NO. 13-1677

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

EDEN FOODS, INC. AND MICHAEL POTTER, OWNER AND SOLE SHAREHOLDER OF EDEN FOODS, INC.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY, UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE DENISE P. HOOD
Civil Case No. 2:13-cv-11229

SUPPLEMENTAL BRIEFING

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ARGUMENT

On September 23, 2013, the Court ordered supplemental briefing to address the precedential impact of *Autocam v. Sebelius*, No. 12-2673, Slip op. (6th Cir. Sept. 17, 2013). Plaintiffs submit the following:

I. *Autocam*'s Holding Should Be Construed Narrowly.

The *Autocam* decision is not a one-size-fits-all wrecking ball, as the government suggests, that should be used to strip all employers of religious freedom, nor should it be employed as such.

The court in *Autocam* recognized that "on very rare occasions, a 'corporate entit[y] which [is] organized expressly to pursue religious ends . . . may have cognizable religious liberties independent of the people who animate them, even if they are profit seeking.'" *Id.*, slip op. at *14 (quoting *Grote v. Sebelius*, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting)). The Court also cited *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) as support for this proposition noting that the *Tyndale* court granted a preliminary injunction on the basis of RFRA. Therefore *Autocam* necessarily suggested one of two things: 1) that each plaintiff is still entitled to an independent review of his/her RFRA claim to determine whether the corporation meets the definition of a "person" under RFRA, *or* 2) that even our most religious "for-profit" corporations,

such as the bible publisher *Tyndale House Publishers*, have no rights under RFRA.[1]

Only the first conclusion follows RFRA precedent which demands that the appropriate focus must be on "the particular claimant" and the individualized case before the court. *See Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418 (2006). Historically, there has never been an entire class of plaintiffs, which—as the government concedes—has standing to present a RFRA challenge to the court, but then is entirely removed from the protections of RFRA, nor should the Sixth Circuit create such a blacklist here.[2] Plaintiffs in the instant case are factually distinguishable from the Plaintiffs in *Autocam*, *see* Appellants Br. at 48-49; therefore, their Constitutional claim should not be foreclosed by *Autocam* but merits independent review and analysis.

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[1] It is important to note that the government chose to dismiss its appeal in *Tyndale* and allowed injunctive relief to stand during the pendency of the case. *Tyndale*, No. 13-5018, order (D.C. Cir., May 3, 2013).

[2] *See Beckwith v. Sebelius*, No. 13-cv-648, Slip op. at *25 (M.D. Fla. June 25, 2013) ("Clearly, an individual employed by a secular corporation has the right to exercise religion concomitantly with her employment. *See Sherbert*, 374 U.S. [*398*,] 404 [*(1963)*] (holding that an employee did not have to work a six-day week—in contravention of her religious beliefs—in order to qualify for state unemployment benefits). But, following the government's logic, that same individual would lose the right to exercise religion merely by changing hats and becoming the *employer* instead of *employee***.** Hypothetically, that same individual (acting now as an employer) would not be able to challenge—on religious freedom grounds—a federal law that compelled (by threat of substantial fines) all "secular," for-profit businesses to remain open seven days a week. The Court sees no reason to distinguish religious freedom rights based upon the manner and form that one chooses to make a living.") (*emphasis in original*).

II. *Autocam* Should Not be Read to Foreclose *All* Employers From *Ever* Bringing a RFRA Claim.

In *United States v. Lee*, the Supreme Court explained that the inquiry of whether a business owner can exercise religious beliefs is a simple one: "Because the payment of the taxed or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." 455 U.S. 252, 257 (1982). Although that employer lost on other elements of the claim, the Court specifically recognized he exercised religion. *Id.* The same is true here: because providing coverage of abortifacients and contraception violates beliefs that the government concedes are sincerely held, compulsory compliance with the Mandate interferes with the Plaintiffs' free exercise rights.

While this case at hand is similar to *Lee* in analysis of standing and substantial burden, it differs in its analysis of strict scrutiny, as here the Mandate cannot pass strict scrutiny. *Lee* was decided on the premise that a government cannot function without taxes. 455 U.S. at 260. In contrast here, the U.S. government has functioned for in excess of two hundred years without a federal mandate demanding the employers provide free abortifacients and contraceptives to their employees. Secondly, the Mandate, which requires Plaintiffs to contract with a private insurance company, is not a tax and not a "government program." Here, Plaintiffs do not fund the government but directly give specific services to

private citizens. The government has decided not to pursue its goals with a governmental program, but instead to conscript religiously objecting citizens.

The government even concedes that if a business owner brought a suit on behalf of his company which was organized as a partnership, instead of in the corporate form, the business owner would be able to bring this claim. *See Gilardi v. Sebelius*, Audio File of Oral Argument, Sept. 24, 2013, *available at* http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=20130920130923&Count=13&scode=1, last visited Sept. 27, 2013. Therefore, the government's argument and the panel's decision in *Autocam* boils down to the effect of the corporate form.

The corporate structure cannot be used strip employers of their Constitutional rights. There is no factual or sound legal basis for the notion that Plaintiffs forfeit their constitutional rights when they chose to conduct business through a business entity authorized by state law. This is as it should be because any effort to make the Plaintiffs' surrender their fundamental rights in order to use the corporate form would itself be unconstitutional. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [First Amendment rights] even if he has no entitlement to that benefit"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)

("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government"). Here, the Plaintiffs seek to live out their religious faith, in part, in the way they conduct the business Plaintiff Michael Potter owns and operates. To force Plaintiffs to violate their conscience or face ruinous fines for doing so substantially burdens the Plaintiffs' free exercise of religion under RFRA and the First Amendment.

The panel in *Autocam* simply stated that "the shareholder must give up some prerogatives." *Id.* at *9 (quoting *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988)). However, "some prerogatives" are not at issue here. "Some prerogatives" does not mean First Amendment freedoms, specifically the free exercise of religion.

III. *Autocam* Did Not Address Plaintiffs' First Amendment Claim Ruled Upon By the Lower Court.

Autocam does not present any analysis effecting Plaintiffs' First Amendment claim.[3] Plaintiffs never abandoned their First Amendment claims, as the

[3] The panel's opinion in *Autocam* conflicts but makes no mention of the 6th Circuit's earlier decision in *Quarles v. City East of Cleveland*, No. 99-3050, 1999 U.S. App. LEXIS 37633 at *3 (6th Cir. Dec. 20, 1999) in which the panel of NELSON, DAUGHTREY and BERTLESMAN held that a corporation was a person able to bring a 42 U.S.C. § 1983 claim. ("Moreover, under the statutes involved in these claims, only the "party injured," *see 42 U.S.C. § 1983*, or the 'person aggrieved,' *see 47 U.S.C. § 553(c)(1)*, may bring a civil action in the federal courts for the specified injuries. Because the applicable statutes consider

government suggests. *See, e.g.*, Appellants Br. at iii, 1st headline ("Plaintiffs Michael Potter and Eden Foods are Likely to Succeed on their RFRA and First Amendment Claims"). Furthermore, the lower court completed a full analysis of Plaintiffs' First Amendment claim, erroneously finding that the Mandate was a law of general applicability. (R-22: Page ID ##615-617).

The Free Exercise Clause states, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." Under the Free Exercise Clause, an individual's freedom of religious belief is absolute, but freedom of conduct is not. *See e.g.*, *Bowen v. Roy*, 476 U.S. 693, 699 (1986). A neutral law of general applicability that incidentally burdens religious exercise need only satisfy rational basis review, not strict scrutiny. *Employment Div. v. Smith*, 494 U.S. 872 (1990). However, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "Neutrality and general applicability are interrelated" and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531-32.

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corporate entities to be 'persons,' *see Monell v. Department of Soc. Servs., 436 U.S. 658, 688, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)* (for *§ 1983* purposes, the term "person" may be applied 'to bodies politic and corporate'); *47 U.S.C. § 522(15)* (the term "person" is defined so as to include corporations).

The Mandate is ridden with exemptions. Appellants' Br. at 2, 3, 9-11, 15, 18, 25, 32, 36-41, 50. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. The mandate is not generally applicable because it does not apply to grandfathered health plans, religious employers, or employers with fewer than fifty employees, to name a few of its numerous exemptions. Appellant Br. at 36-41. Furthermore, the Mandate's exemptions clearly prefer secular purposes over religious purposes and some religious purposes over other religious purposes. *Id*. Burdens cannot be selectively imposed only on conduct motivated by religious belief. *Church of the Lukumi*, 508 U.S. at 543. *Autocam* was silent on Plaintiffs' First Amendment arguments.

CONCLUSION

Based on the foregoing reasons and the reasons originally presented, Plaintiffs respectfully request that this Court reverse the District Court's denial of preliminary injunctive relief for Plaintiffs Michael Potter and Eden Foods.

Respectfully submitted,

THOMAS MORE LAW CENTER

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

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(5) and (6), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and does not exceed seven (7) pages as the Court ordered.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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