Nos. 13-1092, 13-1093

In the U.S. Court of Appeals for the Sixth Circuit

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

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF HEALTH & HUMAN SERVICES; U.S. DEP'T OF HEALTH & HUMAN SERVICES; SETH D. HARRIS, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEP'T OF LABOR; U.S. DEP'T OF LABOR; JACK LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY, AND U.S. DEP'T OF THE TREASURY,
Defendants-Appellants/Cross-Appellees.

APPEAL FROM U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN, NO. 2:12-cv-12061,
HON. ROBERT H. CLELAND, DISTRICT JUDGE

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE AND CROSS-APPELLANT IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-1092 13-1093   Case Name: Legatus v. Sebelius

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 30, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Lawrence J. Joseph
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") files this brief with the consent of all parties. Eagle Forum is an Illinois nonprofit corporation organized in 1981. For over thirty years, it has defended principles of limited government and individual liberty, including freedom of religion. In her capacity as President of Eagle Forum, Phyllis Schlafly is a longtime member and supporter of cross-appellant Legatus. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.[1]

STATEMENT OF THE CASE AND FACTS

This litigation presents two important questions. First, can administrative agencies violate the procedural requirements for rulemaking and, by administrative fiat, override state insurance laws on both conscience protection and preventive care, thereby forcing employers to provide health insurance that offers treatments – such as abortifacients and contraceptives – that violate the employers' faith? Second, can the affected public challenge such overreach under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA")? *Amicus* Eagle Forum respectfully submits that the answers

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

are no to the first question and yes to the second.

Acting under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"), the defendants-appellees Departments of Health & Human Services ("HHS"), Labor, and Treasury and their respective Secretaries (collectively, the "Administration") have injected these controversial requirements to implement PPACA's general directive that "health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for … with respect to women, such additional preventive care and screenings … as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. §300gg-13(4). To implement this provision, the Administration promulgated two interim final rules, 75 Fed. Reg. 41,726 (2010); 76 Fed. Reg. 46,621 (2011), which together adopt the Health Resources and Services Administration's *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011). In pertinent part, the guidelines require health plans to include "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" (hereinafter, the "Mandate").

Legatus (a membership organization of Catholic executives), Daniel Weingartz (a Legatus member), and his company Weingartz Supply Company

("WSC") have sued the Administration under the First Amendment and RFRA to enjoin the Mandate's preventing the plaintiffs (collectively, "Plaintiffs") from running their affairs according to their Catholic faith. As supplemented here, *amicus* Eagle Forum adopts Plaintiffs' Statement of Facts. *See* Second Br. at 5-14.

Under Plaintiffs' faith, the Mandate's requirements are sinful:

> In this context, it is not possible to anaesthetize consciences, for example, concerning the effects of particles whose purpose is to prevent an embryo's implantation or to shorten a person's life…. In the moral domain, your Federation is invited to address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia.

Pope Benedict XVI, *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007); *see also* Pontifical Academy for Life, *Statement on the So-Called 'Morning-After Pill'* (Oct. 31, 2000) ("the proven 'anti-implantation' action of the *morning-after pill* is really nothing other than a chemically induced abortion [and] from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to distributing, prescribing and taking the *morning-after pill*") (emphasis in original). Although it offers its rival interpretations, the Administration does not question the sincerity of Plaintiffs' beliefs and faith.

STANDARD OF REVIEW

Federal appellate courts review the granting or denial of a preliminary injunction for abuse of discretion. *Hunter v. Hamilton Cnty. Bd. of Elections,* 635 F.3d 219, 233 (6th Cir. 2011). Because a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990), federal appellate courts review district courts' underlying legal conclusions *de novo.*

The "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011) (majority); *id.* at 2521 (Thomas, J., dissenting). Particularly in interlocutory appeals on preliminary injunctions – which analyze movants' likelihood of later prevailing on the merits – appellate courts should consider *amicus* arguments that the parties are free to adopt both on appeal and in the future merits proceedings.

SUMMARY OF ARGUMENT

Insofar as a Legatus member has standing, Legatus has associational standing because it easily meets the remaining two tests: (1) religious freedom is germane to Legatus, and (2) purely legal challenges do not require individual

members' participation (Section I.A). Legatus has a ripe challenge because its procedural challenge will never get riper, and the Administration cannot sidetrack Legatus' substantive challenge as to members who will *never* be exempt under the pending rulemaking simply because *some other* Legatus members may someday become exempt (Section I.B).

Promulgating the Mandate without notice-and-comment rulemaking violated not only the Administrative Procedure Act ("APA") (Section II.B) but also the Constitution (Section II.A). As a result, the Mandate commands no deference and cannot qualify as either a compelling interest under RFRA or even a public interest under the test for preliminary injunctions (Section II.C). With respect to the free exercise of religion, the Administration has no right to impose its orthodoxy on Plaintiffs, and its ham-fisted attempt to define abortion as a matter of "federal law" is wrong as a matter of federal law and basic reproductive science (Section III.A). Similarly, the Supreme Court already has rejected the Administration's attempt to deny religious freedom to corporations (Section III.B). Because government action related to – and effects correlated with – the ability to get pregnant are not necessarily sex-discrimination, the Mandate does not qualify as a compelling government interest to remedy sex discrimination (Section III.C).

On the merits, PPACA's delegation to the Administration is impermissibly open-ended and standardless (Section IV.A), which is all the more inappropriate in

this area of traditional *state* regulation, where federal agencies have purported to adopt preemptive rules – without notice-and-comment rulemaking, no less – notwithstanding the presumption *against* preempting state laws in fields of traditional state concern (Section IV.B). Indeed, the presumption against preemption allows this Court to interpret PPACA narrowly, without resort to the Administration's interpretation (Section IV.C). Viewed without deference to the Administration and with deference instead to the states in our federalist structure, PPACA's requirement for "preventive care" suggests prevention of *disease,* not the prevention of pregnancy (Section IV.D).

ARGUMENT

I. LEGATUS HAS STANDING AND A RIPE CHALLENGE TO THE MANDATE

Although it granted a preliminary injunction to WSC and Mr. Weingartz, the district court denied interim relief to Legatus itself on the theory that Legatus as an entity lacked standing and a ripe challenge. Neither Article III barrier justifies denying Legatus interim relief.

A. Legatus Has Standing as a Membership Organization

The tests for standing are familiar, both generally and for membership associations. *See Heartwood, Inc. v. Agpaoa,* 628 F.3d 261, 266 (6th Cir. 2010). Given that the district court granted a Legatus member (Mr. Weingartz) interim relief, it is clear that at least one Legatus member has standing. That leaves only

the germaneness test and whether individual members need to participate. *Id.* But individual participation is not required to litigate a "pure question of law: whether the Secretary properly interpreted the [statute's] provisions," *Int'l Union v. Brock,* 477 U.S. 274, 287-88 (1986), and germaneness is an "undemanding" test, *Nat'l Coal Ass'n v. Lujan,* 979 F.2d 1548, 1552 (D.C. Cir. 1992), which Legatus easily meets.

The district court seemed troubled that it did not know about each Legatus member, but associations may sue on behalf of "any one" of their members, even if other members have *conflicting* interests. *Nat'l Lime Ass'n v. E.P.A.,* 233 F.3d 625, 636 (D.C. Cir. 2000). The district court's associational-standing analysis is wrong.

In addition, Legatus challenges the Administration's failures to observe procedural safeguards, and "those adversely affected … generally have standing to complain." *FEC v. Akins,* 524 U.S. 11, 25 (1998). Rescission and remand may produce the same result, *id.,* but until that happens, the initial injury remains "fairly traceable" to the agency's initial action and redressable by an order striking the initial agency action, *id.*[2] Given the clear procedural violations here, *see* Section II.B, *infra,* coupled with the substantive violation outlined in Sections III-IV, *infra,* Legatus has procedural standing, which *relaxes* the standing inquiry's

[2] Although *Akins* did not involve rulemaking violations, its rationale plainly applies to rulemakings. *Animal Legal Defense Fund v. Glickman,* 154 F.3d 426, 444 (D.C. Cir. 1998) (*en banc*).

redressability and immediacy requirements. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (procedural-rights plaintiffs "can assert that right without meeting all the normal standards for redressability and immediacy"). Rather than raising the bar for Legatus' standing, the district court should have lowered it.

B. Legatus Brings a Ripe Challenge

Legatus' procedural claims certainly are ripe. *Ohio Forestry Ass'n, Inc., v. Sierra Club,* 523 U.S. 726, 737 (1998) (plaintiff "may complain at the time … that [procedural] failure … takes place, for the claim can never get riper"). Moreover, for purposes of Article III, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006). Given that the substantive religious-freedom issues certainly are presented *now* for for-profit organizations ineligible for the Administration's exemptions, neither courts nor the Administration have an institutional interest in deferring review.

With respect to the prior "safe harbors" and enforcement discretion and the pending rulemaking on religious exemptions, the Administration merely tinkers at the margins, affecting only minor timing issues. For ripeness, it is immaterial whether Legatus and its members will hit this wall in 2012, 2013, or 2014. The wall is there, and ripeness provides no barrier to litigating the wall's legality:

"Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974). Here, there is no question that the Mandate will injure Legatus in the near term.

II. THE MANDATE VIOLATED PROCEDURAL REQUIREMENTS OF BOTH THE CONSTITUTION AND THE APA

The "history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. U.S.,* 318 U.S. 332, 347 (1943). Before addressing the substantive merits, *amicus* Eagle Forum first reviews the procedural merits. Although Plaintiffs do not press the issue on appeal, understanding the Mandate's procedural defects will help guide this Court's assessment of not only the Mandate's overall merit but also the underlying jurisdictional issues.

Although PPACA's authorization for preventive care does not *per se* require that HHS act by notice-and-comment rulemaking, it does not exempt HHS from the APA either, which therefore requires APA compliance. 5 U.S.C. §559. To determine whether agency action qualifies as "legislative rules" or "substantive rules" that require notice-and-comment procedures, this Circuit has noted at least some stable guideposts in an area otherwise "enshrouded in considerable smog": "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *State of Ohio Dep't of Human Serv.*

v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin., 862 F.2d 1228, 1234 (6th Cir. 1988) (interior quotations omitted). Because it purports to create new duties, the Mandate qualifies as a legislative or substantive rule, and therefore needed to undergo notice-and-comment procedures or meet an exception.

A. Promulgating the Mandate Violated the Constitution

Although the typically contested procedural issues concern APA noncompliance, this Court should not forget the underlying *constitutional* issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.,* 517 U.S. 748, 771 (1996). In this action, the Administration purports to rely on the exception to congressional lawmaking that Congress itself has enacted. *See* 5 U.S.C. §553(b). In doing so, an agency cannot "replace the statutory scheme with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.,* 412 F.2d 740, 744 (3d Cir. 1969); *accord U.S. v. Picciotto,* 875 F.2d 345, 346-49 (D.C. Cir. 1989) (APA exceptions "must be narrowly construed").

Failure to follow APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown,* 441 U.S. 281, 303 (1979); *Ohio Dept. of Human Serv.,* 862 F.2d at 1237 ("agency action taken in disregard of statutory rulemaking procedures is void") (interior quotations omitted); *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power

upon it”). Thus, if the Administration violated the APA, the Administration’s attempt to make law violates not only the APA but also the Constitution.

B. Promulgating the Mandate Violated the APA

Unless certain exceptions apply, agencies must undertake notice-and-comment rulemaking in order to issue “legislative rules” under the APA. The parties do not question that the Mandate is a legislative rule. As such, the only potential exception to the APA’s rulemaking requirements is where the agency “for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. §553(b)(B). Although the Administration made weak findings to support bypassing a rulemaking, the Administration also promulgated its Mandate as an “interim final rule.” Absent a viable exception to notice-and-comment rulemaking, however, interim final rules (*i.e.,* rules that take effect until the agency gets around to promulgating lawful rules) are foreign to the APA.

An agency’s good-cause finding is, of course, reviewable, *U.S. v. Cain,* 583 F.3d 408, 420-21 (6th Cir. 2009); *Northwest Airlines, Inc. v. Goldschmidt,* 645 F.2d 1309, 1320-21 (8th Cir. 1981), and the Administration’s justification is clearly inadequate. At the outset, “it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the

notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dept. of Environmental Protection v. U.S. Environmental Protection Agency,* 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.,* 682 F.3d 87, 94 (D.C. Cir. 2012) (same); *Cain,* 583 F.3d at 420-21 (same). The APA's legislative history shows just how narrow these exceptions are:

> "'*Impracticable*' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. '*Unnecessary*' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. '*Public interest*' supplements the terms 'impracticable' or 'unnecessary;' it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure."

Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 751 (10th Cir. 1987) (*quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (emphasis in *Hodel)*. Under these tests, the Mandate nowhere reaches the required level.

C. The Mandate's Procedural Defects Deprive It of Deference and Status as Either a Compelling Interest or Even a Public Interest

To prevail in the face of RFRA, the Administration must identify a compelling interest that the Mandate supports. 42 U.S.C. §2000bb-2(b)(1). Under the test for a preliminary injunction, federal courts must weigh the public interest.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). But procedurally infirm rules are a nullity: "agency action taken in disregard of statutory rulemaking procedures is void." *Ohio Dept. of Human Serv.*, 862 F.2d at 1237 (interior quotations omitted); *North Am. Coal Corp. v. Director*, 854 F.2d 386 (10th Cir. 1988). In light of not only the Mandate's procedural defects but also the strong merits arguments against it, Section IV, *infra*, the Mandate is neither a compelling interest nor even a public interest. There is no there there.

III. THE HHS REGULATIONS BURDEN RELIGION

Plaintiffs and the other *amicus curiae* ably brief the right to religious freedom and Plaintiffs' entitlement to relief. *See* Second Br. at 20-52. *Amicus* Eagle Forum focuses on three issues: the relevant religious views on abortifacients; the right of entities like corporations to religious freedom; and the rationality of the Administration's imposing the Mandate to redress sex discrimination.

A. The Government Lacks the Authority to Set the Contours of Permissible Religious Thought

In statements that unintentionally demonstrate how notice-and-comment rulemaking helps ensure informed decision-making, *Chrysler Corp.*, 441 U.S. at 316 ("Congress made a judgment that … informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons notice and an opportunity to comment"), the Administration cites 62 Fed. Reg. 8610, 8611 (1997) and 45 C.F.R. §46.202(f) to argue that "federal law" rejects

Plaintiffs' claim that the Plan B morning-after-pill and Ella week-after-pill are abortifacients. First Br. at 9 n.6. Under these cited authorities, pregnancy begins upon implantation of the embryo to the mother's uterus, not upon fertilization. The Administration's position is both irrelevant and false.

At the outset, conscience rights are defined by the rights holder, not by the Government:

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

Texas v. Johnson, 491 U.S. 397, 415 (1989) (*quoting West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943)). Religious freedom does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 714 (1981). Accordingly, religious freedom neither begins nor ends with government-approved religiosity or lack of it. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 524 (1993) (finding unlawful restriction of a faith with animal sacrifice as a principal form of devotion). If *courts* cannot question the merits of one's religious views in religious-freedom cases, the Administration *a fortiori* cannot impose its religious views by administrative fiat or otherwise: "[Plaintiffs] drew a line, and it is not for us to say that the line [they] drew was an

unreasonable one." *Thomas,* 450 U.S. at 714. Plaintiffs have every right not to care what the Administration considers the beginning of life.

In any event – and this underscores the need for notice-and-comment rulemaking – the Administration is simply wrong about "federal law." The cited regulation does indeed provide that "pregnancy encompasses the time period from implantation to delivery," 45 C.F.R. §46.202(f), but that entire regulation is confined by the limitation "as used in this subpart" (*i.e.,* 45 C.F.R. pt 46, subpt. B), which is simply inapposite to PPACA. 45 C.F.R. §46.202. More importantly, HHS's predecessor did not reject a fertilization-based definition for all purposes but adopted the implantation-based definition only "to provide an administerable policy" for the specific purpose of obtaining informed consent for participation in federally funded research:

> It was suggested that pregnancy should be defined (i) conceptually to begin at the time of fertilization of the ovum, and (ii) operationally by actual test unless the women has been surgically rendered incapable of pregnancy.
>
> While the Department has no argument with the conceptual definition as proposed above, it sees no way of basing regulations on the concept. Rather in order to provide an administerable policy, the definition must be based on existing medical technology which permits confirmation of pregnancy.

39 Fed. Reg. 30,648, 30,651 (1974). Thus, HHS's predecessor had "no argument" on the merits against recognizing pregnancy at fertilization, but declined for

administrative ease and then-current technology. The resulting "administerable policy" merely sets a federal floor for obtaining the informed consent of human subjects in federally funded research. A decision to set an arguable floor (based on 1970s technology) for a limited purpose for administrative expedience obviously cannot translate to the conscience context, where the question is whether individuals or institutions want to avoid participating in activities against their religious beliefs or moral convictions.

Significantly, the enacting Congress expressly held as much by providing that these definitions would not trump religious beliefs and moral convictions under another federal conscience-protection law. S. Rep. No. 93-381 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3655 ("It is the intent of the Committee that guidelines and regulations established by… the Secretary … under the provisions of the Act do not supersede or violate the moral or ethical code adopted by the governing officials of an institution in conformity with the religious beliefs or moral convictions of the institution's sponsoring group"). Thus, "federal law" most emphatically does not define life and abortion as the Administration argues.

Quite the contrary, federal law uses a fertilization-based definition at other times: "Child means an individual under the age of 19 including the period from conception to birth." 42 C.F.R. §457.10; *see also* 67 Fed. Reg. 61,956, 61,963-64 (2002) (finding it unnecessary to define "conception" as "fertilization" because

HHS did "not generally believe there is any confusion about the term 'conception'"). Indeed, the fertilization-based definition has a stronger historical, legal, and scientific foundation:

> All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion.

U.S. Dep't of Health, Education & Welfare, Public Health Service Leaflet No. 1066, 27 (1963). Scientifically, the pre-implantation communications or "cross talk" between the mother and the pre-implantation embryo establish life before implantation, *see, e.g.,* Eytan R. Barnea, Young J. Choi & Paul C. Leavis, "*Embryo-Maternal Signaling Prior to Implantation,*" 4 EARLY PREGNANCY: BIOLOGY & MEDICINE, 166-75 (July 2000) ("embryo derived signaling … takes place prior to implantation"); B.C. Paria, J. Reese, S.K. Das, & S.K. Dey, "*Deciphering the cross-talk of implantation: advances and challenges,*" SCIENCE 2185, 2186 (June 21, 2002); R. Michael Roberts, Sancai Xie & Nagappan Mathialagan, "*Maternal Recognition of Pregnancy,*" 54 BIOLOGY OF REPRODUCTION, 294-302 (1996), as do the embryology texts. *See, e.g.,* Keith L. Moore & T.V.N. Persaud, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 15 (8th ed. 2008) ("Human development begins at fertilization when a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a zygote. This highly specialized, totipotent cell marked the beginning of each

of us as a unique individual.”). This Court should have no difficulty in rejecting the Administration’s ahistorical and unscientific legerdemain. This Nation was founded on principles of freedom of religion, not government-defined orthodoxy.

B. Corporations Can Assert Claims of Religious Freedom

The Administration’s argument that corporations cannot assert free-exercise claims is plainly misplaced. *Citizens United v. Federal Election Comm’n,* 558 U.S. 310, 342 (2010) (“First Amendment protection extends to corporations”). “That [plaintiff] is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983.” *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1057 (9th Cir. 2002) (quoting *Advocates for the Arts v. Thomson,* 532 F.2d 792, 794 (1st Cir. 1976), alteration in *RK Ventures*); *cf. First Nat’l Bank of Boston v. Bellotti,* 435 U.S. 765, 780 n.15 (1978) (“settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment”). “The fundamental concept of liberty embodied in th[e Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment[, which] declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Nothing *per se* prohibits corporations from asserting religious freedom.

While it is true that the Supreme Court has rejected the Article III standing of a large and diverse entity by “require[ing] the participation of individual

members" where "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion," *Harris v. McRae,* 448 U.S. 297, 321 (1980), that reasoning does not extend to close corporations such as WSC that are, in essence, family businesses. *E.E.O.C. v. Townley Engineering & Mfg. Co.,* 859 F.2d 610, 619-20 (9th Cir. 1988) (citing *Tony & Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 303 n.26 (1985)). Thus, even without RFRA, Mr. Weingartz and WSC could challenge the Mandate.

If anything, RFRA *extends* the ability of a corporation and its owners to assert religious-freedom rights. RFRA adopts 42 U.S.C. §2000cc-5 as its definition of the "exercise of religion," 42 U.S.C. §2000bb-2, and that definition extends to "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. §2000cc-5(7)(A) (emphasis added), and even includes the use of real property. 42 U.S.C. §2000cc-5(7)(B). While WSC is not real property, it is nonetheless a form of property that Mr. Weingartz uses in the exercise of his faith. Because the RFRA definition extends broadly to *any* exercise of religion,[3] it plainly is broad enough to include Mr. Weingartz's use of WSC to live his life according to his faith.

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[3] "[R]ead naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *New York v. EPA,* 443 F.3d 880, 885 (D.C. Cir. 2006) (interior quotations omitted).

C. <u>The Mandate Does Not Redress Sex Discrimination</u>

The Administration and its *amici* argue that the Mandate redresses sex discrimination, thereby providing a compelling interest that could trump Plaintiffs' religious freedom. *See, e.g., Amicus* Br. of Nat'l Women's Law Ctr., at 17-18. To the contrary, discrimination because of pregnancy or the ability to get pregnant qualifies as sex discrimination only in the employment context, *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 684 (1983), and only there because the Pregnancy Discrimination Act expressly said so. *Id.* Outside of that context, disparate treatment of a potentially pregnant person because of sex-neutral criteria (*e.g.,* opposition to abortion) is not discrimination *because of that person's sex. Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 271-72 (1993). "While it is true … that only women can become pregnant, it does not follow that every … classification concerning pregnancy is a sex-based classification." *Id.* (interior quotations omitted); *McRae,* 448 U.S. at 322. Instead, discrimination requires that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part *because of,* not merely *in spite of,* its adverse effects upon an identifiable group." *Bray,* 506 U.S. at 271-72 (interior quotations omitted, emphasis added); *In re Union Pacific R.R. Employment Practices Litig.,* 479 F.3d 936, 944-45 (8th Cir. 2007) (no sex discrimination if health plans deny contraceptive coverage to both women and men). Because it seeks to solve a non-

existent problem, the Mandate is arbitrary and capricious – not compelling – as a government interest.

IV. THE MANDATE EXCEEDS HHS'S AUTHORITY

With the foregoing background, *amicus* Eagle Forum now demonstrates that the Mandate exceeds HHS's authority under PPACA. Alternatively, if Congress intended to provide the authority that the Administration claims, then PPACA violates the non-delegation doctrine.

A. The Mandate Violates the Non-Delegation Doctrine

As signaled in Section II.A, *supra,* with respect to agencies' rulemaking authority, the nondelegation doctrine derives from the constitutional command that "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, §1. Under this doctrine, Congress cannot abdicate or to transfer to others the essential legislative functions with which it is thus vested; Congress can, however, delegate legislative authority, so long as it provides "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *U.S. v. Mistretta,* 488 U.S. 361, 372 (1989). Here, PPACA provides no intelligible principle in 42 U.S.C. §300gg-13(4) to guide the Administration. The statute – under the Administration's view of it – is particularly standardless given the presumption against preemption that would apply, if Congress had acted alone. *See* Section IV.B, *infra.* The Constitution does

not allow Congress to write the Administration a blank check to circumvent state authority.

B. The Presumption Against Preemption Applies

As explained in Section IV.B.1, *infra,* the fields of insurance generally, preventive-care coverage specifically, and conscience exceptions all are fields that the states occupied before PPACA's and the Administration's intrusions. In essence, then, the Administration takes the position that its Mandate preempts state law. But federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* 514 U.S. 645, 654 (1995). Accordingly, under the Supreme Court's preemption analysis, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth v. Levine,* 555 U.S. 555, 565 (2009); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

When this presumption applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230; *Wyeth,* 555 U.S. at 565. Significantly, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the

scope of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). As explained in the next two sections, the presumption against preemption applies here and denies the Administration's resort to its expansive interpretation of the statutory phrase "preventive care" in health insurance.

1. PPACA Intrudes into State-Occupied Fields

Although the federal government has been in the field of medical insurance under the Spending Clause for federal insurance programs paid for by the United States, PPACA represents a further federal expansion into several fields and sub-fields already occupied by the states, particularly private health insurance *not* funded under the Spending Clause. First, of course, the states long have regulated health insurance generally. *See Travelers Insurance,* 514 U.S. at 654. Second, as part of that regulation, states have regulated the types of mandatory preventive care that insurance policies in that state must cover and the terms on which they must cover them. *See, e.g.,* ALA. CODE §16-25A-1(8); ARK. CODE. ANN. §23-79-141; COLO. REV. STAT. §10-16-104(11)(b)-(c), (18); IND. CODE §27-8-24.2-10; KY. REV. STAT. §205.6485; MASS. GEN. LAWS ch. 175 §47C; MICH. COMP. LAWS ANN.

§500.3501(b)(ix); MICH. ADMIN. CODE r. 325.6125(d)(ii); MINN. STAT. §§62J.01, 62J.04, 62A.047, 62D.095(5); 72 PA. CONS. STAT. §3402b.5; W. VA. CODE §16-2J-1. Third, as part of both forms of regulation, states have regulated the extent to which conscience rights apply to health insurance with respect to abortion and contraception. *See, e.g.,* ARIZ. REV. STAT. §20-826(Z); ARK. CODE ANN. §20-16-304; CAL. HEALTH & SAFETY CODE §1367.25; CAL. INS. CODE §10123.196; COLO. REV. STAT. §25-6-102; CONN. GEN. STAT. §§38a-503e(b)(1), 38a-530e(b)(1); FLA. STAT. ANN. §381.0051; HAW. REV. STAT. §431:10A-116.7; LA. REV. STAT. §40:1299.31; 24 ME. REV. STAT. §2332-J; NEB. REV. STAT. §28-338; N.J. STAT. ANN. §17:48-6ee; N.Y. INS. LAW §§3221, 4303; N.C. GEN. STAT. §58-3-178; TENN. CODE ANN. §68-34-104; WYO. STAT. ANN. §42-5-101; *cf.* COLO. REV. STAT. §25-6-101 (public employees); W. VA. CODE §16-2B-4 (same); *see also* Erica S. Mellick, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience,* 9 J. HEALTH CARE L. & POL'Y 402, 419, 429-30 (2006).[4] Taken together, PPACA and the Mandate clearly intrude into fields that the states historically have occupied.

2. Congress Would Not Cavalierly Preempt State law

As explained, even with obviously preemptive statutes, the presumption

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[4] Although the foregoing authorities predate PPACA, states have continued to add to their regulations in these fields. *See, e.g.,* 2012 Ariz. Legis. Serv. 337 (West); 2012 Kan. Sess. Laws 112, §1, ch. 337, §1; 2012 Mo. Laws 749, §A.

against preemption applies to limit the scope of that preemption. *Medtronic,* 518 U.S. at 485. Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* For example, *Santa Fe Elevator,* 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.* Notwithstanding the literal application of the federal statute, the presumption prevented the federal law's overstepping traditional state regulation in the absence of something much more explicit from Congress.[5]

As explained in the previous section, the states were heavily involved in all relevant aspects of insurance generally, preventive care, and conscience rights. As

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[5] The presumption against preemption is not limited to states with relevant laws displaced by the federal law in question. Plaintiffs in states without such laws could point to state occupation of the field, in other states, to argue for interpreting federal law narrowly in their states.

such, in order to avoid preempting state laws where Congress did not provide clear and manifest evidence of its intent to preempt these state laws, this Court must interpret the statutory phrase "preventive care" narrowly in order to avoid impinging on state-protected rights of conscience as well as discretion on what preventive care to cover. Where this Court can use a narrow interpretation to avoid preemption, *Altria Group,* 555 U.S. at 77, this Court should do so.

C. The Presumption Against Preemption Answers the Scope of HHS Authority at *Chevron* Step One

At *Chevron* "step one," courts employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron* 467 U.S. at 843 n.9. Only if the attempt to interpret the statute is inconclusive does a federal court go to "*Chevron* step two," where a court would defer to a plausible agency interpretation of an ambiguous statute. *Id.* at 844. As indicated in Section II.C, *supra,* however, the Administration is not entitled to deference if the Court finds the Mandate procedurally invalid. Even if the Court remained open to *Chevron* deference generally, that deference would be inappropriate where (as here) the presumption against preemption applies.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). Although this Court does not have appeared to address the interplay between deferring to the states under the presumption against preemption and deferring to federal agencies under *Chevron,* the federal appellate courts have adopted a similar approach in favor of preemption.[6] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand in this arena than Congress itself.

The presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns. In essence the presumption against preemption is the tool of statutory construction that enables this Court to answer the statutory question at *Chevron* step one, *Chevron* 467 U.S. at 843 n.9,

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[6] *See, e.g., National Ass'n of State Utility Consumer Advocates v. F.C.C.,* 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron,* this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.,* 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 182-83 (1st Cir. 1999).

without resort to the Administration's interpretive gloss.

D. Abortion and Contraception Are Not "Preventive Care"

The foregoing backdrop provides several criteria with which to evaluate the scope of the Administration's authority for mandating "preventive care." First, because the Administration failed to comply with the APA, the Administration's position does not warrant deference. *See* Section II.C, *supra.* Second, because the states already occupied the fields of insurance coverage for preventive care and conscience protections, *see* Section IV.B.1, *supra,* the presumption against preemption applies here to the extent that the Administration attempts to displace either bodies of state law with uniform federal rules. *See* Section IV.B.2, *supra.* That traditional tool of statutory construction allows this Court to interpret PPACA without resort to the Administration's interpretations. *See* Section IV.C, *supra.* Moreover, even recognizing that PPACA preempted *some* state law, the presumption against preemption applies to limit the *scope* of that federal preemption. *Medtronic,* 518 U.S. at 485. Taking all these interpretive strands together, this Court can take one or both of the two paths: interpret "preventive care" narrowly or interpret PPACA to include conscience protections. Under either path, Plaintiffs will prevail. Moreover, as indicated, the Court can take *both* paths. What these tools of statutory construction prohibit, however, is the

Administration's attempt to avoid both paths.[7]

1. This Court Should Adopt a Narrowing Construction of PPACA that Excludes Prevention of Pregnancy from the Scope of "Preventive Care"

In order to avoid displacing state regulation of preventive care to the fullest extent possible, this Court should interpret the statutory phrase "preventive care" to connote the prevention of *disease,* which would minimize the Mandate's impact on pre-existing state laws on preventive care that are less expansive and less coercive than the Mandate. Viewed in this light, preventing pregnancies would fall outside PPACA's scope because *pregnancy is not a disease.*

The Supreme Court has at least implicitly recognized that pregnancy is not a disease. *Nashville Gas Co. v. Satty,* 434 U.S. 136, 140 (1977) (upholding decision not to treat pregnancy as a disease). Medical advisers at the Food & Drug Administration – the relevant agency within HHS – have recognized as much:

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[7] On a related note, the Administration's cost-free argument – namely, that the Mandate does not burden religious employers because they need not pay anything for "free coverage" under the Mandate, given that insurers save money because abortion and birth control cost less than childbirth – is pernicious and likely wrong. At the very least, this macabre insurance-pool analysis fails to consider the offsetting long-term benefits that children provide. In any event, forcing someone to procure insurance that violates that person's conscience would violate religious freedom, even if the added *financial* cost were free. The point is that facilitating sinful action – for example, providing insurance coverage used to cause abortions – is morally wrong to Catholics, *see* authorities quoted at p.3, *supra,* which represents the *moral* cost imposed on religious employers like Mr. Weingartz.

> The oral contraceptives present society with problems unique in the history of human therapeutics. Never will so many people have taken such potent drugs voluntarily over such a protracted period *for an objective other than for control of disease.*

U.S. Food & Drug Admin., Advisory Committee on Obstetrics and Gynecology, Report on the Oral Contraceptives 1 (1966) (emphasis added). Although the Eighth Circuit recently "decline[d] to address whether pregnancy is a 'disease,'" *Union Pacific,* 479 F.3d at 944-45, the Administration's Mandate now forces federal courts to answer that question. In doing so, this Court should reject the Administration's brave new world.

2. This Court Should Adopt a Narrowing Construction of PPACA that Subjects "Preventive Care" to a Conscience Exception

In order to avoid displacing state conscience protections to the fullest extent possible, this Court should interpret PPACA to include the fullest conscience protections allowed under state law. *Medtronic,* 518 U.S. at 485. Because such an interpretation would provide a basis for reading PPACA not to preempt state conscience protections, this Court should adopt that interpretation over the Administration's preemptive interpretation. *Altria Group,* 555 U.S. at 77. This path would minimize or even eliminate PPACA's impacts on pre-existing state laws that protect rights of conscience and freedom of religion.

CONCLUSION

Amicus Eagle Forum respectfully submits that this Court should affirm the

preliminary injunction granted to Mr. Weingartz and WSC and should reverse the denial of that preliminary injunction to Legatus.

Dated: April 30, 2013

Respectfully submitted,

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Dated: April 30, 2013

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I hereby certify that on April 30, 2013, I electronically submitted the foregoing brief *amicus curiae* to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, who are registered CM/ECF users.

Dated: April 30, 2013

Respectfully submitted,

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