NO. 13-1092 AND 13-1093

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

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

v.

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

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

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendants-Appellants ("Defendants") ask this court to help them in completing a tall order: stripping away Plaintiffs' constitutional right to freedom of religion because a business owner with an incorporated business no longer deserves First Amendment protection. Defendants believe that by signing articles of incorporation, a business owner—such as Plaintiff Daniel Weingartz—signs away the rights that Congress guaranteed under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"). Defendants' conclusion violates the purpose of enacting RFRA, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government," and the principles of Constitutional law. *Id.*

SUMMARY OF MATERIAL FACTS

- Defendants' mandate threatens the irreparable harm of the loss of Plaintiffs' constitutional freedoms. *See* Pub. L. No. 111-148, 124 Stat. 119 (2010); 42 U.S.C. § 300gg-13; HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited May 22, 2013).

- Under the mandate, Plaintiffs are forced to choose between violating their religious beliefs or violating federal law. (R-39: Page ID# 545). Plaintiffs

Weingartz Supply Company and Daniel Weingartz face penalties for noncompliance of the law with fines of $2,000 per employee per year absent the District Court's injunction. *Id.* The fines are even more insurmountable if Plaintiffs offered insurance without the objectionable coverage. *Id.*

- Several Courts have granted the relief Plaintiff Daniel Weingartz seeks.[1]

[1] Courts have enjoined the mandate for for-profit companies, the same preliminary injunctive relief sought by Plaintiff Daniel Weingartz, nineteen times now. *Monaghan v. Sebelius*, No. 12-15488, slip op. (E.D. Mich. Dec. 30, 2012 & Mar. 14, 2013); *Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. Nov. 28, 2012); *Korte v. Sebelius*, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012), *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013); *Annex Med. Inc. v. Sebelius*, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013), *Am. Pulverizer Co. v. Dep't of Health & Human Servs*., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); *Newland v. Sebelius*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 12-92, slip op. (E.D. Mo. Dec. 31, 2012); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-36, order (W.D. Mo. Feb. 28, 2013); *Seneca Hardwood Lumber v. Sebelius*, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013); *Lindsay, Rappaport & Postel LLC v. Sebelius*, No. 13-1210, order (Mar. 20, 2013); *Gilardi v. Dep't of Health & Human Servs.*, No. 13-5069 , order (D.C. Cir. Mar. 29, 2013); *Bick Holding, Inc. v. Sebelius*, No. 13-462, order (E.D. Mo. Apr. 1, 2013); *Am. Manufacturing Co. v. Sebelius*, No. 13-295, slip op.(D. Minn. Apr. 2, 2013); *Hart Electric LLC v. Sebelius*, No. 13-2253, order (N.D. Ill. Apr. 18, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *see also Johnson Welded Products v. Sebelius*, No. 13-609, unopposed motion (D.D.C. May 24, 2013).

- No court thus far has denied an injunction on the basis that Defendants request this Court now accept: that a business owner lacks standing to assert a RFRA claim against the mandate.

- Plaintiff Daniel Weingartz, as President and owner of Weingartz Supply Company, is the person who has to purchase the insurance, and implement and carry out the mandate. (Weingartz Decl. at ¶¶ 1-5, 9-10 at Page ID# 217-18).

- Plaintiff Daniel Weingartz belongs to an association, Plaintiff Legatus, a 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. (R-13: Hunt Decl. at ¶ 2 at Page ID # 206-07; Weingartz Decl. at ¶ 11 at Page ID # 217-18).

- All Plaintiffs share sincerely held Catholic religious beliefs that forbid them from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients. (R-13: Weingartz Decl. at ¶¶ 7 at Page ID# 217-18, 10-13; Hunt Decl. at ¶¶ 6-8 at Page ID # 207).

- Defendants have consented to eight preliminary injunctions across the nation; something that would not be done if plaintiffs lacked standing.[2]

[2] *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (Doc. # 41) (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, (Doc. # 9) (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13-0295, (Doc. # 10) (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, (Doc. # 1) (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Construction*

- There are several exemptions under the mandate; however, Plaintiffs are not exempt. *See, e.g.*, *Newland*, slip op. at 14.

- On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption. (R-13 at Ex. 6 at Page ID #241). She added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. *Id.*

- Defendants are considering "potentially" amending the final regulations published on February 15, 2012. 77 Fed. Reg. 16, 501 (Mar. 21, 2012). Health and Human Services had accepted over 200,000 comments prior to issuing its final regulations as it pertains to non-profit such as Plaintiff Legatus. Health and Human Services issued a Notice of Proposed Rulemaking on February 1, 2013, and claims that it may through voluntary cessation abandon its final regulations for non-profit companies—exhibiting that there needs to be a religious exemption for companies, although only addressing this need for non-profit companies. 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013).

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v. Sebelius, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Lindsay v. Sebelius*, No. 1:13-cv-01210, (Doc. # 21) (N.D. Ill. Mar. 20, 2013); *Johnson Welded Products v. Sebelius*, No. 13-609, (Doc. #6) (D.D.C. May 24, 2013).

- Defendants finalized its rulemaking last year when it published its final regulations. 77 Fed. Reg. 16, 501 (Mar. 21, 2012). There have been no other final regulations published.

ARGUMENT

I. As the District Court Correctly Decided, Plaintiff Daniel Weingartz has Standing to Challenge the Mandate.

The District Court appropriately issued an injunction upon Plaintiff Daniel Weingartz, who has standing, showing "a likelihood of success on the merits." (R-39: Op. at 27 at Page ID # 567). The District Court weighed the likelihood of success on the merits with the other three factors to consider when granting an injunction: irreparable harm to the Plaintiff Daniel Weingartz, the probability the injunction would cause substantial harm to others, and whether the public interest was advanced by granting the injunction. *Id.* at Page ID #546 (quoting *Jones v. Caruso*, 569 F. 3d 258, 265 (6th Cir. 2009). The Plaintiff Daniel Weingartz demonstrated that he would face irreparable harm absent an injunction: "The potential for harm to Plaintiffs exists, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case at trial, it is properly characterized as irreparable." (R-39: Op. at 26 at Page ID # 566).

Defendants argue that Plaintiff Daniel Weingartz has no standing because he will not be harmed from the mandate. This is not so. Under RFRA, the federal government may only substantially burden a person's exercise of religion if "it

demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

In 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). "*Any exercise of religion*" should mean just that—any exercise of religion including the religious exercise practiced by a business owner in trying to run his business in accordance with his faith. The rights granted by RFRA was meant to be expansive. Congress did not specify who or what entity might be *excluded* from the protections of religious exercise.

Indeed, the Ninth Circuit has already examined the question posed by the Defendants: whether an individual business owner has standing to assert a RFRA claim—and decided a business owner, identically situated to Plaintiff Daniel Weingartz, does have standing when the challenged regulations pertain to his business. *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).

To trigger RFRA's strict scrutiny, a plaintiff must show that a federal policy or action substantially burdens his sincerely held religious beliefs. *Id.* A regulation that substantially burdens religious exercise is one that necessarily bears

direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). Religious exercise becomes effectively impracticable, when the government exerts "substantial pressure on an adherent to modify his behavior or violate his beliefs." *Id.*

Plaintiff Daniel Weingartz faces a direct and inescapable burden. Under the mandate, he must either provide coverage believed to be immoral or suffer severe penalties. This is not only harm to satisfy standing, it is an archetypal burden: to "make unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The mandate explicitly makes unlawful Plaintiff's religious practice of refraining from covering contraceptives. This burden applies to Plaintiff Daniel Weingartz—and not just Plaintiff Weingartz Supply Company. Plaintiff Daniel Weingartz has standing under RFRA to bring a claim against the mandate.

This litigation stems from Plaintiff Daniel Weingartz's objection, based on his sincerely held religious beliefs, to providing insurance coverage for drugs and information, because he believes providing such coverage is immoral. This religious faith prohibits Daniel Weingartz from providing health insurance coverage for such items as the president and owner of Weingartz Supply Company. Neither a corporate veil nor other legal technicalities give Plaintiff Daniel Weingartz moral absolution to providing coverage for items that he has religious

beliefs against covering. This realization underscores the Defendants' fundamental error: conceiving of Plaintiff Daniel Weingartz's religious beliefs as an exercise in moral theology to deny harm and negate standing. RFRA analysis does not measure moral beliefs, or allow the Court to rationalize or weigh how morally attenuated one's theological objection is in relation to the mandated activity.

The Supreme Court explicitly rejected the kind of moral theologizing that the Defendants wish to employ here to deny standing when analyzing harm under the "substantial burden" requirement of RFRA. In *Thomas v. Review Board*, a plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714, 716 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "*Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one. Court should not undertake to dissect religious beliefs." *Id.* The mandate, which directs penalties and lawsuits and could even force Plaintiff Daniel Weingartz out of the marketplace, is explicitly contrary to Plaintiff Daniel Weingartz's religious beliefs (objecting to providing certain insurance coverage) and harms Plaintiff Daniel Weingartz—establishing standing.

Stormans and *Townley* support the view that an imposition on a family business corporation, Weingartz Supply Company, is no less an imposition on the family owner, Daniel Weingartz. Free exercise historically has allowed such plaintiffs to bring claims. *See United States v. Lee*, 455 U.S. 252, 257 (1982) (allowing business owner to bring suit and holding that an employer's religious beliefs were burdened by paying taxes for his workers).

The burden is not alleviated by the corporate form when the mandate is being directly imposed on Weingartz Supply Company and forcing action by Daniel Weingartz. Indeed, forcing a plaintiff to pay for and provide a health plan that includes contraception is tantamount to forcing a plaintiff to provide employees with vouchers for contraception paid for entirely by the plaintiff himself. This is exactly the type of claim RFRA was enacted to prevent.

Several courts have also rejected Defendants' idea that a plaintiff lacks standing arising out of the distinction between Daniel Weingartz as an individual and his company, Weingartz Supply Company.[3] The mandate imposes the harm on Weingartz Supply Company as it does on its owner and president. The mandate requires Daniel Weingartz to manage his company in a way that violates his religious faith. All penalties assessed against Weingartz Supply Company have a direct financial and practical impact on Daniel Weingartz. The mandate on

[3] *See supra* note 1.

Weingartz Supply Company applies unquestionably substantial pressure on Daniel Weingartz to violate his beliefs. As in the many injunctions issued against the mandate at this point, multiple other courts have recognized that an owner of a company can bring religious exercise claims, because he/she is impacted by government burden on his/her business without a moral distinction between themselves and their companies. *See*, *e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 111-20 & n.9 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n. 15 (9th Cir. 1988); *McClure v. Sports and Health Club, Inc.*, 370 N.W. 2d 844, 850 (Minn. 1985); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2d Cir. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, slip op. at *5-9.

II. Legatus has Associational Standing.

Defendants concede that "[i]t is well established" that if Plaintiff Daniel Weingartz has standing then Plaintiff Legatus has associational standing. Def. Resp. Br. at 26. For the reasons stated above, Plaintiff Daniel Weingartz has standing to challenge the mandate under RFRA; therefore, Plaintiff Legatus has associational standing.

III. Legatus' Own Challenge is Justiciable.

Defendants finalized its rulemaking last year when it published its final regulations. 77 Fed. Reg. 16, 501 (Mar. 21, 2012). "There is no need for [the

plaintiff] to wait for actual violations of his rights under the First Amendment where the statute makes inappropriate government involvement in religious affairs inevitable." *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F. 3d 274, 278 (5th Cir. 1996) (internal citation omitted). Defendants' mandate went into effect on August 1, 2012. Defendants argue that since they are considering a new rule, Plaintiffs lack standing. Def. Resp. Br. at 27. While courts have dismissed lawsuits or held lawsuits in abeyance on this basis, others have ruled that Plaintiffs have standing. *See Roman Catholic Diocese of Fort Worth v. Sebelius*, 12-cv-314, order (N.D. Tex. Jan. 31, 2013).

Defendants publicly disavowed making any future amendments to the mandate. (R-13 at Ex. 6 at Page ID #241) (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 could occur at some point in the future, but what has been finalized infringes upon Plaintiff Legatus' constitutional rights. And that harm to Plaintiff Legatus' constitutional rights from the mandate would be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Furthermore, Plaintiff Legatus' claim is ripe. The ripeness doctrine was established to prevent the court from "premature adjudication" or "from entangling [itself] in abstract disagreements over administrative policies." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003). In holding that a non-profit company's claim was ripe to challenge the mandate, one federal court found that the mandate presented a purely legal action that sought the court's review of a final agency action. *Roman Catholic Diocese of Fort Worth v. Sebelius*, 12-cv-314, order at *9. "And because the Mandate is 'on the books,' there is nothing improper about subjecting it to the limitations of the United States Constitution and other applicable laws. A ruling on the lawfulness of a final rule, in other words, is not tantamount to judicial entanglement 'in abstract disagreements over administrative policies." *Id.* (quoting *Nat'l Park*, 538 U.S. at 807). The court further stated that "a prompt ruling on the merits of [plaintiff's] claims should add clarity to the constitutional issues presented by the Mandate." *Id.* at 9-10.

Like the Diocese in *Roman Catholic Diocese of Fort Worth*, Plaintiff Legatus "simply does not have the luxury of inaction; the Mandate 'has been formalized and its effects [are being] felt in a concrete way.'" *Id.* at 10-11 (quoting *Nat'l Park*, 538 U.S. at 807-08). Plaintiff Legatus' claim is not abstract but based

upon the final rule passed by Defendants. Plaintiff Legatus' claim is ripe, satisfies standing, and is justiciable.

CONCLUSION

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

Respectfully submitted,

THOMAS MORE LAW CENTER

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

Attorney for Plaintiffs-Appellees/ Cross-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 2,944 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

R-47	Notice of Appeal
R-48	Notice of Cross-Appeal