UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LEGATUS; WEINGARTZ SUPPLY COMPANY; and DANIEL WEINGARTZ, President of Weingartz Supply Company, Plaintiffs, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No.: 2:12-cv-12061-RHC-MJH OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION Judge Robert H. Cleland Magistrate Judge Michael Hluchaniuk

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1. Under the temporary enforcement safe harbor, the government will not take any enforcement action against qualifying employers – including Legatus – until the first plan year that begins on or after August 1, 2013 – the plan year that begins on January 1, 2014, in the case of Legatus. Before the safe harbor expires, the government intends to finalize amendments to the preventive services coverage regulations to accommodate the religious objections of organizations like Legatus. In light of the safe harbor and the forthcoming accommodations, does Legatus have standing and are its claims ripe?

2. Have plaintiffs shown a likelihood of success on their claim that the preventive services coverage regulations substantially burden their religious exercise under the Religious Freedom Restoration Act?

3. Assuming the regulations substantially burden plaintiffs' religious exercise, have plaintiffs shown a likelihood of success on their claim that the regulations do not serve compelling governmental interests or are not the least restrictive means to achieve those interests?

4. Have plaintiffs shown a likelihood of success on their claims that the regulations violate the First Amendment's Free Exercise and Free Speech Clauses?

5. Assuming plaintiffs have shown a likelihood of success on the merits, have plaintiffs established irreparable harm and that the public interest weighs in favor of granting a preliminary injunction?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

United States v. Lee, 455 U.S. 252 (1982)

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Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006)

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Nebraska v. HHS, No. 4:12-cv-3035, 2012 WL 2913402 (D. Neb. July 17, 2012)

INTRODUCTION

Plaintiffs ask this Court to preliminarily enjoin regulations that are intended to ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts have deemed necessary for women's health and well-being. The preventive services coverage regulations that plaintiffs challenge require all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[1] As relevant here, except as to group health plans of certain non-profit religious employers (and group health insurance coverage sold in connection with those plans), the preventive services that must be covered include all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. The plaintiffs in this case are Weingartz Supply Company, a Michigan corporation that sells outdoor power equipment, Daniel Weingartz (the company's owner), and Legatus, an association of Catholic businesses. Plaintiffs claim that their sincerely held religious beliefs prohibit them from providing health coverage for contraceptive services.

Weingartz Supply Company and Mr. Weingartz's challenge rests largely on the theory that a self-described secular corporation established to sell outdoor power equipment can claim to exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. The Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which

[1] A grandfathered plan is one that was in existence on March 23, 2010, and that has not undergone any of a defined set of changes. *See, e.g.*, 45 C.F.R. § 147.140.

are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can the owner of a for-profit, secular company eliminate the legal separation provided by the corporate form to impose his personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit, secular companies and their owners to become laws unto themselves, claiming countless exemptions from an untold number of general commercial laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court therefore should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

For this reason and others, plaintiffs' motion for preliminary injunction should be denied because plaintiffs are not likely to succeed on the merits of their claims. As an initial matter, Legatus cannot succeed on the merits because it lacks standing and its claims are unripe. Over the past few months, the government has issued guidance on a temporary enforcement safe harbor and initiated a rulemaking to further amend the regulations, all designed to address religious concerns such as those raised by Legatus. The safe harbor protects Legatus from enforcement by the government until at least January 1, 2014, meaning that any injury is not imminent. And the initiation of a rulemaking that commits to amending the preventive services coverage regulations well before January 2014 to accommodate religious objections like Legatus' shows that any injury is speculative and that Legatus' claims are unripe. As explained below, three courts have reached precisely this conclusion in cases nearly identical to this one.

As for Weingartz Supply Company and Mr. Weingartz, their Religious Freedom Restoration Act claims are without merit. Plaintiffs cannot show, as they must, that the

preventive services coverage regulations substantially burden their religious exercise. Weingartz Supply Company is a for-profit, secular employer, and a secular entity by definition does not exercise religion. Mr. Weingartz's allegation of a burden on his own religious exercise fares no better, as the regulations that purportedly impose such a burden apply only to group health plans and health insurance issuers. Mr. Weingartz is neither. It is well established that a corporation and its owner are wholly separate entities, and the Court should not permit Mr. Weingartz to eliminate that legal separation to impose his personal religious beliefs on the corporate entity's group health plan or its employees. Mr. Weingartz cannot use the corporate form alternatively as a shield and a sword, depending on what suits him in any given circumstance. Furthermore, even if the preventive services coverage regulations were deemed to substantially burden any plaintiff's religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who choose to do so can be part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with religious affiliations. Furthermore, the regulations do not violate plaintiffs' free speech or free association rights. The regulations compel conduct, not speech. They do not require plaintiffs to say anything; nor do they prohibit plaintiffs from expressing to company employees or the public their views in

opposition to the use of contraceptive services. And the regulations do not interfere in any way with the composition of the company's workforce or the association's membership. Indeed, the highest courts of both New York and California have upheld state laws similar to the preventive services coverage regulations against First Amendment challenges like those asserted here.

Finally, even if plaintiffs could show a likelihood of success on the merits, the Court should not grant plaintiffs' request for a preliminary injunction because the balance of equities tips toward the government. Enjoining application of the regulations as to plaintiffs would prevent the government from achieving Congress's goals of improving the health of women and children and equalizing the playing field for women and men. It would also harm the public, given the large number of employees at Weingartz Supply Company—as well as any covered spouses and other dependents—who could suffer the negative health consequences that the regulations are intended to prevent.

BACKGROUND

I. Statutory Background

Before the enactment of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due in large part to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."). Section 1001 of the ACA—which includes the preventive services coverage provision that is relevant here—seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer

non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "for women, such additional preventive care and screenings . . . as provided in comprehensive guidelines supported by [the Health Resources and Services Administration ('HRSA')]." 42 U.S.C. § 300gg-13.

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine ("IOM")[2] with developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2. After an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices. FDA, Birth Control Guide, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/ucm118465.htm (last visited Aug. 25, 2012). IOM determined that coverage, without cost-

[2] IOM was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM REP. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id.*

sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03. *See infra* at 24-25.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), available at http://www.hrsa.gov/womensguidelines/ (last visited June 8, 2012). The amendment to the interim final regulations, issued on the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[3] The religious employer exemption was modeled after the religious accommodation used in multiple states that had already required health insurance issuers to provide coverage for contraception.[4] 76 Fed. Reg. at 46,623.

In February 2012, the government adopted in final regulations the definition of religious

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[3] To qualify, an employer must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B).

[4] At least 28 states have laws requiring health insurance policies that cover prescription drugs to also provide coverage for FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (May 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Aug. 29, 2012).

employer contained in the amended interim final regulations while also establishing a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). Under the safe harbor, as clarified on August 15, 2012, the government will not take any enforcement action against an employer, group health plan, or group health insurance issuer with respect to a non-grandfathered group health plan that fails to cover some or all recommended contraceptive services and that is established or maintained by an organization that meets the following criteria:

(1) The organization is organized and operates as a non-profit entity.
(2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable state law, because of the religious beliefs of the organization.
(3) The group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
(4) The organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribed procedures.[5]

The safe harbor will be in effect until the first plan year that begins on or after August 1, 2013.

During the safe harbor period, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. 77 Fed. Reg. at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register. 77

[5] HHS, Guidance on the Temporary Enforcement Safe Harbor ("Guidance"), at 3 (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Aug. 28, 2012).

Fed. Reg. 16,501. The ANPRM presented ideas and solicited public comment on potential means of achieving the goals of providing women access to contraceptive services without cost-sharing and accommodating religious organizations' religious liberty interests.[6] *Id.* at 16,503. The purpose was to provide "an early opportunity for any interested stakeholder to provide advice and input into the policy development relating to the accommodation to be made" in the forthcoming amendments to the regulations. *Id.* Among other options, the ANPRM suggested requiring health insurance issuers to offer health insurance coverage without contraceptive coverage to religious organizations that object to such coverage on religious grounds and simultaneously to offer contraceptive coverage directly to the organization's plan participants, at no charge to organizations or participants. *Id.* at 16,505. The ANPRM also suggested ideas and solicited comments on ways to accommodate religious organizations that sponsor self-insured group health plans. Defendants have now received comments on the ANPRM and will publish a notice of proposed rulemaking, which will be subject to further public comment, before defendants issue further amendments to the preventive services coverage regulations. *Id.* at 16,501, 16,508. The government intends to finalize the amendments such that they are effective before the end of the temporary enforcement safe harbor (i.e., August 1, 2013). *Id.* at 16,503.

II. Current Proceedings

Plaintiffs claim that the contraceptive coverage requirement violates RFRA, the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act. On July 25, 2012, plaintiffs moved for a temporary restraining order, asserting that they would suffer irreparable harm if the preventive services coverage regulations were not enjoined as to them before August 1, 2012. *See* ECF No. 9. Following two telephonic status conferences with this

[6] The accommodations the government is considering are not constitutionally or statutorily required; rather, they stem from the government's commitment to work with, and respond to, stakeholders' concerns. *See* 77 Fed. Reg. at 16,503.

Court, the government agreed not to enforce the challenged regulations against plaintiffs before January 1, 2013—the beginning of plaintiffs' next plan year.[7] Plaintiffs moved for a preliminary injunction on August 15, 2012, thus mooting the motion for a temporary restraining order. *See* Pls.' Br., ECF No. 13. Plaintiffs' motion is limited to their RFRA and First Amendment claims.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Plaintiffs cannot satisfy any of these requirements.

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. In light of the temporary enforcement safe harbor and the pending rulemaking, Legatus lacks standing and its claims are unripe.

Legatus is unlikely to succeed on the merits because it has not alleged a concrete and imminent injury resulting from the operation of the preventive services coverage regulations. To establish standing, a plaintiff must demonstrate that it has "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations omitted). The harm must be "'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'" *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423, 428 (6th Cir. 2008) (citation omitted). Allegations of possible future injury do not suffice; rather, "[a] threatened

[7] Because of the temporary enforcement safe harbor, the government will not take enforcement action against Legatus before January 1, 2014.

injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quotation omitted). A plaintiff that "alleges only an injury at some indefinite future time" has not shown an injury in fact, particularly where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan*, 504 U.S. at 564 n.2. In these situations, "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id*.

Here, Legatus faces no imminent injury because it is protected by the temporary enforcement safe harbor as a non-profit that has (presumably) not offered contraceptive services from February 10, 2012 onwards. The government will accordingly not take any enforcement action against Legatus until the first plan year that begins on or after August 1, 2013. Guidance at 3. Legatus acknowledges that its plan year begins on January 1 (Pls.' Br. at 10), so the earliest Legatus could be subject to any enforcement action by the government for failing to provide contraceptive coverage is January 1, 2014. With such a long time before the inception of any possible injury and the challenged regulations undergoing further amendment before then, plaintiff cannot satisfy the imminence requirement for standing; the asserted injury is simply "too remote temporally." *See McConnell v. FEC*, 540 U.S. 93, 226 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010).[8]

[8] Legatus contends that it will not qualify for the safe harbor because Legatus believes that "completing [the required] forms and applying for a temporary safe-harbor provision forces compliance with an unconstitutional law that violates its religious beliefs." Pls.' Br. at 9. But completing the required forms would do precisely the opposite: allow Legatus to *avoid* enforcement by the government with respect to a law that Legatus believes is unconstitutional. To the extent Legatus has decided not to complete the required forms in an effort to manufacture standing to sue in this case, such an injury is purely self-inflicted and not legally cognizable. *See Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("The supposed dilemma is particularly chimerical here because the association's asserted injury appears to be largely of its own making. We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing.").

Three recent decisions—in cases nearly identical to this one—confirm this straightforward point. *See Belmont Abbey Coll. v. Sebelius*, Civil Action No. 11-1989 (JEB), 2012 WL 2914417 (D.D.C. July 18, 2012); *Wheaton Coll. v. Sebelius*, Civil Action No. 12-1169 (ESH), 2012 WL 3637162 (D.D.C. Aug. 24, 2012); *Nebraska v. HHS*, No. 4:12-cv-3035, 2012 WL 2913402 (D. Neb. July 17, 2012). The courts in *Belmont Abbey* and *Wheaton College* concluded that the plaintiffs' claims were not ripe because the regulations are not being enforced against the plaintiffs and are currently undergoing a process of amendment to accommodate religious concerns like the plaintiffs'. These courts also held, for similar reasons, that the plaintiffs had not shown any imminent injury necessary to establish standing given the enforcement safe harbor and the forthcoming amendments to the regulations. The *Nebraska* court reached the same conclusion regarding ripeness, although it did not need to reach the issue. *See* 2012 WL 2913402, at *20-24. Thus, in circumstances virtually identical to those here, these courts dismissed the claims of several religious organizations on the same grounds that the government urges here.[9]

As these decisions implicitly recognize, the defect in Legatus' suit does not implicate a mere technical issue of counting intermediate days until an all-but-certain action takes place. The "underlying purpose of the imminence requirement is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all.'" *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting *Lujan*, 504 U.S. at 564 n.2). Here, the upcoming regulatory amendments will at a minimum change the

[9] The impending rulemaking also shows why cases finding standing to challenge the ACA's minimum coverage provision are inapposite here. *See* Pls.' Br. at 10 n.4 (citing *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011)). Unlike the minimum coverage provision, which was certain to take effect in 2014, the contours of the preventive services coverage regulations will change before they apply to organizations like Legatus.

contours of Legatus' challenge and may moot its case altogether. This is why Legatus is plainly wrong to assert that, after the safe harbor expires, "Legatus would find itself in the exact same predicament it is in now—violate the HHS Mandate or violate its religious beliefs." Pls.' Br. at 9. The government has indicated that it intends to finalize the amendments to the regulations *before* the rolling expiration of the temporary enforcement safe harbor starting on August 1, 2013. 77 Fed. Reg. at 16,503; *see also* 77 Fed. Reg. at 8728. In light of the forthcoming amendments, and the opportunity the rulemaking process provides for Legatus to help shape those amendments, there is no reason to suspect that Legatus will be required to sponsor a health plan that covers contraceptive services in contravention of its religious beliefs once the enforcement safe harbor expires. And any suggestion to the contrary is entirely speculative at this point. *See Belmont Abbey*, 2012 WL 2914417, at *10 ("Because an amendment to the final rule that may vitiate the threatened injury is not only promised but underway, the injuries alleged by Plaintiff are not 'certainly impending.'" (quoting *Whitmore*, 495 U.S. at 158)).[10]

Legatus' challenge also is not ripe. "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (quotation omitted). It "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Id.* at 807-08. It also "protect[s] the agencies from judicial interference until an administrative decision has been

[10] Nor may Legatus transform the speculative possibility of future injury into a current concrete injury for standing purposes by asserting that it has to plan now for its future needs. *See* Pls.' Br. at 10-11. Such reasoning would gut standing doctrine. A plaintiff could manufacture standing by asserting a current need to prepare for the most remote and ill-defined harms, thus sapping the imminence requirement of any meaning. Further, any planning Legatus is engaged in now "stems not from the operation of [the preventive services coverage regulations], but from [plaintiff's] own . . . personal choice" to prepare for contingencies that may never occur. *McConnell*, 540 U.S. at 228. Thus, even if this preparation were an injury, it would not be fairly traceable to the challenged regulations. *See Lujan*, 504 U.S. at 560.

formalized and its effects felt in a concrete way by the challenging parties." *Id*. at 807-08. A case ripe for judicial review cannot be "nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). "Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Connecticut v. Duncan*, 612 F.3d 107, 114 (2d Cir. 2010) (internal quotation marks and citation omitted). In assessing ripeness, courts evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99, 105 (1977).

The Supreme Court discussed these two prongs of the ripeness analysis in *Abbott Laboratories*, the seminal case on pre-enforcement review of agency action. 387 U.S. 136. The Court determined that the challenged regulations were fit for judicial review because they were "quite clearly definitive," *id*. at 151; they "were made effective immediately upon publication," *id*. at 152; and "[t]here [was] no hint that th[e] regulation[s] [were] informal . . . or tentative," *id*. at 151. The Court therefore was not concerned that judicial intervention would inappropriately interfere with further administrative action. With respect to the hardship prong, the Court noted that the regulations "require[d] an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id*. at 153.

None of the indicia of ripeness discussed in *Abbott Laboratories* is present in this case. The government has initiated a rulemaking to amend the preventive services coverage

regulations to accommodate the concerns expressed by Legatus and similarly-situated organizations, and have made clear that the amendments will be finalized well before the earliest date on which the challenged regulations could be enforced by the government against Legatus. 77 Fed. Reg. at 8728-29. Therefore, unlike in *Abbott Laboratories*—where the challenged regulations were definitive and no further administrative proceedings were contemplated—the preventive services coverage regulations are in the process of being amended.

Moreover, the forthcoming amendments are intended to address the very issue that Legatus raises here by creating alternative means of providing contraceptive coverage without cost-sharing while accommodating religious organizations' objections to covering contraceptive services. There is a significant chance that the amendments will eliminate altogether the need for judicial review, or at least narrow the scope of any controversy to more manageable proportions. Once the government finalizes the amendments, if Legatus' concerns are not laid to rest, Legatus "will have ample opportunity [] to bring its legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998).[11]

Further, although Legatus' complaint raises largely legal claims, those claims are leveled at regulations that, as applied to Legatus and similarly-situated organizations, have not taken on fixed and final shape. In this respect, "this 'purely legal question' remains a purely *speculative* legal question." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008); *see also Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 539 (6th Cir. 2010) ("How can we know whether the township 'has gone too far' . . . until we 'know[ ] how far the regulation

[11] *See also Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483-84 (5th Cir. 2005); *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999); *Lake Pilots Ass'n v. U.S. Coast Guard*, 257 F. Supp. 2d 148, 160-62 (D.D.C. 2003).

goes' . . . ?") (citation omitted); *Belmont Abbey*, 2012 WL 2914417, at *14. Once the government completes the rulemaking outlined in the ANPRM, Legatus' challenge to the current regulations likely will be moot. *See The Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (rejecting purely legal claim as unripe due to the possibility that it may not need to be resolved by the courts). And judicial review now of any possible future amendments to the regulations would be too speculative to yield meaningful review. The ANPRM does not preordain what amendments to the regulations the government will ultimately promulgate; nor does it foreclose the possibility that the government will adopt alternative proposals not set out in the ANPRM. Thus, review of any of the proposals contained in the ANPRM would only entangle the Court "in abstract disagreements over administrative policies." *Abbott Labs.*, 387 U.S. at 148; *Miles Christi Religious Order*, 629 F.3d at 537. Because judicial review at this time would inappropriately interfere with the government's pending rulemaking and may result in the Court "express[ing] legal opinions on academic theoreticals which might never come to pass," *Am. Fidelity & Cas. Co. v. Pa. Threshermen & Farmers Mut. Cas. Ins.*, 280 F.2d 453, 461 (5th Cir. 1960), this case is not fit for review. *See Belmont Abbey*, 2012 WL 2914417, at *11-*14.

Withholding or delaying judicial review also would not result in hardship for Legatus. Because of the safe harbor and the forthcoming amendments to the regulations, Legatus "faces no imminent enforcement action" by the government. *Duncan*, 612 F.3d at 115. And, although Legatus contends that the regulations require advance planning (Pls.' Br. at 10-11), these allegations do not demonstrate a "direct and immediate" effect on plaintiff's "day-to-day business" with "serious penalties [including criminal penalties] attached to noncompliance," as required to establish hardship. *Abbott Labs.*, 387 U.S. at 152-53. Instead, they are contingencies that may arise in the future. Legatus' alleged desire to plan for these contingencies does not

constitute a hardship; if it did, the hardship prong would become meaningless because organizations (and individuals) are always planning for the future. *See Wilmac Corp. v. Bowen*, 811 F.2d 809, 813 (3d Cir. 1987) ("Mere economic uncertainty affecting plaintiff's planning is not sufficient to support premature review."); *Tenn. Gas Pipeline Co. v. F.E.R.C.*, 736 F.2d 747, 751 (D.C. Cir. 1984) (concluding plaintiff's "planning insecurity" was not sufficient to show hardship); *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 162 (7th Cir. 1976) ("[C]laims of uncertainty in [plaintiff's] business and capital planning are not sufficient to warrant [] review of an ongoing administrative process."); *Belmont Abbey*, 2012 WL 2914417, at *14 ("Costs stemming from Plaintiff's desire to prepare for contingencies are not sufficient . . . to constitute a hardship for purposes of the ripeness inquiry – particularly when the agency's promises and actions suggest the situation Plaintiff fears may not occur."). Nor is Legatus' alleged hardship caused by the challenged regulations. *See Abbott Labs.*, 387 U.S. at 152. Rather, it arises from Legatus' own desire to prepare for a hypothetical (and unlikely) situation in which the forthcoming amendments to the regulations do not sufficiently address its religious concerns. Legatus accordingly lacks standing and its claims are not ripe.

B. Plaintiffs' Religious Freedom Restoration Act claim is without merit.

1. Plaintiffs have not sufficiently alleged that the preventive services coverage regulations substantially burden their religious exercise.

Congress enacted the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-1 *et seq.*) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was intended to reinstate the pre-*Smith* compelling interest test for evaluating legislation that substantially burdens the free exercise of religion. 42 U.S.C. § 2000bb-1(b). Under RFRA, the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of

general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

With respect to Weingartz Supply Company, plaintiffs' principal claim is that it is a "person" who "exercise[s] . . . religion" within the meaning of RFRA. 42 U.S.C. § 2000bb-1(b). But that position cannot be reconciled with the company's repeated proclamations that it is a "*secular* employer." *See* Compl. ¶¶ 44, 75, 244; Pls.' Br. at 21 (emphasis added). The terms "religious" and "secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *See* Merriam-Webster's Collegiate Dictionary 1123 (11th ed. 2003). By definition, a secular employer does not engage in any "exercise of religion," 42 U.S.C. § 2000bb-1(a), as required by RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he practice[] at issue must be of a religious nature."); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd on other grounds*, 333 F.3d 156 (rejecting an organization's RFRA claim because "nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, [Plaintiff] defines itself as a 'non-profit charitable corporation,' without any reference to its religious character or purpose.").

Indeed, Weingartz Supply Company is plainly secular. The company's pursuits and products are not religious; it "sells outdoor power equipment." Decl. of Daniel Weingartz at 2, ECF No. 13-1. Under the heading "purpose or purposes for which the corporation is formed," the company's Articles of Incorporation describe purely commercial activities: "[t]o offer for retail and wholesale farm and garden implements, supplies, equipment and products." *See* Weingartz

Supply Co., Articles of Incorporation at 1, *available at* http://www.dleg.state.mi.us/bcs_corp/image.asp?FILE_TYPE=STS&FILE_NAME=D0126\STAT0640\92262066.TIF (last visited Aug. 17, 2012). Plaintiffs do not allege that the company affiliates with a formally religious entity such as a church or that any such entity participates in the management of the company. Nor does it allege that the company employs persons of a particular faith; indeed, quite the opposite. *See* Decl. of Daniel Weingartz at 6. In short, there is no escaping the conclusion that plaintiffs themselves reach in their complaint and their brief: Weingartz Supply Company is a secular employer. The government is aware of no case in which a for-profit, secular employer with Weingartz Supply Company's characteristics prevailed on a RFRA claim.

Because Weingartz Supply Company is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 702 ("Both Religion Clauses bar the government from interfering with the decision of a *religious* group to fire one of its ministers.") (emphasis added); *id.* at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of U. Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects the power of *religious* organizations to decide for

themselves, free from state interference, matters of church government as well as those of faith and doctrine." (citations and quotation marks omitted)) (emphasis added). This case should begin and end with plaintiffs' admission that Weingartz Supply Company is a secular employer and with the undisputed facts that confirm that admission.

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies cannot permissibly discriminate on the basis of religion in hiring or firing their employees or otherwise establishing the terms and conditions of their employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id.* § 2000e(1)(a). It is clear that Weingartz Supply Company does not qualify as a "religious corporation"; it is for-profit, it is not affiliated with a formally religious entity, it sells secular products, and the company's Articles of Incorporation mention no religious purpose. *See LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217 (3d Cir. 2007).

It would be extraordinary to conclude that Weingartz Supply Company is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b). In such a world, a secular company could impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and well-being (including Title VII). A host of laws and regulations would be subject to attack. Moreover, any secular company in this country would have precisely the same

right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences show why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.[12]

It is significant that Weingartz Supply Company elected to organize itself as a secular, for-profit entity and to enter commercial activity. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Having chosen the secular, for-profit path, the company may not impose its owner's religious beliefs on its employees (many of whom may not share, or even know of, the owner's beliefs). *See id.* ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."). In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). Weingartz Supply Company has "made no showing of a religious belief which requires that [it] engage in the [outdoor power equipment] business." *Id.* Any burden is therefore caused by the company's "choice to enter into a commercial activity." *Id. Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (observing in the First Amendment expressive

[12] For this reason as well, plaintiffs' reliance on cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), is misplaced. Both cases involved *individual* plaintiffs. Sherbert was an employee who was discharged for refusing to work on Saturdays; Yoder was a member of the Old Order Amish religion who objected to a compulsory school attendance law. Neither plaintiff was a for-profit, secular corporation.

association context that "[o]nce [an organization] enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas").

An employer like Weingartz Supply Company therefore stands in a fundamentally different position from a church or a religiously-affiliated non-profit organization. *Cf. Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose.").

The preventive services coverage regulations also do not substantially burden Mr. Weingartz's religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. Mr. Weingartz is neither. The regulations do not impose any obligations on individuals. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. Mr. Weingartz nonetheless claims that the regulations substantially burden *his* religious exercise because the regulations may require the group health plan sponsored by his secular *company* to provide health insurance that includes contraceptive coverage. But a plaintiff cannot establish a substantial burden by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not

make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring). Here, any burden on Mr. Weingartz's religious exercise results from obligations that the regulations impose on a legally separate, secular corporation. This type of attenuated burden is not cognizable under RFRA.[13] Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). Not so here, where the preventive services coverage regulations apply to the group health plan sponsored by Weingartz Supply Company, not to Mr. Weingartz himself.

Mr. Weingartz's theory boils down to the claim that what is done to the company (or the group health plan sponsored by the company) is also done to its owner. But, as a legal matter, that is simply not so. Mr. Weingartz has voluntarily chosen to enter into commerce and elected to do so by establishing a for-profit corporation that is a "creature of statute" and a "separate legal entity, distinct from its shareholders, officers, or directors." *Handley v. Wyandotte Chems. Corp.*, 325 N.W.2d 447, 449 (Mich. Ct. App. 1982); *Battle Creek Equip. Co. v. Roberts Mfg. Co.*, 460 F. Supp. 18, 22 (W.D. Mich. 1978); Mich. Comp. Laws Ann. § 450.1106 (West 2012). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations,

[13] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d). And, as explained below, Weingartz Supply Company is a legally separate entity from its owner.

powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As a Michigan domestic corporation with a "perpetual" term of existence, Weingartz Supply Company has broad powers—it may, for example, conduct business, sue and be sued, and appoint or employ agents. Mich. Comp. Laws Ann. §§ 450.1261(b), (e), (p); Weingartz Supply Co., Articles of Incorporation, *supra*. The company's officers have a duty to act "in the best interests of the corporation," Mich. Comp. Laws Ann. § 450.1541a(c),[14] and they in turn are generally not liable for the corporation's actions, *see Mich. Laborers' Health Care Fund v. Taddie Constr., Inc.*, 119 F. Supp. 2d 698, 702 (E.D. Mich. 2000). In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 163. Mr. Weingartz should not be permitted to eliminate that legal separation only when it suits him, to impose his religious beliefs on the corporation's group health plan or its 170 employees.

Although the preventive services coverage regulations do not require Mr. Weingartz or Weingartz Supply Company to provide contraceptive services directly, Mr. Weingartz's complaint appears to be that, through his company's group health plan and the benefits it provides to employees, he will facilitate conduct (the use of contraceptives) that he finds objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. But the owner has no right to control the choices of his company's employees, many of whom may not share his religious beliefs, when making use of

[14] Similarly, an employer-sponsored group health plan must be administered "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

their benefits. Those employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations. In light of Mr. Weingartz's choice to structure his company to separate himself from the corporate entity, the burden of which he complains is not a burden that establishes a violation of RFRA. *See Lee*, 455 U.S. at 261.[15]

2. Even if there were a substantial burden, the preventive services coverage regulations serve compelling governmental interests and are the least restrictive means to achieve those interests.

a. *The regulations significantly advance compelling governmental interests in public health and gender equality.*

Even if plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the preventive services coverage regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. As an initial matter, "the Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1560 (M.D. Fla. 1995) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)). There can be no question that this compelling interest in the promotion of public health is furthered by the regulations at issue here.

As explained in the interim final regulations, the primary predicted benefit of the

[15] The regulations—even in their current state—do not substantially burden Legatus' religious exercise. The preventive services coverage regulations do not require Legatus' employees to purchase or use contraceptive services. Nor must Legatus provide contraceptive services directly. Instead, the regulations require Legatus to make recommended preventive services, including contraceptive services, available under any health plan it offers to its employees. The policyholder, not Legatus, makes the decision to obtain contraceptive services. Any burden on Legatus therefore arises exclusively from the actions of third party employees of the company, as it is these individuals who actually decide whether or not to engage in the conduct to which Legatus objects.

regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the preventive services coverage regulations. As the Supreme Court explained in *Roberts v. United States Jaycees*, there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." 468 U.S. at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages . . . clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive

health care apply with equal force to women, who might otherwise be excluded from such benefits if their unique health care burdens and responsibilities were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* 155 Cong. Rec. S12265-02, S12269 (daily ed. Dec. 3, 2009); IOM REP. at 19. These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress's goal was to equalize the provision of health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

Plaintiffs miss the point when they attempt to minimize the magnitude of the government's interest by arguing that contraception is widely available and even subsidized for certain individuals at lower income levels. *See* Pls.' Br. at 17-18. Although a majority of employers do offer coverage of FDA-approved contraceptives, *see* IOM REP. at 109, many women forego preventive services, including certain reproductive health care, because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109. The challenged regulations advance the compelling interests of promoting the health of women and newborn children and furthering gender equality by eliminating that cost-sharing. 77 Fed. Reg. at 8728. Furthermore, the

government's interest in ensuring access to contraceptive services is *particularly* compelling for those women employed by companies that do not currently offer such coverage, like plaintiffs. Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro* 546 U.S. at 430-31, an exemption of plaintiffs and other similar employers from the obligation of their health plans to cover contraceptive services would remove these employees from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g., Graham v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987) ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance.").

Each woman who wishes to use contraceptives and who works for plaintiffs or a similarly situated entity (and each woman who is a covered spouse or dependent of an employee)—or, for that matter, any woman in such a position in the future—is significantly disadvantaged when her employer chooses to provide a plan that fails to cover such services. *See United States v. Friday*, 525 F.3d 938, 956 (10th Cir. 2008) (noting that government's interest is still compelling even when impact is limited in scope). As revealed by the IOM Report, those female employees (and covered spouses and dependents) would be, as a whole, less likely to use contraceptive services in light of the financial barriers to obtaining them and would then be at risk of unhealthier outcomes, both for the women themselves and their potential newborn children. IOM REP. at 102-03. They would also have unequal access to preventive care and would therefore be at a competitive disadvantage in the workforce due to their inability to decide for themselves if and when to bear children. These harms would befall female employees (and covered spouses and dependents) who do not necessarily share their employer's religious beliefs and—in the case of

Weingartz Supply Company—might not have been aware of those beliefs when they joined the secular company. Plaintiffs' desire not to provide a health plan that permits such individuals to exercise their own choice as to contraceptive use must yield to the government's compelling interest in avoiding the adverse and unfair consequences that would be suffered by such individuals as a result of the company's decision. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").[16]

b. *The regulations are the least restrictive means of advancing the government's compelling interests.*

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the underlying interests. When determining whether a particular regulatory scheme is "least restrictive," the inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme – or whether the scheme can otherwise be modified – without undermining the government's compelling interest. *See S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *see also, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.). The government is not required "to do the impossible – refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

[16] Plaintiffs rely heavily on *Newland v. Sebelius*, --- F. Supp. 2d ---, 2012 WL 3069154 (D. Colo. July 27, 2012), to support their argument. But *Newland* did not decide whether a for profit, secular company can exercise religion. As for the court's compelling interest and least restrictive means analysis, the government respectfully maintains that *Newland* was incorrectly decided.

Plaintiffs do not explain how they and similarly situated entities could be exempted from the regulations without significant damage to the governmental interests in public health and gender equality; and they do not offer any less restrictive means for achieving those interests, except perhaps a suggestion – made in passing in the context of plaintiffs' compelling interest discussion – that the government could simply provide preventive services directly. *See* Pls.' Br. at 18. Instead, plaintiffs' argument rests almost exclusively on the assertion that the regulations cannot be the least restrictive means of achieving the government's compelling interests when defendants have "carved out a number of exemptions for secular purposes." *Id.*

But, contrary to plaintiffs' assertions, this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47 (internal quotations and citations omitted). Nor do the "exemptions" mentioned by plaintiffs change the fact that the regulations are the least restrictive means of advancing the government's compelling interests. The "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. They reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259 ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."); *United States v. Winddancer*, 435 F. Supp. 2d 687, 695-98 (M.D. Tenn. 2006) (recognizing that the regulations governing access to eagle parts "strike a delicate balance" between competing compelling interests). And, unlike the exemption plaintiffs

seek for all employers that object to the regulations on religious grounds, the existing exemptions do not undermine the government's interests in any significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church*, 911 F.2d at 1208-09 (rejecting the plaintiff's argument that the existence of exemptions indicates that a law is the not the least restrictive means of achieving a compelling interest where the exemptions do not undermine that interest).

First, 26 U.S.C. § 4980H(c)(2) does *not* exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than 50 full-time equivalent employees from the employer responsibility provision. That provision subjects employers with more than 50 full-time employees to assessable payments, beginning in 2014, if they do not provide health coverage to their full-time employees. *See* 26 U.S.C. § 4980H(c)(2). This has nothing to do with preventive services coverage. In fact, small employers that choose to offer non-grandfathered health coverage to their employers must provide coverage for recommended preventive services – including contraceptive services – without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage, because the ACA, among other things, provides tax incentives for small businesses to encourage the purchase of health insurance for their employees. *See id*. § 45R.[17]

[17] Even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision would not undermine the government's compelling interest in ensuring that employees have access to recommended preventive services. Employees of small employers that do not provide health coverage will be able to obtain health coverage through health insurance Exchanges. *See* 42 U.S.C. § 18021; *id.* § 18031(d)(2)(B)(i). Because the preventive services coverage requirement applies to the health plans being offered through the Exchanges, the coverage individuals buy there will necessarily cover recommended contraceptive services. *Id*. § 300gg-13(a). In other words, in general, the employees of small employers will receive contraceptive coverage either through their employers or through the Exchanges.

The second "exemption" cited by plaintiffs – the grandfathering of certain health plans with respect to certain provisions of the ACA – is not limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests – specifically, the interest in spreading the benefits of the ACA, including those under the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA – in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,540, 34,546 (June 17, 2010).

The incremental transition of the marketplace into the ACA administrative scheme does not call into question the compelling interests furthered by the preventive services coverage regulations. Even under grandfathering, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. The government estimates that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See id.* at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption from the regulations sought by plaintiffs. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but they offer no support for such an untenable proposition. To the contrary, this approach is a perfectly reasonable balancing of competing interests. *See Winddancer*, 435 F. Supp. 2d at 695-98.[18]

[18] The third and last "exemption" mentioned by plaintiffs is "waivers for high grossing employers." Pls.' Br. at 18. It is not clear what plaintiffs mean, but for purposes of discussion the

Finally, even if this Court were to consider plaintiffs' vague suggestion that the government could provide preventive services as a less restrictive means, it should reject it as entirely infeasible. Rather than suggesting a modification to the current employer-based system that Congress built on, *see generally* H.R. Rep. No. 111-443, pt. 2, at 984-86 (2010) (explaining why Congress chose to build on the employer-based system), plaintiffs would have the whole system turned upside-down to accommodate their religious beliefs at enormous administrative and financial cost to the government. In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme. But a proposed alternative scheme is not an adequate alternative – and thus not a viable less restrictive means to achieve the compelling interest – if it is not "feasible" or "plausible." *See S. Ridge Baptist Church*, 911 F.2d at 1208 (noting that, for a less restrictive means to be constitutionally required it must be "feasible"); *New Life Baptist*, 885 F.2d at 947; *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the burdens and disadvantages that would be imposed on other important interests, including the additional administrative and fiscal costs of the proffered scheme. *See, e.g.*, *S. Ridge Baptist Church*, 911 F.2d at 1206; *Fegans v. Norris*, 537 F.3d 897, 905-06 (8th Cir. 2008); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Plaintiffs' alternative would impose considerable new costs and other burdens on the government and is otherwise

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government assumes they are referring to the annual limits waiver program. *See* 42 U.S.C. § 300gg-11; 45 C.F.R. § 147.126. The annual limits provision of the ACA restricts annual dollar limits on essential health benefits provided by health insurance issuers and group health plans. *See id.* The Secretary of HHS had the authority to waive these restrictions for plans if compliance "would result in a significant decrease in access to benefits under the plan or health insurance coverage or would significantly increase premiums for the plan or health insurance coverage." 45 C.F.R. § 147.126(d)(3). These waivers are not related to the preventive services coverage regulations, and those non-exempt, non-grandfathered plans that received an annual limits waiver are still required to provide the required preventive services coverage.

impractical. *See, e.g.*, *Lafley*, 656 F.3d at 942; *Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009); *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999).[19]

Nor would the proposed alternative be equally effective at advancing the government's compelling interests. *See, e.g.*, *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (finding that state's means was least restrictive where no alternative means would achieve its interests). As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to build on the existing employer-based system. The anticipated benefits of the preventive services coverage regulations are attributable not only to the fact that contraceptive services will be available to women with no cost sharing, but also to the fact that these services will be available through the existing employer-based system of health coverage, thus ensuring that women with employer-based coverage will face minimal logistical and administrative obstacles to receiving coverage of their care. Plaintiffs' vague alternative, on the other hand, has none of these advantages. It would require establishing entirely new government programs and infrastructures, and would almost certainly require women to take steps to find out about the availability of and sign up for this new benefit, thereby ensuring that fewer women would take advantage of it. Nor do plaintiffs offer any suggestions as to how this program could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposal – in addition to raising myriad administrative and logistical difficulties and being unauthorized by statute and not funded by any appropriation – is far less likely to achieve

[19] The costs and administrative burdens that the proposed alternative scheme would impose on the government are not the only reason that it is an inadequate alternative. Plaintiffs' challenge is to regulations promulgated by defendants, not to the ACA itself. But it is the ACA that requires that, where, as here, employer-based coverage is at issue, recommended preventive services be covered through the existing employer-based system.

the compelling interests furthered by the regulations, and therefore does not represent a less restrictive means.

C. Plaintiffs' Free Exercise claim is meritless.

For the reasons explained above, *see supra* 16-21, a for-profit, secular employer like Weingartz Supply Company does not engage in any exercise of religion protected by the First Amendment. Nevertheless, even if it did, the preventive services coverage regulations do not violate the Free Exercise Clause because they are neutral laws of general applicability. *See Smith*, 494 U.S. at 879. A law is neutral if it does not target religiously motivated conduct but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id.* at 535-37, 545 (concluding law was not generally applicable when it prohibited animal killings almost exclusively when they were performed as part of a Santeria religious ritual).

The preventive services coverage regulations are neutral and generally applicable. The regulations do not target religiously motivated conduct. Indeed, the religious employer exemption serves to accommodate religion, not to burden or disapprove of it.[20] The object of the regulations is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. The regulations reflect expert

[20] Plaintiffs contend this exemption is unlawful because it exempts some religious organizations but not others. Pls.' Br. at 20-21. The First Amendment, however, does not prohibit the government from distinguishing among types of organizations – based on purpose, composition, or character – when it is attempting to accommodate religion. *See, e.g., Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (upholding tax exemption for realty owned by associations organized exclusively for religious purposes and used exclusively for religious purposes); *Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006). It prohibits only laws that "officially prefer[]" "one religious *denomination*" over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added); *see also Gillette v. United States*, 401 U.S. 437, 450-51 (1971). The religious employer exemption contains no such denominational preference.

medical recommendations about the medical necessity of the services, without regard to any religious motivations for or against such services. *Id*. at 533. As shown by the IOM Report, this purpose has nothing to do with religion, as the IOM Report is entirely secular in nature. IOM REP. at 2-4, 7-8.

The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all non-exempt group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable).

Plaintiffs contend that the regulations are not generally applicable because they contain certain categorical exceptions. Pls' Br. at 21. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). Plaintiffs also maintain that defendants have created a system of individualized exemptions. Pls.' Br. at 20-21. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the preventive

services coverage regulations, and there is none.[21]

The preventive services coverage regulations are no different from other neutral and generally applicable laws governing employers that have been upheld against free exercise challenges. *See United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (upholding federal employment tax laws despite plaintiff's claim that they violated a religious belief requiring dissociation from secular government authority); *Am. Friends Serv.*, 951 F.2d at 960 (upholding law that required employers to verify the immigration status of their employees despite plaintiffs' assertion that their religious beliefs compelled them to employ persons without regard to immigration status); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same). Indeed, the highest courts of two states have rejected free exercise claims like those raised by plaintiffs here in cases challenging similar provisions of state law. *See Diocese of Albany*, 859 N.E. 2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87. Because the regulations are neutral laws of general applicability, plaintiffs' free exercise claim fails.[22]

D. Plaintiffs' Free Speech and Free Association claims are likewise meritless.

The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights* ("FAIR"), 547 U.S. 47, 61 (2006). But the preventive services coverage regulations do not require plaintiffs – or any other person, employer, or other entity – to say anything. Contrary to plaintiffs' assertion, *see* Pls.' Br. at 23,

[21] Plaintiffs misunderstand the regulations when they assert that HRSA has "unbridled discretion" to grant or deny an exemption to an employer that meets the religious employer exemption criteria. Pls.' Br. at 22. Any employer that meets the criteria is not required to cover contraceptive services. *See* HRSA Guidelines.

[22] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra* 24-34.

the regulations do not require plaintiffs themselves to provide any education or counseling.[23] Thus, the regulations are not like the law at issue in *Wooley v. Maynard* (*see* Pls.' Br. at 23), which compelled speech. 430 U.S. 705, 707 (1977) (requiring residents to display license plate that read "Live Free or Die"). Plaintiffs here are not being required to speak at all. Nor do the regulations limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views on the regulations. Indeed, under the regulations, plaintiffs may encourage Weingartz Supply Company's employees and/or Legatus's employees and members not to use contraceptive services. The regulations thus regulate conduct, not speech.

Moreover, the conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *FAIR*, 547 U.S. at 66. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services, because it is required by law to do so is not engaged in the sort of conduct the Supreme Court has recognized as inherently expressive. *Compare id*. at 65-66 (making space for military recruiters on campus is not conduct that indicates colleges' support for, or sponsorship

[23] Rather, if Weingartz Supply Company and/or Legatus decide to offer a non-grandfathered health plan to their employees, the plan must cover the costs of any education and counseling provided by a health care provider to its participants. It is the health care provider who will be speaking, not plaintiffs. And the regulations do not purport to regulate the content of the education or counseling provided – that is between the patient and her health care provider. *See* HRSA Guidelines (requiring coverage to include "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider). Therefore, this case does not involve the sort of political and ideological causes at issue in the compelled-subsidy cases cited by plaintiffs. *See* Pls.' Br. at 23 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). Those cases do not stand for the proposition that an employer may refuse to provide coverage for medical services because, during the course of a medical visit, a provider may say something with which the employer disagrees. Plaintiffs' theory would preclude virtually all government efforts to regulate health coverage, as a medical visit almost invariably involves some communication between a patient and a health care provider, and there may be many instances in which the entity providing the health coverage disagrees with the content of this communication.

of, recruiters' message), *with Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568-70 (1995) (openly gay, lesbian, and bisexual group marching in parade is expressive conduct), *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning is expressive conduct), *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-14 (1969) (wearing black armbands to show disapproval of Vietnam hostilities is expressive conduct). Because the regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause. *See Catholic Charities of Sacramento*, 85 P.3d at 89 (upholding similar California law against free speech challenge because "a law regulating health care benefits is not speech").

Plaintiffs' expressive association claim is similarly flawed. The regulations do not interfere in any way with the composition of the company's workforce or the association's membership. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding Boy Scouts' freedom of expressive association was violated by law requiring organization to accept gay man as scoutmaster); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (concluding statute that forced group to accept women against its desires was subject to strict scrutiny). The regulations do not force Weingartz Supply Company to hire employees it does not wish to hire (although Title VII prohibits the company from religious discrimination in hiring because it is not a religious corporation). Nor do the regulations require Legatus to accept members with whom it does not want to associate. Mr. Weingartz and the other members of Legatus, moreover, are free to associate to voice their disapproval of the use of contraception and the regulations. If the statute at issue in *FAIR*, which required law schools to allow military recruiters on campus if other recruiters were allowed on campus, did not violate the law schools' right to expressive association, 547 U.S. at 68-70, neither do the preventive services coverage regulations violate plaintiffs' right. *See also Diocese of Albany*, 859 N.E. 2d at 465 (upholding similar New York

law against free speech and free association challenges).

II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND ENTERING AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC

Plaintiffs suggest that the mere allegation of a RFRA or First Amendment violation—at some point in the future—suffices to establish irreparable harm. Pls.' Br. at 25. This is not the law. Although "[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), in this case the Government has showed that the challenged regulations do not intrude upon plaintiffs' RFRA or First Amendment rights, so there has been no "loss of First Amendment freedoms" for any period of time. In this respect, the merits and irreparable injury prongs of the preliminary injunction standard merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because McNeilly does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails.").[24] Although plaintiffs allege that they "must begin addressing these issues prior to January 1, 2013" (*id.* at 2) and that they "will suffer financial harm" (*id.* at 25) before that time, such inconveniences are not the sort of "irreparable" injury that would justify the extraordinary remedy of injunctive relief. *See Sampson v Murray*, 415 U.S. 61, 90 (1974) (holding that "[m]ere injuries, however substantial, in terms of money, time and energy . . . are not enough" to justify a preliminary injunction).[25] As for Legatus, the enforcement safe harbor and the forthcoming accommodation unquestionably mitigate any need for preliminary relief.

[24] The safe harbor protects Legatus from complying with the regulations until at least January 2014; and, indeed, the regulations may never apply to Legatus due to the forthcoming accommodation.

[25] The cases plaintiffs cite, *see* Pls.' Br. at 25, are not to the contrary. *See Connection*, 154 F.3d at 288 (involving an ongoing First Amendment violation); *Newsom v. Norris*, 888 F.2d 371, 378-79 (6th Cir. 1989) (same).

Moreover, preliminary injunctive relief would harm the government and the public. With regard to the government, "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Enjoining the regulations as to a for-profit, secular corporation after January 2013 would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be a part of the workforce on an equal playing field with men. It would also be contrary to the public interest to deny the employees of Weingartz Supply Company the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 306, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Because Weingartz Supply Company is a for-profit, secular employer, many of its employees undoubtedly do not share Mr. Weingartz's religious beliefs. Those employees should not be denied the benefits of receiving a health plan through their employer that covers contraceptive services. Enjoining the government from enforcing the preventive services coverage regulations, the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728, as to plaintiffs would thus harm the public. Weingartz Supply Company employs 170 people, Compl. ¶ 73, and the scope of coverage of its health plan also affects those employees' covered spouses and dependents. Any potential harm to plaintiffs resulting from their desire not to provide contraceptive coverage is thus outweighed by the significant harm an injunction would cause to the public.

CONCLUSION

This Court should deny plaintiffs' motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I certify that on August 29, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Erin E. Mersino, and I certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: NONE.

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