

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEGATUS; WEINGARTZ SUPPLY CO.; and
DANIEL WEINGARTZ, President of
Weingartz Supply Co.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of Health
and Human Services, et al.,

Defendants-Appellants/
Cross-Appellees

Nos. 13-1092 & 13-1093

**MOTION TO HOLD APPEAL NO. 13-1092 IN ABEYANCE PENDING
THIS COURT'S DECISION IN A RELATED APPEAL**

For the following reasons, the government respectfully moves to hold its appeal (No. 13-1092) in abeyance pending the Court's decision in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.), which presents the same legal issue. This motion is opposed.

1. The plaintiffs' appeal in *Autocam Corp. v. Sebelius*, No. 12-2673, and the government's appeal in *Legatus, et al. v. Sebelius*, No. 13-1092, present the same legal issue: whether, under the Religious Freedom Restoration Act ("RFRA") or the First Amendment, a group health plan sponsored by a for-profit corporation is

entitled to an exemption from the federal regulatory requirement that the plan cover Food and Drug Administration-approved contraceptives, as prescribed by a health care provider, if the corporation's controlling shareholders assert a religious objection to the plan's coverage of contraceptives.

In *Autocam*, the district court denied the plaintiffs' motion for a preliminary injunction, concluding that they do not have a likelihood of success on the merits of their claims. The plaintiffs appealed. A divided panel of this Court denied the plaintiffs' motion for an injunction pending appeal but granted their request to expedite the appeal. *See* No. 12-2673, 12/28/12 Order. The plaintiffs' opening brief was filed on February 11, 2013, and briefing will close in early April.

The plaintiffs in *Legatus* include a for-profit corporation (Weingartz Supply Co.) and the individual who controls that corporation (Daniel Weingartz). The district court granted a preliminary injunction that bars enforcement of the contraceptive-coverage requirement against Weingartz Supply Co. and Daniel Weingartz. *See* R.39 at 12-28; R.42. The court denied a preliminary injunction with respect to a third plaintiff, the non-profit organization Legatus, because the Departments that issued the challenged regulations are engaged in a rulemaking to amend those regulations, and Legatus is protected by an enforcement safe harbor during the rulemaking. *See* R.39 at 9-11. The government appealed the preliminary injunction entered on behalf of Weingartz Supply Co. and Daniel

Weingartz, and plaintiffs cross-appealed the denial of a preliminary injunction with respect to *Legatus*. The cross-appeals are not expedited. The government's opening brief is due March 21, 2013, and briefing is due to close in mid-June.

2. The government respectfully moves to hold its appeal in *Legatus* (No. 13-1092) in abeyance pending this Court's decision in *Autocam* (No. 12-2673). We expect this Court's *Autocam* decision to control the disposition of our appeal in *Legatus*. Indeed, when this Court denied an injunction pending appeal in *Autocam*, the Court expressly noted that the district court in *Legatus* had issued a preliminary injunction on a similar claim. *See* No. 12-2673, 12/28/12 Order, at 2. At a minimum, this Court's *Autocam* decision will inform the resolution of the government's appeal in this case.

3. The *Legatus* plaintiffs have advised us that they oppose this motion. They will not be prejudiced by an order holding the government's appeal in abeyance, however, because Weingartz Supply Co. and Daniel Weingartz have the benefit of the district court's preliminary injunction while the government's appeal is pending. In analogous circumstances, other plaintiffs have given consent to the government's motion to hold its appeal in abeyance pending the disposition of an earlier filed appeal in another contraceptive-coverage case. *See American Pulverizer, Co. v. HHS*, No. 13-1395 (8th Cir.) (Unopposed Motion To Hold

Appeal in Abeyance Pending This Court's Decision in a Related Appeal, filed 2/26/13).

4. We note that this motion does not seek to hold plaintiffs' cross-appeal in abeyance. As explained above, the district court denied a preliminary injunction with respect to the non-profit organization Legatus because the Departments that issued the challenged regulations are engaged in a rulemaking to amend the regulations, and Legatus is protected by an enforcement safe harbor during the rulemaking. *See* R.39 at 9-11; *see also* 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (notice of proposed rulemaking). The denial of a preliminary injunction with respect to Legatus is correct and can be affirmed without regard to the disposition of the government's appeal. *See Wheaton College v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (finding analogous claims unripe in light of the rulemaking).

Respectfully submitted,

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February 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2013, I filed and served the foregoing motion on counsel of record through this Court's CM/ECF system.

/s Alisa B. Klein

Alisa B. Klein