UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LEGATUS, et al.,	
	Case No.: 2:12-cv-12061-RHC-MJH
Plaintiffs,	
v.	Judge Robert H. Cleland
KATHLEEN SEBELIUS, et al.,	Magistrate Judge Michael Hluchaniuk
Defendants.	MOTION AND BRIEF FOR PRELIMINARY INJUNCTION PURSUANT TO FED. R. CIV. P. 65(a) FOR PLAINTIFF LEGATUS

MOTION FOR PRELIMINARY INJUNCTION FOR PLAINTIFF LEGATUS

NOW COMES Plaintiff Legatus, through undersigned counsel, hereby moves this Court to enter a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) in order to prevent immediate irreparable injury to Plaintiff's fundamental rights and interests.

In support of this motion, Plaintiff relies upon the pleadings and papers of record, as well as their brief filed with this motion. For the reasons set forth more fully below, Plaintiff hereby requests that this court enjoin the enforcement of Defendants' Health and Human Services Mandate (hereinafter "HHS Mandate") which violates Plaintiff's rights guaranteed by the Religious Freedom Restoration

Act of 1993 ("RFRA"), 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*. For the purposes of this preliminary injunction, Plaintiff Legatus focuses solely on their RFRA claim; however, Plaintiff does not forfeit any of the claims alleged in their complaint.

Prior to the filing of this Motion for Preliminary Injunction, the attorneys for the Plaintiffs and the Defendants met and conferred. Defendants oppose the relief sought in this motion. The parties agree to waive oral argument unless otherwise requested by this Honorable Court.

Respectfully submitted this 20th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2013, 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

THOMAS MORE LAW CENTER

s/ Erin Mersino
Erin Mersino, Esq. (P70886)

ISSUE PRESENTED

I. Whether forcing Plaintiff Legatus to facilitate access to contraceptives, sterilization, and abortifacients pursuant to a Mandate from the federal government which directly violates Plaintiff's sincerely held religious beliefs causes irreparable harm sufficient to warrant injunctive relief.

CONTROLLING AUTHORITY

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

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

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

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

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

Geneva College v. Sebelius, Case No. 2: 12-207, slip op. (W.D. Penn June 18, 2013)

UNITED STATES DISTRICT COURT
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LEGATUS, et al., Plaintiffs, v. KATHLEEN SEBELIUS, et al., Defendants.	Case No.: 2:12-cv-12061-RHC-MJH Judge Robert H. Cleland Magistrate Judge Michael Hluchaniuk BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION PURSUANT TO FED. R. CIV. P. 65(a) FOR PLAINTIFF LEGATUS

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION FOR PLAINTIFF LEGATUS

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INTRODUCTION

Plaintiff Legatus submits this preliminary injunction against a series of regulations that force Plaintiff to violate their religious beliefs ("the Mandate"). Defendants have now finalized the Mandate and indicated that enforcement will begin on January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013). Contrary to Defendants' prior representations, the Mandate continues to require religious organizations, including Plaintiff Legatus, to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization procedures, and related counseling, in a manner that conflicts with Plaintiff's religious beliefs. Defendants' action blatantly disregards religious freedom and the right of conscience, and is nothing short of irreconcilable with the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. and merits injunctive relief pursuant to Fed. R. Civ. P. 65(a). [1]

[1] As an initial matter, a recent 6th Circuit ruling in *Autocam v. Sebelius*, No. 12-2673, slip op. (6th Cir. Sept. 17, 2013) bears no weight in the instant challenge. There is no dispute that a *non-profit* corporation *is* protected by RFRA. *Id.*, slip op. at 13 ("We recognize that many religious groups organized under the corporate form have made successful Free Exercise Clause or RFRA claims, and *our decision today does not question those decisions*. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (plaintiff was "a not-for-profit corporation organized under Florida law"); *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (affirming RFRA claim by a New Mexico nonprofit corporation), *aff'd*, 546 U.S. 418 (2006).") (Emphasis added). Plaintiff Legatus is a religious, non-profit

BACKGROUND

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 from the business community and professional enterprises. (Ex. 1, Hunt Decl. at ¶ 4). Plaintiff Legatus is incorporated under the laws of Michigan. (*Id.* at ¶ 1).

Plaintiff Legatus follows the teachings, mission, and values of the Catholic faith. (*Id.* at ¶¶ 8, 9). 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. (*Id.* at ¶¶ 8-10). Plaintiff Legatus holds sincerely held religious beliefs that forbid them from facilitating access to, participating in, paying for, training others to engage in, or otherwise supporting contraception, sterilization, abortion, and abortifacients. (*Id.* at ¶ 11). Plaintiff Legatus cannot facilitate access to, provide, fund, or participate in health care insurance benefits which cover artificial contraception, sterilization, 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,

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corporation in the tradition of *Church of the Lukumi Babalu Aye, Inc.* and *O Centro Espirita Beneficiente Uniao do Vegetal*.

sterilization, abortion, abortifacients or related education and counseling, *without violating their deeply held religious beliefs*. (*Id.* ¶¶ 11-14).

As a devoutly Catholic organization, the Plaintiff Legatus aligns 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. *See* (*Id.*; Ex. 2, Zmuda Decl. at ¶ 12; Ex. 3, Donovan Decl. at ¶¶ 5-19). Plaintiff Legatus subscribes to authoritative Catholic teaching regarding the proper nature of health care and medical treatment. (Ex. 3, Donovan Decl. at ¶ 18). For instance, Plaintiff Legatus believes, 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." Plaintiff Legatus does not believe that contraception, sterilization, or abortion properly constitute health care, and involve immoral practices and the destruction of innocent human life. (Ex. 1, Hunt Decl. at ¶ 9, 11, 13; Ex. 3, Donovan Decl. at ¶¶ 19- 20, 27-31, 35-36).

Due to these beliefs, Plaintiff Legatus designed an insurance policy which specifically excludes coverage for contraception, sterilization, abortion, and abortifacients. (Ex. 1, Hunt Decl. at ¶¶ 13- 17; Ex. 2, Zmuda Decl. at ¶ 12-13).

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. (Ex. 1, Hunt Decl. at ¶¶ 15-17; Ex. 2, Zmuda Decl. at ¶¶ 5, 12-13). Plaintiff Legatus' insurance policy specifically excludes coverage from voluntary abortions, sterilization, and contraceptive drugs. (*Id.*).

However after January 1, 2014, Plaintiffs will no longer have the right to make health care insurance decisions in line with their Catholic views. (Ex. 1, Hunt Decl. at ¶ 27; Ex. 2, Zmuda Decl. at ¶ 15).

Defendants promulgated the mandate pursuant to its authority to require employer health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining the category of "preventive care" to all "FDA-approved contraception," the Mandate requires employer health plans to cover abortion-inducing products, contraception, sterilization, and related counseling.[2] Regardless of the size of the employer, if an employer provides insurance, but the insurance does not include abortion-inducing products, contraception, sterilization, and related counseling, the employer faces fines of $100 a day per beneficiary. *See* 26 U.S.C. § 4980D(b). Plaintiff Legatus, as an employer with less than 50 employees, could drop their health insurance altogether

[2] See Women's Preventive Services: Required health Plan Coverage Guidelines, (http://www.hrsa.gov/womensguidelines, last visited Sept. 19, 2013). The category of mandatory FDA-approved contraceptives includes the moening-after pill (Plan B) and Ulipristal (Ella), which can induce abortions.

without an annual penalty, i*d.* § 4980H(a), (c)(1); however, not being able to provide health insurance benefits to their employees places Legatus at a substantial competitive disadvantage. (Ex. 1, Hunt Decl. at ¶ 42-46). Furthermore, Plaintiff Legatus has religious duty to provide for the health and well-being of their employees in accordance with their Catholic faith. (*Id.* at ¶ 42).

The mandate contains an extremely narrow "religious employer" exemption that is effectively limited to "houses of worship." 78 Fed. Reg. at 39, 874 (citing 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013)). The exemption does not include Plaintiff Legatus, but does include many religious schools and other charitable organizations. Since Plaintiff Legatus is a nonexempt organization, the mandate still burdens Plaintiff as Legatus must either (a) sponsor a health plan that will facilitate access to the objectionable products and services for the employees of these nonexempt organizations, or (b) no longer provide health insurance.

Plaintiff originally filed this suit in this Honorable Court on May 7, 2012. (Doc. #1). Since then the Defendants issued a Notice of Proposed Rulemaking ("NPRM") outlining its proposed "solution." *See* 78 Fed. Reg. 8,456 (Feb. 6, 2013). Based on those representations, this Honorable Court denied Plaintiff Legatus' motion for injunctive relief on ripeness grounds. *See Legatus v. Sebelius*, 901 F. Supp. 2d 980, 989-990 (E.D. Mich. 2012) (Doc. #42).

Defendants had previously represented that it was devising an "accommodate[ion]" for religious organizations, and made a "binding commitment" that it would "*never*" enforce the Mandate against religious organizations until the new accommodation was released. *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012). However on June 28, 2013, Defendants published their Final Rule. And contrary to the Defendants' promises, the Final Rule indeed continues to infringe on Plaintiff Legatus' free exercise of religion. *See* 78 Fed. Reg. 39,870 (July 2, 2013). The vaunted "accommodation" is nothing more than an accounting gimmick whereby, *just as before*, Plaintiff Legatus' health insurance plans serve as the conduit by which "free" contraception is delivered to Plaintiff's employees. Thus, eligible religious organization must provide a "self-certification" to their insurance issuer objecting to coverage for FDA-approved contraception. That very self-certification has the perverse effect of requiring Plaintiff's own insurance issuer to provide or arrange "payments for contraceptive services" for Plaintiff's employees. *See* 78 Fed. Ref. at 39,892 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). The mandated "payments" last for the duration that the employees remain on Plaintiff's health plans.[3] In short, under the original version of the Mandate and the Final Rule, the end result is the same, a

[3] *See* 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers offering insured plans, the issuer must "[p]rovide separate payments for any contraceptive services . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

nonexempt religious organization's decision to offer a group health plan results in the provision of "free" abortion-inducing products, contraception, sterilization, and related counseling, to its employees in a manner directly contrary to Plaintiff Legatus' religious beliefs.

Needless to say, this shell game does not address Plaintiff's fundamental religious objection to improperly facilitating access to the objectionable products and services. This should come as no surprise to the Defendants because like-minded religious objectors repeatedly informed Defendants that this so-called "accommodation" (as set forth in the NPRM) would not relieve the burden on Plaintiff's religious beliefs.[4] Despite its representations to this and other courts that is was making a "good faith effort" to address the religious objections of Plaintiff Legatus and like-minded non-profit organizations, Defendants finalized the NPRM proposal without material change. Consequently, as before, Plaintiffs are coerced, through threats of crippling fines and other pressure, into acting directly contrary to their sincerely held religious beliefs.

Thus far one Court has already enjoined the new revision to the Mandate effecting non-profit corporations. *See Geneva College v. Sebelius*, Case No. 2: 12-207, slip op. (W.D. Penn. June 18, 2013). This is because the new regulations issued by the Defendants still require religious organizations, such as Legatus, to

[4] *See, e.g.*, Ex. 4, Comment on Rulemaking to HHS from the United States Conference of Catholic Bishops, dated Mar. 20, 2013.

facilitate contraceptive, abortifacient, and sterilization coverage against their religious beliefs by knowingly providing insurance to their employees through which their insurance provider will provide contraceptive coverage to their plan participants and beneficiaries at no cost. *Id.* at *2-3, 10-22. Therefore, the new regulations "do not alleviate [Plaintiff's] religious exercise concerns." *Id.*

ARGUMENT

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 Plaintiff's religious freedom, the crucial and often dispositive factor is whether Plaintiff is likely to prevail on the merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995)).

Without protection from this Honorable Court, Plaintiff will be required to facilitate and provide through their insurance plan contraception, abortifacients, sterilization, and patient education and counseling for women with reproductive capacity—in direct contravention of Plaintiff's religious beliefs.

A. Plaintiff is Likely to Succeed on the Merits.

i. The Mandate Violates RFRA.

Under the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq. (hereinafter "RFRA"), the federal government is prohibited from "substantially burden[ing] 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 compelling interest." 42 U.S.C. § 2000bb-1(b); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

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." *O Centro* 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 Mandate substantially burdens the Plaintiff's 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).

ii. The Mandate Substantially Burdens Plaintiff's Free Exercise of Religion.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). This initial inquiry requires court to identify the particular exercise of religion at issue, and then assess whether the law substantially burdens that religious practice. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294,

2013 WL 3216103, at * 20 (10th Cir. June 27, 2013) (en banc). Here, the Mandate imposes a substantial burden on Plaintiff Legatus' religious exercise by forcing Legatus to do precisely what their religion forbids: impermissibly facilitate access to abortion-inducing products, contraception, sterilization, and related counseling.

Plaintiff's operation of their health insurance plans according to their religious beliefs is the "exercise of religion" under the RFRA. RFRA protects "any exercise of religion, whether compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception to the particular belief or practice in question. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, a court must accept the plaintiff's description of their beliefs and practices, regardless of whether the court, or the government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714-15. "Courts," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Id.* at 716.

Pursuant to the teachings of the Catholic Church, Plaintiff's sincerely held religious beliefs prohibit them from facilitating, providing, or purchasing health insurance coverage for contraception, abortion, abortifacients, sterilization, or related education and counseling. Plaintiff's compliance with these beliefs is a religious exercise protected under RFRA. The Mandate creates government-

imposed coercive pressure on Plaintiff to facilitate access to or provide through its insurance plan contraception, sterilization, abortion, and abortifacients—or go without employer health insurance benefits altogether. In other words, the government is forcing Plaintiff Legatus to change or violate their religious beliefs, or cease being competitive as an employer in the marketplace. By failing to provide an exemption for Plaintiff's religious beliefs, the Mandate not only exposes Plaintiff to substantial per employee fines for their religious exercise if plaintiff offers a noncompliant health benefit plan—$100 per employee per day, a fine significantly more severe than the $5 per student fine struck down by the Court in *Yoder*—, but also exposes Plaintiff to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs. 26 U.S.C. § 4980D(b); *see also Sherbert* at 374 U.S. at 403-04.

As the Supreme Court has made clear, a federal law "substantially burdens" an exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218, or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas*, 450 U.S. at 716-18 (holding that the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets).

The Mandate imposes a substantial burden on Plaintiff's religious exercise by forcing Plaintiff to violate deeply held religious beliefs and the teachings of the Catholic Church. Plaintiff Legatus, pursuant to their religious beliefs, cannot serve as a conduit by which contraception, sterilization, and abortion-inducing drugs are delivered to their plan participants and beneficiaries.

It is not enough for the government to claim that Plaintiff Legatus is eligible for the so-called "accommodation." The "accommodation" does nothing to resolve the conflict with Plaintiff Legatus' religious beliefs. For the purposes of this Court's analysis, what matters is whether the government is coercing entities to take actions that violate their sincere religious beliefs. *See Hobby Lobby*, 2013 WL 3216103, at * 19 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The fact remains that the accommodation compels Plaintiff Legatus, through their health insurance plan, to serves as the catalyst through which objectionable products and services are provided to Plaintiff Legatus' employees, plan participants, and beneficiaries, in violation of Plaintiff's sincerely held religious beliefs. These sincere religious beliefs are entitled to no less protection than the beliefs at issue in *Sherbert*, *Yoder*, or *Thomas*.

iii. The Mandate Fails to Justify a Compelling Interest.

The Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as contraceptives and abortifacients are currently readily available through other means without forcing Plaintiff to facilitate access to them.

It is the Defendants, not the Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *O Centro*, 546 U.S. at 428-30. In order to prove that Defendants' substantial burden on the Plaintiffs' religious liberties is justified, the Defendants would need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Defendants are charged to "specifically identify an 'actual problem' in need of solving" and show that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). The government bears the burden of proof and "ambiguous proof will not suffice." *Id.* at 2739. And the government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431.

Forcing the Plaintiffs to facilitate access to contraceptives, sterilization, and abortifacients, and necessarily involve Plaintiff's insurance plan serves only an ambiguous, non-compelling interest, and *at best* would serve the interest of *marginally* increasing access to contraceptives and abortifacients. There is "no actual problem in need of solving," and forcing the Plaintiffs to violate their religious beliefs fails to offer any sort of "actually necessary solution."

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." (http://www.hhs.gov/news/press/2012pres/01/20120120a.html, last visited Sept. 9, 2013). Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services—and now these drugs are widely available at drugstores nationally without a prescription. There is no compelling reason for the Mandate to take the matter one step further by specifically forcing religious employers, such as the Plaintiffs, objecting upon sincere religious grounds to facilitate access to these services through the their insurance plans. If the Defendants were truly concerned with the lack of access to contraceptives, sterilization, and abortifacients in this country, the Defendants could provide those "preventive services" itself without burdening the Plaintiffs' religious beliefs.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leave appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012). Here the government cannot claim an interest of the "highest order" because the Mandate already excepts millions through a combination of "grandfathering" provisions, the narrow exemption for "religious employers," inter alia. As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 2013 WL 3216103, at *23; *Newland*, 881 F. Supp. 2d at 1298; *Tyndale v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *18 (D.D.C. Nov. 16, 2012); *see also Geneva College*, No. 12-00207 (W.D. Pa. April 19, 2013) ("in light of the myriad exemptions to the mandate's requirements already granted and conceding that the requirement does not include small employers similarly situated to SHLC, the requirement is 'woefully under inclusive' and therefore does not serve a compelling government interest.").

If the government really possessed an interest "of the highest order" to justify coercing the Plaintiffs to violate their sincerely held religious beliefs, the government could not voluntarily use grandfathering to omit tens of millions of

women from the mandate. The pedestrian reason for the grandfathering exemption illustrates this point: it exists because "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'" (HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered" Health Plans," available at http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html, last visited Sept. 8, 2013). Yet, Congress considered some of the Affordable Care Act's requirements (but not the HHS Mandate) paramount enough to impose on grandfathered plans. *See* 75 Fed. Reg. at 34,542 (listing §§ 2704, 2708, 2711, 2712, 2715, 2718 as applicable to grandfathered plans). These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions and annual or lifetime limits. These requirements actually surround the mandate, § 2713, but Congress intentionally omitted the mandate from the requirements it made necessary for all plans. Moreover, Congress did not consider coverage for abortifacients and all FDA approved contraception important enough to list in § 2713. As far as Congress was concerned, the Affordable Care Act need not impose any mandate that employers provide abortifacients or contraception. The government even admits that Congress gave HHS authority to exempt any religious objectors it wanted to exempt from this mandate. 76 Fed. Reg. at 46,623-24; 77 Fed. Reg. at

8,726. As far as Congress is concerned, the government could have exempted the Plaintiff Legatus. Congress deemed certain interests in the Affordable Care Act to be "of the highest order" for all health plans, but not the Mandate.

iv. The Mandate Fails to Use the Least Restrictive Means

Under RFRA, the government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In *Riley v. National Federation of the Blind*, 487 U.S. 781, 799–800 (1988), the Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective to achieve the goal.[5] *See also, S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1206 (6th Cir. 1990).

Defendants could further their interests without coercing Plaintiffs in violation of their religious exercise. The government could directly provide or facilitate contraception to employees at exempt entities. This in and of itself shows the mandate fails RFRA's least restrictive means elements. *O Centro*, 546 U.S. at 428-30. The government could also: (i) offer grants to entities that already provide

[5] In *Riley*, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by punishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799-800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *Id.*

contraceptive services at free or subsidized rates and/ or work with these entities to expand delivery of these services; (ii) directly offer insurance coverage for contraceptive services; (iii) offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, or (iv) provide incentives for pharmaceutical companies and/or drug stores to provide such products free of charge or at reduced rates.[6] In fact the government *already* subsidizes contraception for certain individuals.[7] The government is currently working to launch its website and infrastructure to operate its exchanges until the Affordable Care Act. The government could likely organize a different manner in which it could achieve its stated goals under the mandate, using the tools it is currently formulating. Indeed, of the various ways the government could achieve

[6] *See*, e.g., *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *18 n. 16 (M.D. Fla. June 25, 2013) ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at *11 (E.D. Mich. Mar. 14, 2013) ("[T]he Government has not established its means as necessarily being the least restrictive.").

[7] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

its interests; it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive, sterilization, and abortifacients services, such as Plaintiff Legatus. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties"). In light of these alternative, there is no justification for forcing Plaintiff Legatus to violate their religious beliefs.

B. Plaintiff Will Suffer Irreparable Harm Without Injunctive Relief.

Plaintiff will be irreparably harmed absent the issuance of an injunction by this Court. The Mandate deprives Plaintiff of fundamental First Amendment rights. 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, Plaintiff 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 Mandate. Plaintiff Legatus faces per employee fines for noncompliance with the Mandate. Plaintiff faces substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to remaining faithful and exercising their religious beliefs. Plaintiff will incur costs and expenses due to the enforcement of the Mandate. If an injunction does not issue, Plaintiff will be forced to violate their religious beliefs or forfeit health insurance.

C. Granting a Preliminary Injunction Will Cause No Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiff is substantial because Plaintiff's freedom of religion is at issue. The deprivation of this inalienable right, even for minimal periods, constitutes irreparable injury.

On the other hand, if Defendants are restrained from enforcing the Mandate against Plaintiff, 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 Mandate. Allowing the Plaintiff 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 Plaintiff shows that religious freedom rights have been violated, then the harm to others is inconsequential. As demonstrated, the enforcement of Defendants' HHS Mandate on Plaintiff violates First Amendment freedoms; therefore, any "harm" to others is inconsequential.

D. The Impact of the Preliminary Injunction on the Public Interest Favors Granting the Injunction.

The impact of the preliminary injunction on the public interest turns in large part on whether Plaintiff's Constitutional rights are violated by the enforcement of Defendants' overreaching 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"). Aforementioned, the enforcement of Defendants' Mandate is a direct violation of Plaintiff's fundamental rights. Therefore, the public interest is best

served by preventing the Defendants from compelling individuals to violate their religious beliefs and rights of conscience, protected by RFRA.

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

CONCLUSION

Plaintiff hereby requests that this court issue a preliminary injunction. The Mandate violates RFRA. Unless this Court issues a preliminary injunction prior to when the Plaintiff needs to implement logistics for their January 1, 2014 plan year, Plaintiff inescapably must choose between violating their religious beliefs or suffering massive financial penalties or harm to the goodwill and sustainability of their company. Defendants, conversely, would face no harm from an injunction as the Mandate already exempts millions of other companies and organizations. Plaintiff seeks this Court to enjoin Defendants' requirement that Plaintiff covers or facilitates access to contraception, abortifacients, sterilization, and counseling and education for the same, in its health plans.

Respectfully submitted this 20th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None

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