Nos. 13-1092 & 13-1093

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEGATUS; WEINGARTZ SUPPLY COMPANY; and DANIEL WEINGARTZ, President of Weingartz Supply Company,

Plaintiffs-Appellees/Cross-Appellants,

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 Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, in his official capacity as Secretary of the 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 (No. 2:12-CV-12061) (Hon. Robert H. Cleland)

RESPONSE AND REPLY BRIEF FOR THE APPELLANTS/CROSS-APPELLEES

STUART F. DELERY
Acting Assistant Attorney General

BARBARA L. McQUADE
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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STATEMENT OF THE ISSUES

The government's appeal presents the following issue:

Whether, in enacting the Religious Freedom Restoration Act ("RFRA"), Congress authorized for-profit, secular corporations to demand exemptions from government regulation.

Plaintiffs' cross-appeal presents the following issues:

1. Whether Legatus lacks standing to sue on behalf of its member Daniel Weingartz, because Mr. Weingartz himself lacks standing to challenge the regulation of the Weingartz Supply Company group health plan.

2. Whether Legatus fails to assert a justiciable claim on its own behalf, because the challenged regulations are soon to be superseded by new regulations and Legatus is protected by an enforcement safe harbor during the rulemaking process.

SUMMARY OF ARGUMENT

I. Plaintiffs contend that, in enacting RFRA, Congress authorized for-profit, secular corporations to demand exemptions from federal regulation, if a controlling shareholder asserts a religious objection to such corporate regulation. Plaintiffs rely on what they describe as "the commonsense view that an imposition on a family-business corporation is no less an imposition on the owner." Pl. Br. 32.

The Supreme Court, however, has emphasized that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

Accordingly, "the circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name.'" *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 602-603 (6th Cir. 1988) (citing cases). This shareholder standing rule "remains fully applicable even where, as here, the individual who seeks redress for corporate injuries is the corporation's sole shareholder." *B&V Distributing Co., Inc. v. Dottore Companies, LLC*, 278 Fed. App'x 480, 485 (6th Cir. 2008) (unpub.) (citing *Canderm Pharmacal, Ltd.*, 862 F.2d at 603).

None of the Supreme Court cases that formed the background to RFRA departed from these settled tenets of corporate law. The Supreme Court's cases do not remotely suggest that a shareholder's religious objection can be a basis for a for-profit, secular corporation to demand an exemption from corporate regulation. Congress, in enacting RFRA, carried forward the pre-existing distinction between

non-profit, religious organizations—which can engage in the exercise of religion—and for-profit, secular corporations, which cannot. Weingartz Supply Company and its subsidiaries are "for-profit, secular companies." R.1, Page ID #13, ¶ 75 (complaint). Therefore, Weingartz Supply Company cannot deny its secular workforce the employee benefits required by federal law.

II. The district court correctly denied a preliminary injunction with respect to the non-profit organization Legatus. Plaintiffs' primary contention is that Legatus has standing to challenge the contraceptive-coverage requirement on behalf of its member, Daniel Weingartz. It is a prerequisite to associational standing that the member himself have standing to sue. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Because Mr. Weingartz lacks standing to challenge the contraceptive-coverage requirement, Legatus lacks standing to assert such a claim on Mr. Weingartz's behalf.

Nor can Legatus bring suit on its own behalf. As the district court explained, the challenged regulations soon will be superseded by new regulations, and Legatus has the protection of an enforcement safe harbor during the rulemaking process. In comparable circumstances, the D.C. Circuit and district courts in 21 cases have found challenges to the contraceptive-coverage requirement to be nonjusticiable. *See Wheaton College* v. *Sebelius*, 703 F.3d 551 (D.C. Cir. 2012); *see also* p.28 n.8, *infra* (district court decisions).

ARGUMENT

I. RFRA Does Not Allow A For-Profit, Secular Corporation To Deny Employee Benefits On The Basis Of Religion.

A. Weingartz Supply Company Is Not A Person Engaged in the Exercise of Religion Within The Meaning Of RFRA.

1. Weingartz Supply Company and its subsidiaries are "for-profit, secular companies" that sell outdoor power equipment. R.1, Page ID #13, ¶ 75 (complaint). Plaintiffs contend that, under RFRA, the group health plan sponsored by Weingartz Supply Company is entitled to an exemption from the requirement to cover Food and Drug Administration ("FDA")-approved contraceptives, as prescribed by a health care provider.

Under RFRA, a plaintiff must show as a threshold matter that a challenged requirement is a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Plaintiffs cannot make that showing because Weingartz Supply Company—which is the entity that is required to provide contraceptive coverage—is not a "person" engaged in the "exercise of religion" within the meaning of RFRA or other federal statutes that provide accommodations for an organization's religious beliefs.

Our opening brief explained that Congress has accommodated religious organizations through religious exemptions in statutes that regulate the employer-employee relationship. At the same time, however, Congress has not permitted

for-profit, secular corporations to invoke religion as a basis to defeat the requirements of federal law. Under Title VII of the Civil Rights Act of 1964, an employer cannot discriminate on the basis of religion in the terms or conditions of employment, including employee compensation, unless the employer is "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (collectively, "religious organization"). Similarly, the Americans with Disabilities Act ("ADA"), which prohibits employment discrimination on the basis of disability, also includes specific exemptions for religious organizations. *See* 42 U.S.C. § 12113(d)(1), (2); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 701 n.1 (2012) (discussing the ADA exemptions). Likewise, the National Labor Relations Act ("NLRA"), which gives employees collective bargaining and other rights, has been interpreted to exempt church-operated educational institutions from the jurisdiction of the National Labor Relations Board. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The organizations found to qualify for these religious exemptions all have been non-profit, religious organizations, as in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987), which upheld a religious exemption claim by a non-profit entity run by the Mormon Church. *See also* Opening Br. 20 n.8 (citing other cases). Likewise, in the RFRA and free exercise cases on which plaintiffs rely, the claimants were non-

profit, religious organizations. *See* Pl. Br. 34-35 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) ("Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law"); *Okleveuha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012) (church); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (synogogues)); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (religious sect); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012) (church-operated school).

Plaintiffs deem it irrelevant that all of these corporations were non-profit, religious organizations. But the Supreme Court and courts of appeals have stressed that for-profit status is an objective criterion that allows courts to distinguish a secular corporation from a potentially religious organization. "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002). By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid.*

Thus, the D.C. Circuit held that an organization qualifies for the religious exemption in the NLRA if, among other things, the organization is "organized as a 'nonprofit'" and holds itself out as religious. *Id.* at 1343 (quoting *Universidad*

Central de Bayamon v. NLRB, 793 F.2d 383, 400, 403 (1st Cir. 1985) (en banc) (opinion of then-Judge Breyer)). The D.C. Circuit explained that this bright-line distinction prevents courts from "'trolling through a person's or institution's religious beliefs.'" *Id*. at 1341-42 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). The D.C. Circuit noted that the "prohibition on such intrusive inquiries into religious beliefs underlay" the Supreme Court's interpretation of the Title VII religious exemption in *Amos*. *Id*. at 1342. Similarly, in *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011), Judge O'Scannlain explained that the Title VII religious exemption must "center[] on neutral factors (i.e., whether an entity is a nonprofit and whether it holds itself out as religious)," "[r]ather than forcing courts to 'troll[ ] through the beliefs of [an organization], making determinations about its religious mission.'" *Id*. at 734 (O'Scannlain, J., concurring) (quoting *Great Falls*, 278 F.3d at 1342).

Plaintiffs urge the Court to disregard this body of federal law. They declare that RFRA "trumps other statutes" including Title VII of the Civil Rights Act of 1964. Pl. Br. 29. But Congress, in enacting RFRA, emphasized that "[n]othing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964." S. Rep. No. 103-111, at 13 (1993). RFRA carried forward the background principles reflected in Title VII and other federal statutes, by requiring a plaintiff to demonstrate a substantial burden on "a person's exercise

of religion." 42 U.S.C. § 2000bb-1(a). Under RFRA, as under the pre-existing federal statutes, an entity's for-profit status is an objective criterion that allows a court to distinguish a secular company from a potentially religious organization. "[F]or-profit corporate entities, unlike religious non-profit organizations, do not—and cannot—legally claim a right to exercise or establish a 'corporate' religion under the First Amendment or the RFRA." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 6 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (emphases omitted); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) ("Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations . . . have a constitutional right to the free exercise of religion."), *appeal pending*, No. 12-6294 (10th Cir.); *Briscoe v. Sebelius*, No. 13-285, slip op. 8 (D. Colo. Feb. 27, 2013) ("Secular, for-profit corporations neither exercise nor practice religion.").

This distinction between non-profit, religious organizations and for-profit, secular corporations is rooted in "the text of the First Amendment," *Hosanna-Tabor Evangelical Lutheran Church & School*, 132 S. Ct. at 706, and embodied in federal law. Contrary to plaintiffs' assertion, the distinction does not require a court to make "essentially theological" determinations. Pl. Br. 30. The distinction prevents precisely that type of entanglement, by enabling a court to rely on an

objective standard rather than "'trolling through a person's or institution's religious beliefs.'" *Great Falls*, 278 F.3d at 1341-42 (quoting *Mitchell*, 530 U.S. at 828).

Weingartz Supply Company and its subsidiaries are "for-profit, secular companies" that sell outdoor power equipment. R.1, Page ID #13, ¶ 75 (complaint). Plaintiffs do not claim that Weingartz Supply Company qualifies for the religious exemptions in Title VII, the ADA, the NLRA, or any other federal statute that regulates the employment relationship. Likewise, RFRA provides no basis to exempt the corporation from the regulations that govern health coverage under the Weingartz Supply Company group health plan, which is a significant aspect of employee compensation.

Plaintiffs underscore their misunderstanding of the issue when they declare that "any effort to make the Plaintiffs' [sic] surrender their fundamental rights in order to use the corporate form would itself be unconstitutional." Pl. Br. 33. There is no doubt that Congress can require for-profit, secular corporations to abide by federal law, as Congress has done through the longstanding federal employment statutes discussed above. Likewise, in enacting RFRA, Congress did not authorize for-profit, secular corporations to demand exemptions from federal law.[1]

[1] Plaintiffs also misunderstand the other statutory provisions on which they rely. *See* Pl. Br. 27. Unlike RFRA, these provisions do not require a showing that an entity is a person engaged in the exercise of religion. For example, 42 U.S.C. § 18023 permits a state government to prohibit abortion coverage in qualified

Continued on next page.

B. The Obligation To Cover Contraceptives Lies With The Weingartz Supply Company Group Health Plan, Not With Mr. Weingartz Personally.

1. Plaintiff Daniel Weingartz is the controlling shareholder of Weingartz Supply Company. He cannot even establish standing to challenge the contraceptive-coverage requirement, much less demonstrate that this requirement is a substantial burden on his personal exercise of religion.

Our opening brief explained that the contraceptive-coverage requirement does not require Mr. Weingartz as an individual to do anything. The obligation to provide contraceptive coverage lies with the group health plan sponsored by Weingartz Supply Company—not with Mr. Weingartz in his personal capacity—and the funds used to help pay for that coverage belong to the corporation, not to Mr. Weingartz. *See* Opening Br. 23-26; *see also*, *e.g.*, *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. 3 (3d Cir. Feb. 7, 2013) (Garth, J., concurring); *Grote v. Sebelius*, 708 F.3d 850, 857-858 (2013) (Rovner, J., dissenting).

Plaintiffs rely on what they describe as "the commonsense view that an imposition on a family-business corporation is no less an imposition on the

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health plans sold on a health insurance exchange, and a state government cannot assert "religious beliefs." Pl. Br. 27.

owner." Pl. Br. 32. The Supreme Court, however, has emphasized that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

Accordingly, "the circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name.'" *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 602-603 (6th Cir. 1988) (citing cases). The shareholder standing rule applies even where—unlike here—an injury to the corporation diminishes the value of the shareholder's stock and thus causes the shareholder injury that is concrete and personal. "The derivative injury rule holds that a shareholder (even a shareholder in a closely-held corporation) may not sue for personal injuries that result directly from injuries to the corporation." *In re Kaplan*, 143 F.3d 807, 811-812 (3d Cir. 1998) (Alito, J.).

The shareholder standing rule "remains fully applicable even where, as here, the individual who seeks redress for corporate injuries is the corporation's sole shareholder." *B&V Distributing Co., Inc. v. Dottore Companies, LLC*, 278 Fed.

App'x 480, 485 (6th Cir. 2008) (unpub.) (citing *Canderm Pharmacal, Ltd.*, 862 F.2d at 603).[2] "Indeed, in one sense the rule may be more rigid in a sole shareholder situation." *Kush*, 853 F.2d at 1384. Mr. Weingartz "chose to operate his business in corporate form." *Ibid.* "That form gave him several advantages over operations as an unincorporated sole proprietorship, not the least of which was limitation of liability." *Ibid.* He "may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Ibid.*

Plaintiffs emphasize that Weingartz Supply Company "is a closely held 's' corporation, subject to pass through taxation as if its income belongs to its owner as an individual." Pl. Br. 32. But the fact that a corporation is "a 'subchapter S' corporation is of no matter." *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1318 (4th Cir. 1994). "While an S corporation is treated differently for taxation purposes, it remains a corporation in all other ways, and it and its shareholders are separate entities." *Ibid.* (dismissing

[2] *Accord, e.g., Diva's Inc. v. City of Bangor*, 411 F.3d 30, 42 (1st Cir. 2005); *In re Kaplan*, 143 F.3d 807, 811-812 (3d Cir. 1998) (Alito, J.); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1318 (4th Cir. 1994); *Schaffer, et al. v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968); *Kush v. American States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988); *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *The Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002).

shareholder's claim on standing grounds); *see also The Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002) (sole shareholder of subchapter S corporation lacked standing to assert race discrimination claim derived from injury to the corporation).

"While this rule, which recognizes that corporations are entities separate from their shareholders in contradistinction with partnerships or other unincorporated associations, is regularly encountered in traditional business litigation, it also has been uniformly applied on the infrequent occasions it has arisen in suits against the state for statutory or constitutional violations." *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994). For example, in *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005), the First Circuit held that the sole shareholder of a corporation that operated an adult entertainment bar lacked standing to claim that local officials had denied the corporation a special amusement permit in violation of her rights under the First and Fourteenth Amendments. Similarly, in *Potthoff v. Morin*, 245 F.3d 710, 717-718 (8th Cir. 2001), the Eighth Circuit dismissed a sole shareholder's First Amendment claim on standing grounds because the termination of the corporation's leasing agreement did not cause the shareholder any "cognizable injury" that was "distinct from the harm" to the corporation rather than derivative of that harm. In *The Guides, Ltd. v. Yarmouth Group Property*

Management, Inc., 295 F.3d 1065, 1070, 1071-73 (10th Cir. 2002), the Tenth Circuit held that a sole shareholder lacked standing to assert a race discrimination claim that derived from the defendants' failure to contract with the corporation. And, in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), the Fourth Circuit dismissed a sole shareholder's claim under the Privileges and Immunities Clause because the shareholder did "not show the type of individualized harm that is necessary to support such a claim." *Id.* at 1317. "Instead, all injury is merely 'derivative' of the injury to the corporation, which is not constitutionally cognizable under the Privileges and Immunities Clause." *Ibid.* The Fourth Circuit explained that, although the shareholder wished "to discard the separate entity doctrine in this instance, such an action would vitiate the established rule against corporate standing in its entirety, while disregarding settled theory of corporate law." *Id.* at 1317-1318 (followed in *Chance Management, Inc. v. State of South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996)).[3]

[3] *See also, e.g.*, *Flynn v. Merrick*, 881 F.2d 446, 450 (7th Cir. 1989) ("Filing suit under 42 U.S.C. § 1983 does not diminish the requirement that the shareholder suffer some individual, direct injury."); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (extending shareholder standing rule to civil rights actions under § 1983); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (finding "nothing in the Civil Rights Act" that would permit a plaintiff-stockholder to circumvent the rule that, "even though a stockholder owns all, or practically all, of the stock in a corporation, such a fact of itself does not authorize him to sue as an individual").

These settled tenets of corporate law foreclose plaintiffs' contention that "an imposition on a family-business corporation is no less an imposition on the owner." Pl. Br. 32. The obligation to provide health coverage under the Weingartz Supply Company group health plan and the money used to help pay for that coverage belong to the corporation, not to Mr. Weingartz. *See Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. 3 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (citing *Grote v. Sebelius*, 708 F.3d 850, 857-858 (2013) (Rovner, J., dissenting)). So long as the corporation's liabilities are not Mr. Weingartz's liabilities—"which is the primary and 'invaluable privilege' conferred by the corporate form" —neither are the corporation's expenditures Mr. Weingartz's own expenditures. *Grote*, 708 F.3d at 858 (Rovner, J., dissenting) (quoting *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation)).

"It would be entirely inconsistent to allow [Mr. Weingartz] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging" the contraceptive-coverage requirement. *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.). Mr. Weingartz has chosen to conduct business through a corporation, with the "accompanying rights and benefits and limited liability." *Gilardi v. Sebelius*, __ F.

Supp. 2d __, 2013 WL 781150, *4 (D.D.C. March 3, 2013), *appeal pending*, No. 13-5069 (D.C. Cir.). He "cannot simply disregard that same corporate status when it is advantageous to do so." *Ibid.* "The law protects that separation between the corporation and its owners for many worthwhile purposes." *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). "Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Ibid.*[4]

2. None of the Supreme Court cases that formed the background to RFRA departed from these established tenets of corporate law. Plaintiffs rely heavily on *United States v. Lee*, 455 U.S. 252 (1982), *see* Pl. Br. 24, 25, but *Lee* considered a free exercise claim raised by an individual Amish employer—not by a corporation or its shareholder. Moreover, even with respect to that individual employer, the Supreme Court rejected the free exercise claim, emphasizing that, "[w]hen followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261.

[4] Plaintiffs declare that *Autocam* is "factually distinguishable," Pl. Br. 50, but its reasoning is equally applicable here.

Plaintiffs also rely on *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), *see* Pl. Br. 27, but neither case involved corporate regulation. *Sherbert* held that a state government could not deny unemployment compensation to an individual who lost her job because her religious beliefs prevented her from working on a Saturday. *Thomas* applied *Sherbert*'s reasoning to hold that a state government could not deny unemployment compensation to an individual who lost his job because his religious beliefs prevented him from working in an armament factory. *See Gilardi*, 2013 WL 781150, *9 ("Plaintiffs misread *Thomas*." "In that case, . . . the burden of the denial of benefits rested with the person exercising his religion, not a separate person or corporate entity, as is the case here.").

Plaintiffs note that the "Ninth Circuit allowed two for-profit corporations to assert free exercise claims on behalf of their owners." Pl. Br. 26 (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988); and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119-20 & n.9 (9th Cir. 2009)). In both cases, the Ninth Circuit held that the corporations had standing to assert free exercise claims on behalf of their owners, and then proceeded to reject the free exercise claims on the merits. The Ninth Circuit's standing rulings are incorrect—the court overlooked the tenets of corporate law discussed above, which the court did not discuss. Moreover, RFRA requires a plaintiff to show that a federal regulation

"substantially burden[s]" a person's exercise of religion, 42 U.S.C. § 2000bb-1(a), an issue that neither *Townley* nor *Stormans* addressed.

Plaintiffs also rely on *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *see* Pl. Br. 25-26, but, there, a state hearing examiner "pierced the 'corporate veil'" to make the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. *McClure*, 370 N.W.2d at 850-51 & n.12. The *McClure* court rejected the free exercise claim because the corporate plaintiff was "not a religious corporation—it is a Minnesota business corporation engaged in business for profit." *Id*. at 853.[5]

C. Decisions That Employees Make About How To Use Their Compensation Cannot Properly Be Attributed To The Corporation Or Its Shareholders.

As explained above, plaintiffs' RFRA claim fails because Weingartz Supply Company is not a person engaged in the exercise of religion, and Daniel Weingartz is not regulated by the contraceptive-coverage requirement. Even apart from these fundamental defects in plaintiffs' argument, their claim also fails because an employee's decision to use her health coverage for a particular service cannot

[5] Other cases cited by plaintiffs (Pl. Br. 26) are inapposite. *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), rejected a free exercise challenge to a state law that regulated kosher food labels. In *Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323, *6-7 & n.10 (D.D.C. Nov. 16, 2012), the district court relied on the "unique corporate structure" of the plaintiff, which was 96.5% owned by a non-profit, religious organization.

properly be attributed to her employer, much less to the shareholder of a corporation.

Our opening brief explained that, in other First Amendment contexts, the Supreme Court has rejected the argument that a person or entity that provides a source of funding should be deemed responsible for the decisions that another person makes in using those funds. *See* Opening Br. 30-32 (discussing *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002), and *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000)). Plaintiffs make no attempt to reconcile their position with these Supreme Court decisions, which their brief does not cite.

There is no dispute that employees of Weingartz Supply Company have the right to use their wages to pay for health services that they and their doctors find appropriate. Likewise, Weingartz Supply Company employees are entitled to use their health coverage, which is a significant aspect of employee compensation, to pay for such services. "To the extent [Mr. Weingartz himself is] funding anything at all—and . . . one must disregard the corporate form to say that" he is—he is "paying for a plan that insures a comprehensive range of medical care that will be used in countless ways" by participants in the Weingartz Supply Company plan. *Grote v. Sebelius*, 708 F.3d 850, 865 (2013) (Rovner, J., dissenting). "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [the

employer's] decision or action." *Ibid*. Plaintiffs cannot "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302, *3 (10th Cir. Dec. 20, 2012).

D. The Contraceptive-Coverage Requirement Is Narrowly Tailored To Advance Compelling Governmental Interests.

1. Assuming arguendo that strict scrutiny applies here, the contraceptive-coverage requirement is narrowly tailored to advance compelling governmental interests in public health and gender equality. *See* Opening Br. 34-40. The particular health services at issue here relate to an interest—a woman's control over her procreation—that is so compelling as to be constitutionally protected from state interference. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012).

There is no doubt that the exemption that plaintiffs demand here would undermine Congress's objectives. Whereas Congress sought to increase access to women's recommended preventive health services by requiring that these services be covered without cost sharing, plaintiffs seek to exclude contraceptive coverage entirely from the Weingartz Supply Company plan.

Plaintiffs assert that the exemption they demand would not undermine the government's compelling interests because certain plans that collectively cover millions of employees are not subject to the requirement to cover recommended

preventive health services without cost sharing. *See* Pl. Br. 41-43. But, contrary to plaintiffs' suggestion (Pl. Br. 41), plans offered by small employers are not exempt from that requirement. Small businesses that offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive health services without cost sharing. *See* 42 U.S.C. § 300gg-13. Moreover, small employers have business incentives to offer health coverage to their employees, and an otherwise eligible small employer would lose eligibility for certain tax benefits if it did not do so. *See* 26 U.S.C. § 45R.

Plaintiffs are likewise mistaken to assume that all or most grandfathered plans exclude contraceptive coverage. The Institute of Medicine found that "[c]ontraceptive coverage has become standard practice for most private insurance." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 108 (2011) ("IOM Report"). In any event, as the district court explained, the Affordable Care Act's grandfathering provision does not have the effect of providing the type of permanent exemption from a coverage requirement that plaintiffs demand here. *See* R.39, Page ID #558 (opinion). Instead, the grandfathering provision is transitional in effect. *See ibid*. Changes to a group health plan such as the elimination of certain benefits, an increase in cost-sharing requirements, or a decrease in employer contributions can cause a plan to lose its grandfathered status. *See* 45 C.F.R. § 147.140(g). For example, "Weingartz

Supply Company's health care plan is no longer grandfathered due to plan design changes"—the $2,000 deductible that was in effect when the Affordable Care Act was enacted has since been increased to $3,100. Pl. Br. 12 n.2.[6] "To find the Government's interests other than compelling only because of the grandfathering rule would perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status." R.39, Page ID #558 (opinion); *see also Korte v. HHS*, __ F. Supp. 2d __, 2012 WL 6553996, *7 (S.D. Ill. Dec. 14, 2012) (the grandfathering provision's "gradual transition" does not "undercut[] the neutral purpose or general applicability of the mandate"), *appeal pending*, No. 12-3841 (7th Cir.).

Plaintiffs also note that certain non-profit organizations qualify for a "religious employer" exemption from the contraceptive-coverage requirement. *See* Pl. Br. 41. Clearly, the government can provide an exemption for non-profit, religious institutions such as churches and their integrated auxiliaries, *see* 45

[6] A majority of group health plans are expected to lose their grandfather status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010); *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://ehbs.kff.org/pdf/2012/8345.pdf (last visited February 23, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011).

C.F.R. § 147.130(a)(1)(iv)(B), and address religious objections raised by additional non-profit, religious organizations, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013), without also extending such measures to for-profit, secular corporations. *See*, *e.g.*, *Lee*, 455 U.S. at 260 (noting that "Congress granted an exemption" from social security taxes, "on religious grounds, to self-employed Amish and others").

Plaintiffs "see no difference between" for-profit, secular corporations such as Weingartz Supply Company and non-profit, religious organizations. *Korte v. HHS*, __ F. Supp. 2d __, 2012 WL 6553996, *8 (S.D. Ill. Dec. 14, 2012). But, as discussed above, "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." 78 Fed. Reg. at 8461-62. Consistent with this longstanding federal law, the Departments that issued the preventive health services coverage regulations proposed to make certain accommodations for "nonprofit religious organizations, but not to include for-profit secular organizations." *Id*. at 8462. "Using well established criteria to determine eligibility for an exemption based on religious belief, such as the nonsecular nature of the organization and its nonprofit status, the [Affordable Care Act], through its implementing rules and regulations, both recognizes and protects the exercise of religion." *Hobby Lobby Stores*, 870 F. Supp. 2d at 1289. "The fact that the

exceptions do not extend as far as plaintiffs would like does not make the mandate nonneutral." *Ibid*.; *see also Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by non-profit, religious organizations and used exclusively for religious worship).

The Supreme Court has made clear that the government "may encourage the free exercise of religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment Clause." *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208, *10 (E.D. Mo. Sept. 28, 2012) (citing cases), *appeal pending*, No. 12-3357 (8th Cir.). "'Such legislative accommodations would be impossible as a practical matter'" if, as plaintiffs contend, the government could not distinguish between religious organizations and for-profit, secular corporations. *Ibid*. (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 79 (Cal. 2004)).

2. Plaintiffs alternatively contend that, instead of regulating the terms of group health plans, "the government could subsidize contraception itself and give it to employees and exempt entities." Pl. Br. 48. They assert that the government could "offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, provide these services to citizens itself, or provide incentives for pharmaceutical companies to provide such products free of charge."

These proposals—which would require federal taxpayers to pay the cost of contraceptive services for the employees of for-profit, secular companies—reflect plaintiffs' basic misunderstanding of RFRA and the "least restrictive means" test that it incorporates. That test has never been interpreted to require the government to "subsidize private religious practices." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance policies cover prescription contraceptives).[7]

[7] Plaintiffs incorrectly state that the government "waived" arguments with respect to irreparable harm, the balance of the equities, and the public interest. *See* Pl. Br. 52. To the contrary, our opening brief explained that, because plaintiffs' assertion of irreparable harm rests on their claim that the contraceptive-coverage requirement imposes a substantial burden on their religious exercise, their failure to demonstrate a likelihood of success on the merits also forecloses their assertion of irreparable harm. *See* Opening Br. 15-16; *see also McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because [plaintiff] does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."); *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) ("when a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

II. The District Court Correctly Denied A Preliminary Injunction With Respect To The Non-Profit Organization Legatus.

A. Legatus Cannot Sue On Behalf Of Mr. Weingartz Because Mr. Weingartz Lacks Standing To Sue.

The district court correctly denied a preliminary injunction with respect to the non-profit organization Legatus. Plaintiffs' primary contention is that Legatus has associational standing to sue on behalf of its member, Daniel Weingartz, who is also a plaintiff in this suit. *See* Pl. Br. 52-55.

It is well established that, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977) (internal quotation marks and citations omitted). But an association cannot bring suit on behalf of its members unless (among other requirements) the "members otherwise would have standing to sue in their own right." *Id*. at 343.

For the reasons discussed above, Mr. Weingartz lacks standing to challenge the contraceptive-coverage requirement. The obligation to provide contraceptive coverage lies with Weingartz Supply Company, not with Mr. Weingartz in his personal capacity, and a shareholder lacks standing to challenge the regulation of a corporation. *See* pp. 10-16, *supra*.

B. Legatus's Own Challenge To The Contraceptive-Coverage Requirement Is Not Justiciable.

Legatus cannot bring suit on its own behalf because the regulations that it seeks to challenge soon will be superseded by new regulations, and Legatus has the protection of an enforcement safe harbor during the rulemaking process. When the Departments issued the challenged regulations, they announced that they were undertaking a new rulemaking to consider means to accommodate the religious objections of non-profit organizations that do not fall within the religious-employer exemption. *See* 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012). The Departments established a one-year enforcement safe harbor for entities like Legatus, *see ibid*., and the Departments made clear that, "[b]efore the end of the temporary enforcement safe harbor," they would "work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage." *Id*. at 8728.

To that end, the Departments issued an Advance Notice of Proposed Rulemaking in March 2012, *see* 77 Fed. Reg. 16,501 (Mar. 21, 2012), and a proposed rule in February 2013, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013). The proposed rule reiterated the government's commitment to issue new final regulations before the safe harbor expires this August. *See id*. at 8458.

Given the ongoing rulemaking and the enforcement safe harbor, the district court correctly held that Legatus lacks standing to challenge the contraceptive-coverage requirement. *See* R.39, Page ID ##548-550 (opinion). In comparable circumstances, the D.C. Circuit and district courts in 21 cases have found challenges to the contraceptive-coverage requirement to be nonjusticiable on ripeness and/or standing grounds. *See, e.g.*, *Wheaton College* v. *Sebelius*, 703 F.3d 551 (D.C. Cir. 2012).[8]

[8] *See also Priests for Life v. Sebelius*, No. 12-cv-753 (E.D.N.Y. Apr. 12, 2013); *Criswell College v. Sebelius*, No. 12-cv-4409 (N.D. Tex. Apr. 9, 2013); *Ave Maria Univ. v. Sebelius*, No. 12-cv-88 (M.D. Fla. Mar. 29, 2013); *Eternal World Television Network, Inc. v. Sebelius*, No. 12-cv-501 (N.D. Ala. Mar. 25, 2013); *Franciscan Univ. of Steubenville v. Sebelius*, No. 12-cv-440 (S.D. Ohio Mar. 22, 2013); *Geneva Coll. v. Sebelius*, No. 12-cv-207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Wenski v. Sebelius*, No. 12-cv-23820 (S.D. Fla. Mar. 5, 2013); *Roman Catholic Diocese of Dallas v. Sebelius*, No. 12-cv-1589 (N.D. Tex. Feb. 26, 2013); *Conlon v. Sebelius*, No. 12-cv-3932 (E.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis v. Sebelius*, No. 12-cv-924, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815 (D.D.C. Jan. 25, 2013), *appeal pending*, No. 13-5091 (D.C. Cir.); *Persico v. Sebelius*, No. 12-cv-123 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 12-cv-1276, 2013 WL 74240 (C.D. Ill. Jan. 3, 2013); *Univ. of Notre Dame v. Sebelius*, No. 12-cv-253, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012), *appeal pending*, No. 13-1479 (7th Cir.); *Catholic Diocese of Biloxi v. Sebelius*, No. 12-cv-00158 (S.D. Miss. Dec. 20, 2012); *Zubik v. Sebelius*, No. 12-cv-676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012), *appeal pending*, No. 13-1228 (3d Cir.); *Catholic Diocese of Nashville v. Sebelius*, No. 12-cv-934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Wheaton College v. Sebelius*, No. 12-cv-1169, 2012 WL 3637162 (D.D.C. Aug. 24, 2012); *Belmont Abbey College v. Sebelius*, No. 11-cv-1989, 2012 WL 2914417 (D.D.C. July 18, 2012); *Nebraska ex rel. Bruning v.*

Continued on next page.

These decisions are clearly correct. The Supreme Court recently emphasized that, for purposes of Article III standing, a "threatened injury must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1152 (2013). Plaintiffs filed this suit in May 2012, after the government had established the safe harbor that protects Legatus against government enforcement of the 2012 regulations. Thus, Legatus could not establish the certainly impending injury that is a prerequisite for Article III standing, much less demonstrate the irreparable harm that is necessary for a preliminary injunction to issue.[9]

Legatus's claim is also unripe. Even when the Article III requirements are satisfied, "there may also be prudential reasons for refusing to exercise jurisdiction." *American Petroleum Institute v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) (quotation marks and citations omitted). "The 'basic rationale' of the ripeness doctrine is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference

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Dep't of Health & Human Servs., 877 F. Supp. 2d 777 (D. Neb. July 17, 2012), *appeal pending* No. 12-3238 (8th Cir.).

[9] The plaintiffs in *Wheaton* filed suit before they had the protection of the safe harbor. Although the D.C. Circuit found their claims to be unripe, the court held that the plaintiffs had standing "because standing is assessed at the time of filing." *Wheaton*, 703 F.3d at 552.

until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2004) (*Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967)). "Postponing review" also "conserve[s] judicial resources" and "comports with [a court's] theoretical role as the governmental branch of last resort. " *American Petroleum Institute*, 683 F.3d at 386-87 (citation and quotation marks omitted). "Put simply, the doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Id*. at 387 (citations omitted).

These principles preclude adjudication of Legatus's claim. The regulations that Legatus seeks to challenge soon will be superseded by new regulations, and Legatus is protected by an enforcement safe harbor during the rulemaking process.

Plaintiffs simply ignore the D.C. Circuit's decision in *Wheaton* and the 21 district court decisions that found comparable claims to be nonjusticiable. Plaintiffs rely heavily on the contrary reasoning in *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-02542 (E.D.N.Y. Dec. 5, 2012), but the government sought reconsideration of that order, and the district court recently halted all proceedings pending the completion of the current rulemaking proceedings. *See* 4/25/13 Minute Order.

CONCLUSION

The preliminary injunction entered in favor of plaintiffs Weingartz Supply Company and Daniel Weingartz should be reversed, and the denial of a preliminary injunction with respect to plaintiff Legatus should be affirmed.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

BARBARA L. McQUADE
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

/s/ Alisa B. Klein
ALISA B. KLEIN
MARK B.STERN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7186 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Page ID# Range	Description
R.1	1-42	Complaint
R.39	540-568	Opinion
R.42	577-579	Preliminary Injunction Order