from its current, unconstitutional state into, *potentially*, a law that is constitutional does nothing to block the Court from addressing the controversy before it.

Despite Defendants' unenforceable promise, Plaintiff Legatus satisfies standing and has "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Plaintiff Legatus has sustained present and future harm through the violation of their constitutional freedoms. This harm is unquestionably traceable to the Defendants' mandate and is redressable by this Court through the requested relief. Plaintiff Legatus' injury is both "concrete and particularized," and "affect[s] the plaintiff in a *personal* and *individual* way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

Courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000). Furthermore, "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute." *Nat'l Rifle Assoc. of Am. v.*

Magaw, 132 F.3d 272, 282 (6th Cir. 1997) (finding that gun manufacturers and dealers had standing to make a pre-enforcement challenge to a criminal statute that "targeted [them] for regulation"); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *see also Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that is sufficient to confer standing). And when the plaintiff is the subject of the challenged action, as Plaintiff Legatus is here, "there is ordinarily little question that the action or inaction has caused him injury." *Defenders of Wildlife*, 504 U.S. at 561-62. Plaintiff Legatus avers personal injury, as it is the subject to the H.H.S. Mandate which burdens its religious beliefs and practices. The mandate seeks for Plaintiff Legatus to implement adverse business practices. This injury is unquestionably traceable to the mandate and likely to be redressed by the declaratory and injunctive relief requested.

Indeed, absent judicial relief, the mandate hangs over Plaintiff Legatus' head "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991). The inevitable action causing harm—the enactment of the mandate—has arrived. *See generally Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that the exercise of governmental rule-making power "sets a standard of conduct for all to whom its terms apply, [and i]t

operates as such *in advance of the imposition of sanctions* upon any particular individual," observing that "[i]t is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails") (emphasis added). As a result, Plaintiff Legatus is compelled to change its behavior to comply with the mandate, and Plaintiff Legatus need not wait for the inevitable future harm to seek relief from this court. Plaintiff Legatus has standing because it has alleged a "personal injury" that is "fairly traceable" to the mandate and is "likely to be redressed by the requested relief." *See Allen*, 468 U.S. at 751.

Defendants in the lower court argued that Plaintiff Legatus "cannot transform the speculative possibility of future injury into a current concrete injury for standing purposes by asserting that it must plan now for its future needs." (R-14 at 12 n.10) (arguing that "[s]uch reasoning would gut standing doctrine"). *Id.* Such reasoning has been specifically rejected by many of the federal courts who have found that the plaintiffs had standing to challenge the "minimum coverage" provision of the ACA. *See, e.g., Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011) (changing present behavior to comply with the future mandate requirement causes a present injury in fact); *Roman Catholic Archdiocese of New York*, slip op. at 23 ("the delay until the Coverage Mandate will be enforced against plaintiffs—just over a year—is short when compared to other cases where

standing was established.") (citing the Sixth Circuit in *Thomas More Law Ctr.*, 651 F. 3d at 537). Even in light of the Defendants' sophistry, it remains that there is nothing speculative about the current impact of the mandate on Plaintiff Legatus and its business practices. *See, e.g., Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) ("it is a matter of commonsense" that businesses forced by the challenged regulation to make changes to their everyday business practices would sustain "a concrete economic injury.") (internal citation omitted).

Similarly here, it is "commonsense" that a non-profit organization that is forced to adversely change its business practices would sustain "a concrete economic injury." Plaintiff Legatus, while a non-profit organization, still must be competitive to sustain its operations. This includes the capability of attracting and maintaining quality employees and the capability to attract dues paying members. Coercing Plaintiff Legatus to drop its health insurance coverage to abide by its religious beliefs throws Legatus employees into the mandatory choice of purchasing insurance out-of pocket to comply with Affordable Care Act's "minimum coverage" mandate or seeking other employment. The mandate is presently causing a significant, negative economic impact upon Plaintiff's business practices. Plaintiff Legatus must imminently decide whether it is going to: comply with the mandate, violate its religious beliefs, and suffer the loss of members who

also oppose the mandate on religious grounds, or suffer the loss of valuable employees. Plaintiff Legatus is enduring a present injury in fact.

C. Plaintiff Legatus' claims are ripe for judicial review

The Ripeness Doctrine "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs.*, 387 U.S. at 148). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.

Plaintiff Legatus' challenge to the mandate presents a legal issue before the Court and is unquestionably a case fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (holding a challenge to regulatory provisions ripe where the issue presented was legal and would not be clarified by further factual development); *Abbot Labs.*, 387 U.S. at 149 (finding the issues appropriate for judicial resolution because "the issue tendered is a purely legal one"); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 530 (6th Cir. 1998) (holding the plaintiffs' challenge to the assault-weapons ban ripe and stating that "we believe a citizen should be allowed to prefer official adjudication to public disobedience") (quotations omitted); *see also Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290-91; *Brown*

& Williamson Tobacco Corp. v. Fed. Trade Comm'n, 710 F.2d 1165, 1171 (6th Cir. 1983).

Plaintiffs present this legal question before the Court: can the federal government compel a private employer to modify its contract with a private insurance company to provide access to contraception and abortifacients to its employees, when doing so violates the employer's sincerely held religious beliefs? This is a legal question that this Court can and should answer, not turn a blind eye to because, as the Defendants assert, the law "might," "potentially," "may," or "could" change in the future at the whim of the non-aggrieved party.

As stated above, the mandate causes present economic injury to Plaintiff by forcing it to make a choice between providing its employees with healthcare insurance which violates Plaintiff Legatus' sincerely held religious beliefs, or dropping the coverage and thus losing valuable employees. This directly and adversely affects Plaintiff's current business practices. *See Abbott Labs.*, 387 U.S. at 152-53 (finding hardship in a pre-enforcement challenge caused by new regulations that had the status of law and that caused a present economic impact on the day-to-day operations of the petitioners' businesses); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 284 (finding hardship in a pre-enforcement challenge based on economic injury); *see also Brown & Williamson Tobacco Corp.*, 710 F.2d at 1172; *Thomas*, 473 U.S. 581.

The enforcement of the mandate against Plaintiff Legatus is inevitable, if not presently effective in fact. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) (finding challenge to statute ripe because its obligations were presently effective in fact, even though the plaintiffs had not been threatened with criminal prosecution). Thus, there are no advantages to the parties or this Court to be gained from withholding judicial review. Plaintiff is already suffering harm. As the Supreme Court stated in *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1942), "[w]hen the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provision will come into effect."

In *Roman Catholic Archdiocese of New York*, the court expressly rejected the district court's holding on the standing of Plaintiff Legatus:

> I do not see the basis for such holdings. . . . The [H.H.S. Mandate] is a final rule, see 77 Fed. Reg. 8,730 (adopting the Interim Final rules "as binding on plaintiffs. Therefore, this is not a case where an enforcement action is only remotely possible or plaintiffs' concerns are imaginary or speculative. Even if plaintiffs' future harms were not sufficiently imminent to be considered injuries in fact, the Court would find the plaintiffs have standing because the [H.H.S. Mandate] is causing plaintiffs to suffer present harm.

Roman Catholic Archdiocese of New York, slip. op. at 29. The application of the mandate is "sufficiently probable," if not inevitable such that the case is ripe for review. In the final analysis, Plaintiff Legatus has standing to advance its claims, which are ripe for review.

While Defendants frame their proposed intention of making a "new" rule as creating a ripeness issue, there is a more accurate way to frame the jurisdictional question. There is no dispute that the mandate is currently the law. Defendants now claim that they are going to make a new regulation that will deprive this Court of jurisdiction to decide the current challenge. Therefore, the issue is not one of ripeness so much as it is an issue of *mootness*. Indeed, this tactic of shifting rules and regulations to postpone what is inevitable by making an incredible plea of repentance and reform so as to avoid a legal challenge is frowned upon by the courts, and for good reason: the government could always avoid legal challenges by momentarily ceasing illegal conduct (*e.g*., providing a "*temporary* enforcement safe harbor" or making a false promise and creating a false hope that change is coming) and then once the legal challenge is dismissed, return to its old ways. Consequently, the Supreme Court has long recognized that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)*; see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). The Defendants new proposed rule should rightly be categorized as just that—an attempt at voluntary cessation. Likewise, voluntary restraint from the

unconstitutional conduct should not deprive this Court of its power to hear this case.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court uphold the District Court's grant of preliminary injunctive relief in Plaintiffs Daniel Weingartz and Weingartz Supply Company's favor, but reverse the denial of Plaintiff Legatus' motion for preliminary injunction.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Erin Mersino
Erin Mersino, Esq.

Attorneys for Plaintiffs-Appellees/ Cross-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 15,461 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-1	Complaint
R-13	Plaintiffs' Motion for Preliminary Injunction
	Exhibit 1 Declaration of John J. Hunt
	Exhibit 2 Declaration of Daniel Weingartz
	Exhibit 3 Declaration of Joseph DiCresce
	Exhibit 4 Declaration of Gordon Leipold
	Exhibit 5 Blue Cross/Blue Shield of Michigan, Statement of Exclusions Letter
	Exhibit 6 Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, Jan. 20, 2012
	Exhibit 7 *Newland, et al. v. Sebelius, et al.*, No. 12-1123, slip op. (D. Colo. July 27, 2012)
	Exhibit 8 Proposed Order
R-14	Defendants' Opposition
R-19	Plaintiffs' Reply
R-39	Opinion Granting Preliminary Injunction for Plaintiffs Daniel Weingartz and Weingartz Supply Company and Denying Preliminary Injunction for Plaintiff Legatus
R-42	Order
R-43	Transcript of Oral Argument of Preliminary Injunction Hearing

R-47 Notice of Appeal

R-48 Notice of Cross-Appeal