

**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
NOTICE OF MOTION AND BRIEF FOR
TEMPORARY RESTRAINING ORDER
Judge Robert H. Cleland
Magistrate Judge Michael Hluchaniuk

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**PLAINTIFFS' NOTICE OF MOTION AND EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER & BRIEF IN SUPPORT**

PLEASE TAKE NOTICE that at the earliest possible time for the court to hear this motion, Plaintiffs Legatus, Weingartz Supply Company, and Daniel Weingartz, by and through their undersigned counsel, will and hereby move the court for a Temporary Restraining Order pursuant to Fed. R. Civ. P. 65 and L.R. 65(b) in order to prevent immediate irreparable injury to Plaintiffs' fundamental rights and interests.

In support of their motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief filed with this motion, and the declarations and exhibits attached hereto. For the reasons set forth more fully below, Plaintiffs hereby request that this court temporarily enjoin the enforcement of Defendants' Health and Human Services Mandate (hereinafter "HHS Mandate") which violates Plaintiffs' rights guaranteed by the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq. For the purposes of this temporary restraining order, the Plaintiffs' focus solely on Claims I-III and V-VIII of their complaint; however, Plaintiffs do not forfeit any of the claims alleged in their complaint.

1. The purpose for a TRO in this case is to enjoin the HHS Mandate, which becomes law on August 1, 2012, and will violate the Plaintiffs' deeply held religious beliefs.

2. Defendants' HHS Mandate, as demonstrated further below, violates Plaintiffs' First Amendment rights and Plaintiffs' rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

3. Allowing the enforcement of the Mandate will cause irreparable harm to the Plaintiffs sufficient to justify immediate injunctive relief.

4. This TRO request requires immediate attention because the HHS Mandate becomes law on August 1, 2012.

5. Plaintiffs, individually and through counsel, have made attempts to resolve this matter prior to seeking this TRO.

6. Counsel has met and conferred, engaging in two telephone conversations on June 20, 2012 and June 22, 2012. Counsel on both sides respectfully came to the conclusion that their positions were too divergent and concurrence could not be reached.

7. Counsel has additionally communicated via email. Counsel agreed by stipulation that the Defendants be allowed to extend the time to answer the Plaintiffs' complaint, but also expressly agreed that "This stipulation will not in any way affect the Plaintiffs' right and ability to move for a temporary restraining order prior to August 1, 2012." (Doc. #8).

8. Since an agreement between the parties cannot be reached and the Plaintiffs fear the imminent violation of their constitutional rights and religious beliefs, Plaintiffs have no choice but to seek this TRO with the court in order to protect Plaintiffs' constitutional rights and avoid severe monetary fines for noncompliance with the HHS Mandate.

9. Defendants' counsel has filed an appearance. Therefore, Plaintiffs' counsel will provide notice of this TRO request through ECF filing with the court, in addition to sending a copy of this motion and brief to the Department of Justice via facsimile at (202) 616-8470 and via email at Ethan.P.Davis@usdoj.gov. The phone number for the Department of Justice is (202) 514-9242.

ISSUE PRESENTED

I. Whether the HHS Mandate, which substantially burdens the Plaintiffs' First Amendment freedoms and free exercise of religion without serving a compelling interest and without using the least restrictive means necessary, causes irreparable harm sufficient to warrant injunctive relief.

CONTROLLING AUTHORITY

Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq.

Sherbert v. Verner, 374 U.S. 398 (1963)

Wisconsin v. Yoder, 406 U.S. 205 (1972)

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993)

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995)

Elrod v. Burns, 427 U.S. 347 (1976)

BREIF IN SUPPORT OF EMERGENCY TRO MOTION**RELEVANT FACTS**

Plaintiffs Legatus, Weingartz Supply Company and Daniel Weingartz bring this motion for a temporary restraining order to enjoin the unconstitutional and illegal directives of the HHS Mandate. Plaintiff Legatus is an international, Catholic organization established for the purpose of promoting the study, practice, and spread of the Catholic faith in the business, professional, and personal lives of its members, comprised of Chief Executive Officers, Presidents, Managing Partners and Business Owners, with their spouses, from the business community and professional enterprises. (Hunt Decl. at ¶ 2; Weingartz Decl. at ¶ 11). Plaintiff Legatus is incorporated under the laws of Michigan. (Hunt Decl. at ¶ 1). Plaintiff Daniel Weingartz is a member of Legatus and the President of Weingartz Supply Company, a for-profit business incorporated under the laws of Michigan with over 50 full time employees. (Weingartz Decl. at ¶¶ 1-5, 9-10; Hunt Decl. at ¶ 9, 21-23; DiCresce Decl. at ¶ 9).

The members of Plaintiff Legatus, including Plaintiff Daniel Weingartz, follow the teachings, mission, and values of the Catholic faith. (Weingartz Decl. at ¶¶ 7, 10-13; Hunt Decl. at ¶¶ 6, 7). Plaintiff Legatus professes, educates, lectures, gives presentations, and engages in outreach amongst its members and in the community that contraception, abortion, and abortifacients violate the religious beliefs of Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz. (Hunt Decl. at ¶ 7). Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz, share sincerely held religious beliefs that forbid them from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients. (Hunt Decl. at ¶ 8). Plaintiff Legatus and its members, including Plaintiff Daniel Weingartz, cannot provide, fund, or participate in health care insurance which

covers artificial contraception, abortion, or abortifacients, or related education and counseling, nor provide information or guidance to its employees or its members for the purpose of supporting or providing artificial contraception, abortion, abortifacients or related education and counseling, *without violating their deeply held religious beliefs*. (Hunt Decl. at ¶¶ 12, 13).

As practicing Catholics, the Plaintiffs align their beliefs with Pope Paul VI's 1968 encyclical *Humanae Vitae*, which states "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception—is a grave sin. (Weingartz Decl. at ¶¶ 7, 10-13, 16; Hunt Decl. at ¶¶ 6, 7). Plaintiffs subscribe to authoritative Catholic teaching regarding the proper nature of health care and medical treatment. For instance, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." *Id.* Plaintiffs do not believe that contraception or abortion properly constitute health care, and involve immoral practices and the destruction of innocent human life. (Weingartz Decl. at ¶ 16).

Due to these beliefs, Plaintiffs designed insurance policies which specifically exclude coverage for contraception, abortion, and abortifacients. (Weingartz Decl. at ¶ 18; Hunt Decl. at ¶¶ 14, 15; Leipold Decl. at ¶ 8; DiCresce Decl. at ¶ 13); (Ex. 5). Plaintiff Daniel Weingartz, on behalf of Plaintiff Weingartz Supply Company, worked with his insurance agent Brown & Brown of Detroit to design its group health insurance plan which specifically excludes abortion, abortifacients, and contraception from its insurance plan. (DiCresce Decl. at ¶¶ 4-8; Weingartz Decl. at ¶¶ 16-18). Brown & Brown of Detroit was able to secure this plan design through a self-

funded program, with Blue Cross/Blue Shield of Michigan providing third party administration and stop-loss insurance. (DiCresce Decl. at ¶ 6; Weingartz Decl. at ¶¶ 16-18).

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

However after August 1, 2012, Plaintiffs will no longer have the right to make health care insurance decisions in line with their Catholic views. On August 1, 2012, the Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate") will go into effect and force Plaintiffs to pay, fund, contribute, or support artificial contraception, abortion, abortifacients or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs. *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (<http://www.hrsa.gov/womensguidelines>) (*See also* Leipold Decl. at ¶¶ 7, 11; DiCresce Decl. at ¶¶ 10, 14; Hunt Decl. at ¶ 25-29; Weingartz Decl. at ¶ 26).

The Affordable Care Act called for health insurance plans to provide coverage and "not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines" and directed the Secretary of the United States Department of Health and Human Services, Defendant Sebelius, to determine what would constitute "preventative care." 42 U.S.C § 300gg-13(a)(4). Defendants United States Health and Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care Act. 75

Fed. Reg. 41726 (2010), requiring providers of group health insurance to cover “preventive care” for women as provided in guidelines to be published on a later date.¹ *Id.* Prior to adopting those guidelines, Defendants accepted public comments. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception, abortion, and abortifacients.

On February 15, 2012, Defendant United States Department of Health and Human Services (“HHS”) promulgated the mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012 (“the HHS Mandate”). *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (<http://www.hrsa.gov/womensguidelines>). All FDA-approved contraceptives included contraception, abortion, and abortifacients such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the “morning-after pill”; and ulipristal, also known as “ella” or the “week-after pill”; and other drugs, devices, and procedures. (<http://www.hrsa.gov/womensguidelines>).

The HHS Mandate applies to almost all group health plans and health insurance issuers, 42 U.S.C. § 300gg-13 (a)(1),(4), and forces Plaintiffs to provide “preventative care” by making available and subsidizing contraception, abortion, and abortifacients such as the “morning-after

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

pill,” “Plan B,” and “ella.” The HHS Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity—despite the impact that paying for or providing such “services” violates one’s consciences and deeply held religious beliefs.

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

Neither of Plaintiffs’ health insurance plans are “grandfathered” and are subject to the provisions of the HHS Mandate as soon as August 1, 2012. (Leipold Decl. at ¶ 7; DiCresce Decl. at ¶¶ 10-12; Hunt Decl. at ¶ 18; Weingartz Decl. at ¶ 30).² Furthermore, Plaintiffs do not

² Plaintiff Legatus’ health care plan is not a grandfathered plan as: (1) the health care plan does not include the required “disclosure of grandfather status” statement; (2) Legatus does not take the position that its health care plan is a grandfathered plan and thus does not maintain the

qualify for the “religious employer” exemption contained in 45 C.F.R. § 147.130 (a)(iv)(A) and (B) and therefore do not fall under any “safe harbor provisions,” which would delay compliance with the HHS Mandate for one year.³ The HHS Mandate indicates that the Health Resources and Services Administration (“HRSA”) “may” grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Plaintiffs, such as Plaintiff Weingartz Supply Company and Daniel Weingartz, cannot be considered for such an exemption as Weingartz Supply Company is a for-profit business. (Weingartz Decl. at ¶¶ 3, 28-32). Furthermore, Plaintiff Legatus fails to meet the narrow qualifications for the religious exemption. (Hunt Decl. at ¶¶ 19-20; Leipold Decl. at ¶¶ 7, 10). Due to the size of Plaintiff Weingartz Supply Company, after August 1, 2012, Plaintiffs face per employee fines for non-compliance with the HHS Mandate. 26 U.S.C. § 4980H; (Weingartz Decl. at ¶ 28; Hunt Decl. at ¶ 36; DiCresce Decl. at ¶ 9, 14).

records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140; (Hunt Decl. at ¶ 18).

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

³ The HHS Mandate allows HRSA to grant exemptions for “religious employers” who “meet[] all of 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)(iv)(B).

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

At the same time, however, Sebelius announced that HHS “intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support,” inherently acknowledging that contraceptive services are readily available without mandating Plaintiffs subsidize them. (Ex. 6). Yet, Defendants have forced the Plaintiffs to face this decision: comply with their deeply held religious beliefs or comply with federal law. (Weingartz Decl. at ¶¶ 33-39; Hunt Decl. at ¶¶ 28-34; DiCresce Decl. at ¶¶ 14-16).

ARGUMENT

The factors to be weighed before issuing a TRO are the same as those considered for issuing a preliminary injunction. *See, e.g., Workman v. Bredesen*, 486 F.3d 896, 904-05 (6th Cir. 2007); *Southerland v. Fritz*, 955 F. Supp. 760, 761 (E.D. Mich. 1996). The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff’s likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3)

whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiffs' First Amendment rights, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Id.*

A. Plaintiffs' Likelihood of Success on the Merits

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

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

The statement written by Justice Jackson in his majority opinion is considered one of the Court's greatest statements about our fundamental freedoms established by the Bill of Rights. It is upon this backdrop, and resting upon this body of jurisprudence built upon deference to the inalienable freedom of religion, that the constitutionality of the HHS Mandate must be decided.

i. The HHS Mandate violates the Religious Freedom Restoration Act.

Congress enacted the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq. (hereinafter "RFRA"), in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), where, in upholding a generally applicable law that burdened the sacramental use of peyote, the Supreme Court held that the First Amendment's Free Exercise Clause did not require the court to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws, *id.* at 883-90.

Congress, by enacting RFRA three years after its decision in *Smith*, purposefully adopted a statutory rule comparable to the constitutional rule rejected in *Smith*.

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

In its formulation of RFRA, Congress expressly adopted the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In both cases, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants." *Gonzales* at 431, *see also Yoder* at 213, 221, 236; *Sherbert* at 410. In *Sherbert*, the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. In *Sherbert* the court held that the government could not impose the same kind of burden upon the free exercise of religion as it would impose a fine against noncompliant parties of the law. *Id.* at 402 ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals

or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.”) (internal citations omitted).

In *Yoder*, Amish and Mennonite parents of teenaged children held religious beliefs that prohibited them from sending their children to high school in violation of Wisconsin law. *Yoder* at 207. Each parent was fined \$5 per child for failing to comply with state law for not sending their children to school beyond the eighth grade in accordance with their sincerely held religious belief that “higher learning tends to develop values they reject as influences that alienate man from God.” *Id.* at 208-13. The Court held that the impact of Wisconsin law, while recognizing the “paramount” interest in education that the law sought to promote, impermissibly compelled the parents to perform acts undeniably at odds with the fundamental tenets of their religious beliefs. *Id.* at 218, 213, 221; *see also Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). The Court found that this compulsion “carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent,” *Yoder* at 218; the same constitutionally forbidden compulsion is before the court in this case.

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

Pursuant to the teachings of the Catholic Church, Plaintiffs’ sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for contraception, abortion, abortifacients, or related education and counseling. Plaintiffs’ compliance with these

beliefs is a religious exercise. The HHS Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception, abortion, and abortifacients—or in other words, *to change or violate their beliefs*. By failing to provide an exemption for the Plaintiffs' religious beliefs, the HHS Mandate not only exposes Plaintiff Weingartz Supply Company and Plaintiff Daniel Weingartz to substantial per employee fines for their religious exercise—roughly \$2,000 annually per employee, a fine significantly more severe than the \$5 per student fine struck down by the Court in *Yoder*—, but also exposes all Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs.

The HHS Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held religious beliefs and the teachings of the Catholic Church to which they belong. The HHS Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as contraceptives are currently readily available through other means without forcing the Plaintiffs to provide them.

Forcing the Plaintiffs to provide and fund health insurance which makes contraceptives and abortifacients available to their employees *at best* would serve the interest of *marginally* increasing access to contraceptives and abortifacients. Defendant Kathleen Sebelius herself has admitted that contraceptive services are already readily available “at sites such as community health centers, public clinics, and hospitals with income-based support.” Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the HHS Mandate to take the matter one step further by forcing employers, such as the Plaintiffs, objecting upon sincere religious grounds to subsidize these services through the insurance plans they sponsor. Furthermore, the HHS Mandate fails to

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

ii. The HHS Mandate violates the First Amendment to the United States Constitution, Free Exercise Clause.

The First Amendment prohibits the government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See generally* *McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. And as the Supreme Court acknowledged, "This principle that government may not enact laws that suppress religious belief or practice is . . . well understood. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

Unquestionably, the First Amendment protects Plaintiffs' right to express and exercise their religious beliefs. Under the Free Exercise Clause, the Supreme Court has ruled that the government may only pass a law that burdens certain religious exercises when the law is facially neutral and of general applicability. *Id.* at 531 (discussing, *when not subject to the scrutiny and analysis of RFRA*, a facially neutral law of general applicability is permissible notwithstanding any incidental burdens it imposes, so long as the law passes rational basis review). *However*, when a law burdens religious exercise because it is *not actually neutral or*

generally applicable it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Id.* at 531-32 (citing *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990)); see also *id.* at 547 ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal quotation and citation omitted).

In *Church of the Lukumi, supra*, the City of Hialeah enacted an ordinance prohibiting the public sacrifice of animals. *Id.* at 527. The ordinance also contained exemptions for the slaughtering of animals raised for food purposes and for sale in accordance with state law. *Id.* at 528. The ordinance had the stated purpose of promoting "public health, safety, welfare, and the morals of the community" and carried a maximum fine of \$500. *Id.* at 528. The ordinance, however, prevented members of the church of Santeria from engaging in a principle aspect of their religious worship, which was the public, sacrificial killing of animals. *Id.* at 524-25. This practice was known to the Defendant prior to the enactment of the ordinance. *Id.* at 526-27.

In deciding that the ordinance was not neutral nor generally applicable, the Court examined whether the law "infringe[d] upon or restrict[ed] practices because of their religious motivation," or "in a selective manner impose[d] burdens only on conduct motivated by religious belief." *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs. *Id.* at 534 (internal quotations and citations omitted).

The Court in *Church of Lukumi* further adopted the reasoning from *Smith* that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without

compelling reason.” *Id.* at 537 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 884; *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.)

Likewise, in the instant case, the HHS Mandate cannot avoid strict scrutiny as the law is not neutral nor generally applicable and the Defendants have set forth a number of individualized exemptions from the general requirement. Despite being informed in detail of the imposition on Catholic belief beforehand, Defendants designed the Mandate and the religious exemptions to the Mandate in a way that made it impossible for Plaintiffs to comply with their religious beliefs. By design, the Defendants imposed the Mandate on some religious organizations or religious individuals but not on others, resulting in discrimination among religions. The Defendants have created a number of categorical exemptions and individualized exemptions, none of which alleviate the chill imposed on the Plaintiffs’ free exercise of religion.

The Affordable Care Act and the HHS Mandate include exemptions for:

- Individual members of a “recognized religious sect or division” that conscientiously object to acceptance of public or private insurance funds in their totality, such as members of the Islamic faith or the Amish. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii).
- Employers with fewer than 50 full time employees. 26 USC § 4980H(c)(2)(B)(i). While employers with more than 50 full time employees must provide federal government-approved health insurance or pay substantial per-employee fines. 26 U.S.C. § 4980H.
- Employers with health care plans that are considered to be “grandfathered,” which, amongst meeting other criteria, have been in place and remain unchanged since March 23, 2010. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.
- Non-profit employers who qualify under the narrow exemption of a “religious employer.” 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

The HHS Mandate in its exemptions completely fails to address the constitutional and statutory implications on for-profit, secular employers such as Plaintiff Weingartz Supply

Company and Plaintiff Daniel Weingartz. Furthermore, there is no exemption available for a member of the Catholic faith who conscientiously objects to the HHS Mandate on religious grounds. The HHS Mandate vests the Health Resources and Services Administration with unbridled discretion in deciding whether to allow exemptions to some, all or no organizations meeting the definition of “religious employers” or religious individuals.

For these reasons and those articulated in the previous section of this brief, the substantial burden the Defendants anchor onto the Plaintiffs’ religious exercise, is not narrowly tailored to any compelling governmental interest. The HHS Mandate violates the Plaintiffs’ rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

iii. The HHS Mandate violates the First Amendment to the Constitution, Free Speech and Expressive Association.

As the United States Supreme Court has long recognized, “spreading one’s religious beliefs” and “preaching the Gospel” are activities protected by the First Amendment. *See Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). Supreme Court precedent also “establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Additionally, “[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.” *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). The Sixth Circuit echoed this fundamental understanding of the right to association by stating, “Freedom to engage in association for the advancement of beliefs and ideas is an inseparable

aspect of freedom of speech.” *Connection Distributing Co.*, 154 F.3d at 295 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

Indeed, “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *see also id.* at 636 (O’Connor, J., concurring) (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.”).

The government traditionally has not been allowed to force a person—who objects to an activity or conduct on moral grounds—to subsidize, and thereby endorse, conduct that he believes, teaches, or otherwise states is wrong. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that the government cannot compel state bar members to finance political and ideological activities of which they disagree); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (holding that the government cannot require state employees to provide financial support for ideological union activities they oppose which are unrelated to collective bargaining); *Wooley v. Maynard*, 430 U.S. 705 (1977) (enjoining a state law which required that plaintiff affix the motto “Live Free or Die” on his license plate when the plaintiff, who was a Jehovah’s witness, found the motto morally repugnant).

Indeed, the First Amendment protects the right “to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Therefore, Plaintiffs should not be compelled by the government to provide education and counseling against their deeply held beliefs. Plaintiffs should not be compelled to subsidize and endorse private conduct that it objects to—especially when Plaintiffs

have chosen to express their faith through religious speech and assembly. Plaintiffs will be hard-pressed to effectively and persuasively communicate the Church's teachings that contraception, abortion, and abortifacients are immoral, yet simultaneously pay for and provide contraceptives. The precepts are irreconcilable.

Based on the speech at issue here (expressing one's faith), Plaintiffs are also protected by "the First Amendment's expressive associational right." See *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000) (finding that the Boy Scouts are protected by the First Amendment and stating, "It seems indisputable that an association that seeks to transmit . . . a system of values engages in expressive activity"). In *Boy Scouts of America*, the Supreme Court held that "freedom of expressive association" under the Free Speech Clause prohibited the enforcement of a public accommodation law when it required the Boy Scouts be led by a homosexual scoutmaster. *Id.* at 648. The Supreme Court held that compelling the enforcement of the public accommodation law would "force the organization to send a message, both to the youth members and the world, that the [organization] accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. Correspondingly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Supreme Court held that the First Amendment gave the plaintiffs, organizers of a private St. Patrick's Day parade, the right to exclude a homosexual group from the parade, when the plaintiffs believed that the group's presence would communicate a message about homosexual conduct to which the plaintiffs objected. The First Amendment protected the plaintiffs' right "not to propound a particular point of view," *id.* at 575, and the Supreme Court protected the "principle of speaker's autonomy," *id.* at 580.

Since the First Amendment through its free speech and expressive association provisions protects nonreligious organizations based upon moral objections to exclude individuals whose

mere *presence* was thought to send an objectionable message, then reasonably the Court should protect the free speech and association of the Plaintiffs who object to subsidizing and supporting certain messages and conduct based upon their deeply held religious beliefs. The compelled subsidization and support of contraceptives, abortion, and abortifacients in the instant case strikes at the heart of one's ability to communicate unambiguous moral teachings and religious beliefs, and one's ability to form associations that maintain adherence to those teachings.

The Defendants cannot compel speech and association they find favorable, but is volatile of the Plaintiffs' religious beliefs. Based upon this, and all other reasons articulated in this brief, the Plaintiffs have demonstrated a substantial likelihood of prevailing on the merits of their claims.

B. Irreparable Harm to Plaintiffs without the TRO.

Plaintiffs will be irreparably harmed without the TRO. The HHS Mandate deprives Plaintiffs of their fundamental First Amendment rights. And it is well established that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Connection Distributing Co.*, 154 F.3d at 288 (quoting *Elrod*); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (“The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.” (citing *Elrod*)).

Additionally, Plaintiffs will suffer financial harm. Plaintiff Legatus obtains its revenue through its membership of faithful Catholic individuals. Plaintiff Legatus engages in outreach and education regarding the teachings of the Catholic Church which contradict with the provisions of the HHS Mandate. Plaintiff Daniel Weingartz and Weingartz Supply Company

faces per employee fines for noncompliance with the HHS Mandate. All Plaintiffs face substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to remaining faithful and exercising their religious beliefs. Plaintiffs will incur costs and expenses due to the enforcement of the HHS Mandate. If a TRO does not issue, Plaintiffs will be forced to violate their religious beliefs or potentially forfeit health insurance.

C. Whether Granting the TRO Will Cause Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs' First Amendment freedoms and Plaintiffs' freedom of religion are at issue, and the deprivation of these rights, even for minimal periods, constitutes irreparable injury.

On the other hand, if Defendants are restrained from enforcing the HHS Mandate against Plaintiffs, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of the Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F.3d at 288. The Defendants already exempt a number of other employers and individuals from the HHS Mandate. Allowing the Plaintiffs an exemption in order to stop a violation of their deeply held religious beliefs fails to cause harm to the Defendants. Any legitimate interest asserted by Defendants or others will remain fully protected by existing provisions of law.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiffs show that their First Amendment rights have been violated, then the harm to others is inconsequential. As demonstrated, the enforcement of Defendants' HHS Mandate on Plaintiffs violates the First Amendment; therefore, any "harm" to others is inconsequential.

D. The Impact of the TRO on the Public Interest.

The impact of the TRO on the public interest turns in large part on whether Plaintiffs' Constitutional rights are violated by the enforcement of Defendants' HHS Mandate. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's Constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). As noted previously, the enforcement of Defendants' HHS Mandate is a direct violation of Plaintiffs' fundamental rights protected by the First Amendment. Therefore, it is in the public interest to issue the TRO.

In the final analysis, the Defendants' HHS Mandate violates the Plaintiffs' fundamental Constitutional rights. The HHS Mandate forces the Plaintiffs to violate their deeply held religious beliefs of their Catholic faith. Without a TRO, Plaintiffs will be irreparably harmed.

CONCLUSION

Plaintiffs hereby request that this court issue the requested TRO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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. I further certify that due to the expeditious nature of the TRO Request, I emailed the foregoing to counsel at Ethan.P.Davis@usdoj.gov and faxed same to (202) 616-8470.

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