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 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Judge Robert H. Cleland Magistrate Judge Michael Hluchaniuk

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Defendants' opposition to Appellant's Motion for Preliminary Injunction is long on obfuscations of the truth and ad hominem attacks, but short on legal reasoning and accuracy. Plaintiffs hereby reply to Defendants' opposition to this Honorable Court:

ARGUMENT

Plaintiffs rightfully seek the protections of a preliminary injunction, requiring that Plaintiffs demonstrate that absent injunctive relief, "[they] are likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995)). Without protection from the court, Plaintiffs will be required to provide contraception, abortifacients, and patient education and counseling for women with reproductive capacity as part of their employee insurance plans—in direct contravention of Plaintiffs' religious beliefs. Therefore, the Court has no choice but to favor entry of injunctive relief, as the Plaintiffs cannot avoid imminent, irreparable harm. Furthermore, the entry of injunctive relief supports public interest because "[o]n balance, the threatened harm to Plaintiffs, impingement of their right to freely exercise their religious beliefs, and the concomitant public interest in that right strongly favor the entry of injunctive relief." *Newland, et al. v. Sebelius, et al.*, No. 12-1123, slip op. at 10 (D. Colo. July 27, 2012).

I. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS THAT DEFENDANTS' ACTIONS VIOLATE BOTH RFRA AND THE FIRST AMENDMENT

a. Defendants Violated the Religious Freedom Restoration Act

Defendants argue that Plaintiffs forfeit their rights to religious liberty by deciding to earn their living by running a corporation. Citing as its legal support, Defendants cling to dicta in a memorandum opinion in which the Holy Land Foundation for Relief and Development ("HLF")

sought to circumvent its designation as a terrorist organization and the resulting blockage of its assets as arbitrary, capricious and unconstitutional. *Holy Land Found. For Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 62 (D.D.C. 2002), *aff'd on other grounds*, 333 F.3d 156 (2003). Such authority is not only nonbinding on this Honorable Court; it is factually and wholly inapposite.

Ninth Circuit precedent recognizes that the religious beliefs of individual owners of for-profit and even "secular" corporations can be burdened by regulation of their corporation. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988). And as logically follows, each corporation could sue to protect those beliefs. *Id.* Defendants seem to advance the argument that an individual cannot exercise religion while engaging in business. However, the free exercise of religion is expansive expression, which encompasses and protects the practice of religious beliefs in any context. That free exercise historically has included the pursuit of financial gain in employment and commerce. *See United States v. Lee*, 455 U.S. 252, 257 (1982) (holding that an employer's religious beliefs were burdened by paying taxes for workers*); Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (holding an employee's religious beliefs were burdened through not receiving unemployment benefits); *see also Thomas v. Review Board*, 450 U.S. 707, 709 (1981).

In the Religious Freedom Restoration Act (hereinafter "RFRA"), Congress itself defined free exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb *et seq.;* 42 U.S.C. § 2000cc-5(7)(a). Congress did not specify who or what entity might be *excluded* from the protections of religious exercise. Mirroring the protection of First Amendment freedoms, where the Court looks not at who is being protected—but *what* is being protected. The Supreme Court has expressly held that "First

Amendment protection extends to corporations," and a First Amendment right "does not lose [its] First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 899 (2010) (regarding speech). In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), the Supreme Court held in its determination of the constitutionality of a law identified as §8,

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does. . . . We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 775-76, 784 (1978).

These protections cannot be reconciled with the government's view that commerce excludes religion. Defendants' Mandate on a family business directly burdens the family's religious beliefs. 42 U.S.C § 300gg–13. Defendants try to argue that because its Mandate applies to a corporation, Plaintiff Weingartz and his family are isolated from its effect.

Stormans and *Townley* support the common sense view that an imposition on a family business corporation is no less an imposition on the family owners. Here, Plaintiff Weingartz Supply Company was founded as a family business and is still a closely held family corporation. Defendants' Mandate on Plaintiff Weingartz Supply Company realistically calls for the president and co-owner of the company, Plaintiff Daniel Weingartz, to implement the mandate. The

Defendants' emphasis on a corporation's limited liability is a *non sequitor*. Limited liability is only one corporate characteristic, and not the morally relevant one here. The corporate form fails to isolate Plaintiff Daniel Weingartz from the Mandate—in fact it is actually the mechanism the Mandate uses to impose its burden. The Mandate inescapably coerces Plaintiffs to use their property in a way that violates their religious beliefs, and penalizes noncompliance—with a minimum fine of $2,000 per employee for noncompliance fined to the corporation.

Defendants constructively argue that when it fines a person, it is not burdening him, but merely burdening his bank account and assets. However, the Supreme Court has previously ruled that coercion against an individual's financial interests *is* a substantial burden on religion. *Sherbert*, 374 U.S. at 403–04. And in all honesty, the Defendants' Mandate does burden the Plaintiffs because although they are free to abandon their jobs, their livelihoods, and their property so that others can take over their family's company and comply with the Mandate—that expulsion from business, their livelihood, their namesake and family tradition is an extreme form of governmental burden.

While the Defendants make numerous statements about Plaintiffs' status and ability to maintain a claim under RFRA, the Defendants fail to address the basis of this claim—the protection of the Plaintiffs' genuine and deeply held religious beliefs. The Mandate burdens Plaintiff Weingartz Supply Company's own free exercise. Plaintiff Daniel Weingartz's detailed factual affirmation that Plaintiff Weingartz Supply Company has actually adopted and followed Catholic religious beliefs in his business practices is left unchallenged by the government. (Pl. Br. at Ex. 2). Importantly, Plaintiff Weingartz Supply Company and Plaintiff Daniel Weingartz adopted the Catholic belief system in its health insurance decisions, and expressly excluded

objectionable service prior to the Defendants' enactment of the Mandate to ensure compliance with their moral conscience and religious exercise. (Pl. Br. at Ex. 2).

The Defendants' Mandate compels a family business to violate the beliefs they have pursued to earn a living. If the Court adopts Defendants' argument, it would prevent businesses from operating according to any kind of ethical norm or charitable effort, as the basis that its profit motive is "overriding."

The First Amendment was not enacted and has never been used to wholly exclude religion from private business. Defendants incorrectly assert that no case recognizes the free exercise of religion through a business or corporation. *Stormans*, 586 F.3d at 1119–20 (affirming not only that for-profit, corporation's owners could assert free exercise claims, but that Stormans, Inc. itself could present those claims on the owners' behalf). In *Stormans*, the Court recognized, *as is true here*, that the for-profit corporation was a family owned entity—the Court allowed for no relevant distinction between the burden on the owners' beliefs and the applicability of the mandate to the corporation. *Id.*; *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d at 620 n.15 (recognizing free exercise claims asserted by a mining equipment manufacturer). Furthermore, the Minnesota Supreme Court plainly held that the Defendant's argument (a "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority.") failed to hold any weight in court. *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (citing *Bellotti*, 435 U.S. 765, and *United States v. Lee*, 455 U.S. 252).

Most incongruous in the instant case, the Defendants assert that secular, *non-profit* corporations who object to providing "preventive services" are not required to provide objectionable services and are entitled to protection; however, *for-profit* corporations are

somehow uniquely devoid of the same rights and protections. (Def. Br. at 10) (describing that non-profit companies who have not offered contraceptive services since February 10, 2012 may be eligible for a temporary safe harbor provision—except for the fact it is expressly excluded because it is *for-profit*, Plaintiff Weingartz Supply Company's policy appears that it would otherwise qualify for the safe harbor provision).

The Defendant relies on *United States v. Lee* for its claim that religion is incompatible with earning a living. In actuality, *Lee* made no such finding. Instead, the Court found that the Social Security tax *did* create an "interfere[nce] with the[] free exercise rights" of the Amish employers. 455 U.S. at 257. It only resolved the case *after* recognizing the religious liberty interest of the employer, when it applied the required scrutiny level. Defendants brief's often repeated the quote from *Lee* regarding plaintiffs who "enter into commercial activity" is plucked out of context to suggest that people in businesses can assert no free exercise burdens. Instead the quote came under the court's scrutiny analysis and is misquoted as used by the Defendants. Furthermore, the Defendants make numerous references and arguments involving Title VII, which bears no relation or influence on the litigation before the Court and would be rightly dismissed by the Court as irrelevant and unpersuasive.

i. Defendants' Mandate substantially burdens Plaintiffs' free exercise of religion

Although the Defendants in their argument attempt to reformulate the RFRA statute and the Free Exercise Clause to draw division between for-profit and non-profit corporations, "RFRA asks a much simpler question: whether the government is imposing a substantial burden on the exercise of religion." *Newland*, slip op. at 11 (citing 42 U.S.C. § 2000bb-1). RFRA requires strict scrutiny analysis, which the Defendant cannot satisfy. *Id.* Relying upon Plaintiffs' original brief and attached affidavits, Defendants' fail to counter that Plaintiffs'

religious exercise is substantially burdened by the Defendants' Mandate. It is quite clear that the Mandate compels the Plaintiffs to do exactly what the Catholic Church teaches them not to do, which is to provide contraceptives and abortifacients, along with related counseling and education. All which is seen as material cooperation with evil by the Catholic Church. Therefore, the questions befall on the Defendants whether the Defendants assert a compelling governmental interest and utilize the least restrictive means.[1]

ii. Defendants' Mandate fails to serve a compelling governmental interest and fails to use the least restrictive means

The Defendants assert two bases that a "compelling governmental interest" exists to force Plaintiffs to provide contraceptives, abortifacients, counseling and education in violation of their religious beliefs. These bases are: to promote the health of women and newborn children through the use of contraceptives and to promote equality for women who are inherently "disadvantaged" in the workplace without free contraceptives. Neither purported reason furthered by the "preventive services" Mandate satisfies what constitutes a "compelling governmental interest" under RFRA.[2]

[1] The Defendants try to argue that Plaintiffs are not subject to the Mandate because they are not group insurance plans or insurance issuers, despite the fact that the ACA and the Mandate expressly require Plaintiffs' compliance. It is important to note that even if "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas v. Review Bd.*, 450 U.S. at 717–18). A substantial burden exists if "a government . . . requires participation in an activity prohibited by a sincerely held religious belief" or "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Id.* at 1315. Any contention from the Defendants that Plaintiffs' taxes fund government programs that provide contraceptive coverage, and this invalidates the substantial burden placed upon Plaintiffs' religious exercise is patently incorrect. Defendants' Mandate "*compel[s]* a violation of conscience," direct or indirect, and is nothing other than a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

[2] Defendants' asserted dual compelling interest is tenuous at best, and Defendants' proffered supporting "evidence is not compelling." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011). Defendants are required to show that the compelling interest is tailored to the exemption

The Supreme Court held that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). Therefore,"[i]n order to justify a substantial burden on Plaintiffs' free exercise of religion, the government must show that its application of the preventive care coverage mandate to Plaintiffs furthers 'interests of the highest order'" not only in its general application—but also in its application specifically to the Plaintiffs. *Newland*, slip op. at 13 (internal citation omitted). Quite plainly, "a law *cannot* be regarded as protecting an interest of *the highest order* when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi*

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requested. *Gonzales*, 546 U.S. at 430–31. Here, Defendants assert only generic interests and marginal benefits, without proving that there is a direct correlation between their asserted interests and achievement of their related goals. Defendants fail to point to a single example where the Plaintiffs' current plans, which do not provide contraceptives or abortifacients, caused a health issue or blocked access to contraceptives for a female employee, woman or a newborn child, or where a woman experienced inequality in the workplace due to not being able to take free contraceptives. Furthermore examination of the government's own research, shows that its main goal of the Mandate, thwarting "unintended pregnancy," is supported by a study stating that "research is limited" when it comes to negative outcomes of unintended pregnancy. Inst. of Med. ("IOM"), *Clinical Preventive Services for Women: Closing the Gaps* (2011) at 103. The IOM cites its 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy." The 1995 IOM admits that no causal link exists for most of its alleged factors. (Inst. of Med., *The Best Intentions* (1995) ("1995 IOM"), http://books.nap.edu/openbook.php?record_id=4903&page=64.

Additionally, Defendants' stated interest of promoting equality in the workplace for women who are otherwise, as the Defendants claim, "disadvantaged" is protected by federal law—which rightfully places the burden on the employer not to discriminate against a woman due to being a female or being pregnant. *See, e.g.*, Pregnancy Disability Act (PDA) (P.L. 95-555, 92 Stat. 2076) (1978); Family Medical Leave Act (FMLA) (Pub. L. 103-3) (1993); 29 U.S.C. § 2601; 29 C.F.R. § 825; 29 C.F.R. § 1604. The Defendants' argument places the burden on the female employee to accept discrimination and change her behavior in order to avoid discrimination by taking contraceptives, despite their medical side effects, as the only way to avoid workplace discrimination.

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). Here, the Defendants leave unprohibited "over 190 million health plan participants and beneficiaries from the preventive care coverage mandate." *Newland*, slip op. at 14. Defendants cannot show that a compelling interest exists as it pertains to the Plaintiffs in this litigation, when they themselves have exempted nearly 200 million from the Mandate through its scheme of exemptions. Furthermore, Defendants are required to "offer[] evidence that granting the requested religious accommodations would seriously compromise its ability to administer this program." *Gonzales* at 435. Defendants have failed to show that while they exempt "190 million," exempting two additional health plans for small business employers based upon deeply held religious grounds would somehow *seriously* compromise the stated goals of the Mandate. *See Newland*, slip op. at 15 ("this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs"). It is wholly without merit for the Defendants to argue that it has an interest "of the highest order" to justify forcing the Plaintiffs to violate their religious beliefs when Defendants themselves decided to leave millions of female employees at this purported "disadvantage" for reasons such as the plan is "grandfathered" (furthering the political agenda that "if you like your plan, you can keep it").

Defendants present conjectural arguments in their effort to somehow justify the exclusion of "190 million health plan participants and beneficiaries." Defendants try to argue that the exemptions stem not from the Mandate but from the "Patient Protection and Affordable Care Act" (Pub. L. 111-148, March 23, 2010, 124 Stat. 119) and the "Health Care and Education Reconciliation Act" (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively known and hereinafter referred to as the "ACA"), claiming an exemption "has nothing to do with preventive service coverage." (Def. Br. at 30). Then, however, in the very next paragraph Defendants

admit that the Mandate is a provision of the ACA. (Def. Br. at 31). Regardless, the Defendants' argument misses the relevant analysis. Creative labeling or attempted shifting by Defendants cannot change the fact that the relevant inquiry under RFRA is whether the law "leaves appreciable damage to supposedly vital interest unprohibited." *Church of Lukumi Babalu* at 547. Here, Defendants cannot avoid that they are content to leave millions of women at a "disadvantage" because they are not receiving free contraceptives and abortifacients through exemptions in the law, but at the same time Defendants insist that this stated harm must be prevented specifically by the Plaintiffs' two health insurance policies. *See Brown v. Entm't Merchs. Ass'n* at 2741 (Defendants cannot claim to "have a compelling interest in each marginal percentage point by which its goals are advanced.").

Defendants secondly argue that the effect of the grandfathered plan exemption is not permanent; therefore the exemption should not matter to this court's analysis.[3] This argument contradicts the text of the ACA, the government's website, and its own data. In order to pass the ACA, "President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[4] The grandfathering regulation "makes good on that promise by [p]rotecting the ability of individuals and businesses to keep their current plan." *Id.* There is no expiration date for plans that qualify for grandfathered status in the ACA. Instead, a plan can keep grandfathered status in perpetuity, even if it raises fixed-cost employee contributions and, for several items, even if the increases exceed medical inflation plus 15% every year. *Id.* The exemption for grandfathered plans is repeatedly called a "right." *See* 75 Fed. Reg. 34,538, at

[3] It is important to note that Congress in passing the ACA rendered the interests of this Mandate non-compelling by deciding to omit the Mandate from the requirements of grandfathered plans.
[4] HealthCare.Gov, "Grandfathered Health Plans," http://www.healthcare.gov/law/features/rights/grandfathered-plans/.

34,540, 34,558, 34,562, & 34,566. This begs the question why the "right" to a grandfathered plan merits an exemption, but the *right* to freedom of religion does not.

Defendants lack the evidence to satisfy their burden to show a compelling governmental interest. Defendants fail to explain why the 170 employees of Weingartz Supply Company must be subject to the Mandate, while the Defendants voluntarily exclude "190 million health plan participants and beneficiaries." Defendants accuse the Plaintiffs of wanting "the whole system turned upside-down to accommodate their religious beliefs." (Def. Br. at 32). In actuality, the Plaintiffs have only sought one thing: for their religious freedom to be protected. Even if recognizing an exemption for the Plaintiffs under RFRA means that other devoutly religious employers would obtain the same, the Defendants' own resource explains that only "some" group insurance plans exist that do not offer contraceptives and abortifacients.[5] The number of employers who would seek exemption on religious grounds would likely pale in comparison to the number of employers already exempt from the Mandate. Plaintiffs' participation in Defendants' stated interest merely represents a percentage point toward the advancement of the interest, and should not overshadow Plaintiffs' religious freedom.

RFRA requires that the Mandate be the "least restrictive means," and the Defendants bear the burden of proving that there are no feasible, less-restrictive alternatives. 42 U.S.C. § 2000bb-1; *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *see also Newland*, slip op. at 17 ("Defendants bear the burden of demonstrating that refusing to exempt Plaintiffs from the preventive care coverage mandate is the least restrictive means of furthering their compelling interest. Given the existence of government programs similar to Plaintiffs' proposed alternative, the government has failed to meet this burden.").

[5] Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (May 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf; see also (Def. Br. at 6 n.4).

Defendants have failed to refute why the government could not make contraceptives or abortifacients directly available to those few individuals who seek free contraceptives but work for an employer who objects to such insurance coverage on the basis of religion. Instead, Defendants summarily refute such an alternative as not feasible or plausible. Defendants claim that an alternative "would impose considerable new costs." (Def. Br. at 32). However, the Supreme Court held that a law cannot survive strict scrutiny even when alternatives are costly and require the restructuring of a governmental scheme. *See Riley v. National Federation of the Blind of North Carolina, Inc.* Defendants admittedly want the Plaintiffs to subsidize contraceptives and abortifacients when they are widely available at "community health centers, public clinics, and hospitals with income-based support." (Pl. Br. at Ex. 6). Defendants, on their own, even suggested for employees to go to these "community health centers, public clinics, and hospitals" as an alternative for employees whose employers currently fall under the temporary safe-harbor provision for 2013-14. (Pl. Br. at Ex. 6). Given the fact that contraceptives are readily available, and reasonable alternatives exist rendering it unnecessary for Plaintiffs to violate their right of conscience and their religious freedom, Defendants cannot prove they have used the least restrictive means.

b. Defendants violate the Free Exercise Clause of the First Amendment

For the reasons articulated above and in Plaintiffs' opening brief, the Mandate is not generally applicable and cannot survive strict scrutiny analysis.

c. Defendants violate the Free Speech and Free Association Clauses of the First Amendment

Defendants state that "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." (Def. Br. at 37 n.23). As

an initial matter, it is not Plaintiffs' decision that their health insurance plans do not qualify for grandfathered status. The reality is that, through no fault of their own, Plaintiffs' plans do not meet the Defendants' qualifications and are not grandfathered. And through the Defendants' own admission, the Mandate forces the Plaintiffs to "cover the costs of any education and counseling," forcing and compelling speech to which the Plaintiffs object. The Supreme Court has explained that compelled speech, as here when the Defendants force a speaker to fund objectionable speech, is protected by the First Amendment. *See, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest or least restrictive means test. *Knox v. Service Employees Intern. Union*, --- U.S. ---, 2012 WL 2344461 at *9 (June 21, 2012).

There is no "mandated association" before the Court as the Defendants exempt numerous employers from the Mandate, which cannot be upheld as furthering a compelling interest. Thus in allowing this compelled speech to stand, the Court quite plainly would be affirming that while some are excused from complying with the Mandate, those that are forced to comply must pay for objectionable speech. This truth, coupled with the fact that the Mandate is not a condition on government funding, reveal Defendants' error in their reliance on *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006).

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

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

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

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

Defendants' Mandate went into effect on August 1, 2012. It is inescapable that the Mandate is the current law and is being enforced as this brief is being read. One district court has already issued a preliminary injunction to enjoin its unconstitutional aims. *See Newland*. Claiming that the Mandate is somehow "hypothetical" at this point in time is incorrect. Defendants ask this Court to bestow them with blind trust and naïveté that the Defendants' will change the current law and, despite their track record, their future actions will be constitutional. While Defendants' publicly disavow making any future amendments to the Mandate, *see* (Pl. Br. at Ex. 6) (declaring that the final rule will require insurance plans to cover contraceptive services and that temporary safe-harbor provision only provides time for qualifying organizations to adapt to the imminent violation of their constitutional rights: "This additional year will allow these

organizations more time and flexibility to adapt to this new rule."), Defendants argue that a change in the current law "may" "potentially" occur at some point in the future.

Defendants incorrectly contend that Plaintiff Legatus alleges an injury at some indefinite future time. (Def. Br. at 10). Plaintiff Legatus clearly states that it is subject to the Mandate as of January 1, 2013. (Pl. Br. at 10). Furthermore even if Plaintiff Legatus were to obtain certification for the temporary safe-harbor provision, then the Mandate will apply as of January 1, 2014. (Def. Br. at 10). Nothing about this date certain renders Plaintiff Legatus' injury "hypothetical." Instead, Defendants argue that the mere fact that they "*may*" change the current law from its current, unconstitutional state to, "*potentially*," a law that is constitutional blocks this Courts from addressing the controversy before it.

Despite Defendants' unenforceable promise, Plaintiff Legatus satisfies standing and has "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Plaintiff Legatus has sustained present and future harm through the violation of their constitutional freedoms. This harm is unquestionably traceable to the Defendant's Mandate and is redressable by this Court through the requested relief.[6] Plaintiff Legatus' injury is both

[6] Plaintiff is directly affected by the Mandate both as an employer—qualifying for standing in its own right, but it is also a Catholic organization which strictly follows and spreads the teachings of the Catholic Church and has *associational standing*. "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Here, members of Plaintiff Legatus share its religious objections to the Mandate and are required to supply health care pursuant to the Mandate. (*See* Pl. Br. at Ex.1). The religious liberty interests that Plaintiff Legatus seeks to protect is germane to the organization's purpose which is the teaching and sharing of Catholic beliefs. And since this case presents a pure legal claim that seeks only prospective relief, the individuals are not required to participate in the action.

"concrete and particularized," and "affect[s] the plaintiff in a *personal* and *individual* way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

Courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000). Furthermore, "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute." *Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997) (finding that gun manufacturers and dealers had standing to make a pre-enforcement challenge to a criminal statute that "targeted [them] for regulation"); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *see also Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that is sufficient to confer standing). And when the plaintiff is the subject of the challenged action, as Plaintiff Legatus is here, "there is ordinarily little question that the action or inaction has caused him injury." *Defenders of Wildlife*, 504 U.S. at 561-62. Plaintiff Legatus avers personal injury, as it is the subject to the Mandate which burdens its religious beliefs and practices. The Mandate seeks for Plaintiff Legatus to implement adverse business practices. This injury is unquestionably traceable to the Mandate and likely to be redressed by the declaratory and injunctive relief requested.

Indeed, absent judicial relief, the Mandate hangs over Plaintiff Legatus' head "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metro. Wash. Airports*

Therefore, Plaintiffs also satisfy associational standing through its members, who are integral to Plaintiff's Catholic objectives and practice, and who are similarly harmed by the Mandate.

Auth. v. Citizens for Abatement of Aircraft Noises, Inc., 501 U.S. 252, 265 n.13 (1991). The inevitable action causing harm—the enactment of the Mandate—has arrived. *See generally Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that the exercise of governmental rule-making power "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such *in advance of the imposition of sanctions* upon any particular individual," observing that "[i]t is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails") (emphasis added). As a result, Plaintiff Legatus is compelled to change its behavior to comply with the Mandate, and Plaintiff Legatus need not wait for the inevitable future harm to seek relief from this court. Plaintiff Legatus has standing because it has alleged a "personal injury" that is "fairly traceable" to the Mandate and is "likely to be redressed by the requested relief." *See Allen*, 468 U.S. at 751.

Defendants argue that Plaintiff Legatus "cannot transform the speculative possibility of future injury into a current concrete injury for standing purposes by asserting that it must plan now for its future needs." (Def. Br. at 12 n.10) (arguing that "[s]uch reasoning would gut standing doctrine"). *Id.* However, it was this reasoning that the Defendants wish this Court reject that many of the federal courts found that the plaintiffs had standing to challenge the "minimum coverage" provision of the ACA. *See, e.g., Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011) (changing present behavior to comply with the future mandate requirement causes a present injury in fact). Even in light of the Defendants' sophistry, it remains that there is nothing speculative about the current impact of the Mandate on Plaintiff Legatus and its business practices. *See, e.g., Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) ("it is a matter of commonsense" that businesses forced by the challenged

regulation to make changes to their everyday business practices would sustain "a concrete economic injury.") (internal citation omitted).

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

e. Plaintiff Legatus' Claims are Ripe for Judicial Review

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

Plaintiff Legatus' challenge to the Mandate presents a legal issue before the court and is unquestionably a case fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (holding a

challenge to regulatory provisions ripe where the issue presented was legal and would not be clarified by further factual development); *Abbot Labs.*, 387 U.S. at 149 (finding the issues appropriate for judicial resolution because "the issue tendered is a purely legal one"); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 530 (6th Cir. 1998) (holding the plaintiffs' challenge to the assault-weapons ban ripe and stating that "we believe a citizen should be allowed to prefer official adjudication to public disobedience") (quotations omitted); *see also Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290-91; *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1171 (6th Cir. 1983).

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

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

The enforcement of the Mandate against Plaintiff Legatus is inevitable, if not presently effective in fact. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) (finding challenge to statute ripe because its obligations were presently effective in fact, even though the plaintiffs had not been threatened with criminal prosecution). Thus, there are no advantages to the parties or this court to be gained from withholding judicial review. Plaintiff is already suffering harm. As the Supreme Court stated in *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1942), "[w]hen the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provision will come into effect." The application of the Mandate is "sufficiently probable," if not inevitable such that the case is ripe for review. In the final analysis, Plaintiff has standing to advance its claims, which are ripe for review.[7]

CONCLUSION

For these reasons and the reasons offered in their opening brief, the Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction.

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

Respectfully submitted this 6th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None

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