UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

EDEN FOODS, INC.; MICHAEL POTTER, Chairman, President, and Sole Shareholder of Eden Foods, Inc., Plaintiffs, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No. 2:13-cv-11229 REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION Judge Denise Page Hood Magistrate Judge Mark A. Randon

THOMAS MORE LAW CENTER
Richard Thompson, Esq. (P21410)
Erin Mersino, Esq. (P70886)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
emersino@thomasmore.org
(734) 827-2001

Attorneys for Plaintiffs

STUART F. DELERY
Acting Assistant Attorney General

BARBARA L. McQUADE
United States Attorney
Eastern District of Michigan

SHEILA M. LIEBER
Deputy Branch Director

BRADLEY P. HUMPHREYS
Trial Attorney, VA Bar No. 83212
Civil Division, Federal Programs Branch
United States Department of Justice
20 Massachusetts Ave. NW
Washington, DC 20001
Tel: (202) 514-3367
Fax: (202) 616-8470
E-Mail: bradley.p.humphreys@usdoj.gov

Attorneys for Defendants

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

As an initial matter, at the same time these Defendants are forcing Plaintiffs Michael Potter and Eden Foods to violate their religious beliefs, Defendants have simply *decided not* to impose the HHS Mandate against several Plaintiffs in similar cases by consenting to preliminary injunctive relief for for-profit companies and their owners.[1] It seems disingenuous to claim that these Plaintiffs must preliminarily comply with the Mandate while specifically exempting other plaintiffs; such action undermines the Defendants' arguments against injunctive relief.[2]

I. SUBSTANTIAL BURDEN ON PLAINTIFFS' RELIGIOUS BELIEFS

The corporate form cannot be a reason to declare an entity incapable of exercising religion, consistent with Supreme Court precedent. Likewise, RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. § 1 includes corporations. The United States Code requires the conclusions that corporations can exercise religion. Concluding otherwise

[1] *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (Doc. # 41) (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, (Doc. # 9) (W.D. Mo. Feb. 28, 2013)); *Hall v. Sebelius*, No. 13-0295, (Doc. # 10) (D. Minn. Apr. 2, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, (Doc. # 1)8 (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Lindsay v. Sebelius*, No. 1:13-cv-01210, (Doc. # 21) (N.D. Ill. Mar. 20, 2013).

[2] Out of the twenty three challenges to the Mandate made by for profit companies in other courts, *nineteen* courts have granted the injunctive relief sought by Plaintiffs. *See Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. October 31, 2012); *Monaghan v. Sebelius*, No. 12-cv-15488, slip op. (E.D. Mich. Mar. 14, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. November 28, 2012); *Korte v. Sebelius*, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012), *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013); *Annex Med. Inc. v. Sebelius*, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013), *Am. Pulverizer Co. v. Dep't of Health & Human Servs*., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); *Newland v. Sebelius*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 12-92, slip op. (E.D. Mo. Dec. 31, 2012); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-36, order (W.D. Mo. Feb. 28, 2013); *Seneca Hardwood Lumber v. Sebelius*, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013); *Lindsay, Rappaport & Postel LLC v. Sebelius*, No. 13-1210, order (Mar. 20, 2013); *Gilardi v. Dep't of Health & Human Servs.*, No. 13-5069 , order (D.C. Cir. Mar. 29, 2013); *Bick Holding, Inc. v. Sebelius*, No. 13-462, order (E.D. Mo. Apr. 1, 2013); *Am. Manufacturing Co. v. Sebelius*, No. 13-295, slip op.(D. Minn. Apr. 2, 2013); *Hart Electric LLC v. Sebelius*, No. 13-2253, order (N.D. Ill. Apr. 18, 2013); *Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013).

would mean that churches, religious hospitals, and religious non-profits cannot bring claims either under RFRA or under the Free Exercise Clause. Reading the definition of person to cover corporations is consistent with the statutory scheme because corporations already benefit from other civil rights provisions and from the First Amendment Rights RFRA was designed to restore. *See, e.g. Thinket Ink. v. Sun Microsystems, Inc.*, 368 F. 3d 1053, 1058-60 (9th Cir. 2004)(corporations may bring § 1981 actions for racial discrimination); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 867 (9th Cir. 1984)(corporations may bring § 1983 actions and qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause); *NAACP v. Button*, 371 U.S. 415, 428-430 (1963)(corporations can assert the rights of others). Corporations qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause. *Id.* And corporations have brought free exercise cases before. *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993)(claim involving a "not-for-profit corporation organized under Florida law"); *Okleveuha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012); *Mirdrash Sephardi, Inc. v. Town of Surfside*, 367 F. 3d 1214 (11th Cir. 2004); *see also Durham & Smith, 1 Religious Organizations and the Law* § 3:44 (2012) (explaining reasons religious organizations use the corporate form).

The Supreme Court has expressly held that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory

analysis").[3] For-profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Just because Plaintiffs have entered the commercial marketplace, they have not abandoned their rights to the exercise of religion. The Supreme Court has recognized that an Amish business owner exercises religion in *United States v. Lee*, 455 U.S. 252, 257 (1982). Although that employer lost on another element of the claim, the Court specifically recognized he exercised religion. *Id.* Other cases likewise show that a for-profit company can exercise religion and bring free exercise claims on behalf of itself or its owners. *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (holding that a health club and its owners *could* assert free exercise claims). The Ninth Circuit allowed two for-profit corporations to assert

[3] In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), the Supreme Court held in its determination of the constitutionality of a law identified as §8,

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does. . . . We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Id. at 775-76, 784 (1978). These protections cannot be reconciled with the government's view that commerce excludes religion. There is no factual 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 religious faith, in part, in the way Plaintiff Michael Potter conducts the business he 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.

free exercise claims on behalf of their owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009) (pharmacy and its religious owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (manufacturer on behalf of its religious owners). In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), the Court allowed a kosher deli and its owners, *id.* at 200, to bring Free Exercise and Establishment Clause claims, and the Court subjected each claim to the applicable level of scrutiny rather than declaring that the for-profit business and its owners were not capable of exercising religion. *See also Tyndale House Publishers, Inc. v. Sebelius, et al.*, No. 12-1635, slip op. at *5-9 (D.D.C. Nov. 16, 2012).

Defendants falsely seek to create a new distinction under RFRA: profit vs. non-profit activity, corporate vs. individual activity, direct vs. indirect activity. RFRA presents this question: whether the government is imposing a substantial burden on the exercise of religion. 42 U.S.C. § 2000bb-1. RFRA requires strict scrutiny analysis. The Seventh and Eighth Circuits have echoed four times that such cases presented "a sufficient likelihood of success on the merits." *See Annex Medical*; *O'Brien*; *Grote*; *Korte*.

Defendants attempt to draw a line in the sand by arguing that one cannot exercise religion while engaging in business, but the free exercise clause has often involved the commercial sphere. In *Sherbert*, an employee's religious beliefs were burdened by not receiving unemployment benefits. 374 U.S. at 399. The same occurred in *Thomas*, 450 U.S. at 709. In *U.S. v. Lee*, the Court held that an employer's beliefs were burdened by paying taxes for workers. 455 U.S. at 257. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360

(3d Cir. 1999)(Alito, J.), an employee's bid to continue his employment was burdened by discriminatory grooming rules.[4]

The government's central argument seems to be that laws such as the Civil Rights Act prevent Plaintiffs from exercising religion under RFRA or the First Amendment. Many of the government's case citations interpret terms such as "religious employer" in Title VII—not "free exercise." This contention is a non sequitur. Congress cannot change the First Amendment by statute. RFRA's concept of "free exercise" is entirely coextensive with the First Amendment, and no justification exists for imposing Title VII's narrow scope on RFRA or the Free Exercise Clause.

The government states the RFRA was enacted upon the background principles in federal employment statutes which silently declared that Title VII of the Civil Right Act diminished the exercise of religion to exclude business. This misconstrues RFRA, Title VII, and ordinary canons of statutory interpretation. Title VII contains explicit language limiting its religious exemption from applying beyond "religious corporations." This background is an argument for, not against, the Plaintiffs' ability to exercise religion under RFRA. Congress, when enacting RFRA, easily could have used or adopted Title VII's language, but chose not to. Since these sections are so near each other in the U.S. Code (42 U.S.C. § 2000e & 2000bb), the term "religious employer" in Title VII should be given a different meaning than "*any* exercise of religion" in RFRA. "Under accepted canons of statutory interpretation, we must . . . giv[e] effect

[4] Congress also has rejected the government's argument in many ways. For example, the Affordable Care Act lets employers and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be nonprofits. 42 U.S.C. § 18023; *see* http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited Apr. 22, 2013). Congress has repeatedly authorized similar objections. *See, e.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-C.F.R. § 1609.7001(c)(7). These protections cannot be reconciled with the government's now-stated view that religious exercise cannot occur in the world of commerce. If facilities and health plans have conscience protections under federal law, so too should the Plaintiff family business.

to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions . . . meaningless." *Lake Cumberland Trust, Inc. v. United States EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992). Moreover, RFRA explicitly declares that it trumps other statutes unless those statutes explicitly exempt themselves from RFRA. 42 U.S.C. § 2000bb-3. Title VII cannot be read to trump RFRA when RFRA insists the opposite. The fact that Congress felt the need in Title VII to explicitly limit its religious protections suggests that Congress believed that if it had not done so, the default of free exercise belonging to all would have ruled the day.

Furthermore the government tries to inflate its position by claiming that a "special solicitude" for only religious non-profits is reflected in "Acts of Congress." But it cites only one "Act of Congress," Title VII, which addresses only one issue, employment discrimination, among myriad ways businesses could exercise religion. Notably, RFRA is also an "Act" of Congress, giving "solicitude" to "any" exercise of religion in any context. Title VII has not been canonized into the Bill of Rights.

Furthermore, the government misconstrues the holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when it contends that only "religious organizations" can exercise religion. No Supreme Court case, including *Hosanna-Tabor*, makes that assertion. In *Hosanna-Tabor* the Court made clear that religious corporations are protected by special Establishment Clause concerns relating to their selection of ministers, but the Court in no way limited religious exercise in its decision or concluded that no company has protection unless it is a religious nonprofit.

No case exists which holds that religious exercise should be confined to the four walls of a person's church, home, or mind. Religion is not an isolated category of human activity. Religion is, among other things, a viewpoint from which people engage in any kind of activity or

purpose, not excluding business. *See Goods News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001) (activities of any kind, whether "social," "civic," "recreational," or educational, are not different kinds of activities when religious, they are the same kind of activity simply done from a religious perspective). Under the law, a person is not required to attend weekly mass, uphold the sacraments, or tithe before being able to hold religious beliefs as the government suggests. Therefore, such practices cannot then be required of a corporation. Religion is also not purely "personal" as the government argues. Many religions require exercise in groups, and guide believers in all their daily activities. American law protects religious exercise, not religious subjectivism. No precedent exists which dictates that the confluence of two realities—corporate status and profit motive—make religious exercise impossible. The First Amendment has never contained a "dichotomy between religious and secular employers" and case law dictates the same. Corporations are no more purely "secular" or purely religious than are the people that run them. It is essential to freedom in America for its citizens to be able to live out their faith in their everyday lives, which includes such things as being employed and running a business.[5]

II. DEFENDANTS FAIL TO EVIDENCE A COMPELLING INTEREST

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. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 428-30 (2006); *see also Newland*, slip op. at 11 ("The initial burden is borne by the party challenging the

[5] Furthermore, Defendants incorrectly assert that substantial burden placed on Plaintiffs' free exercise is "too attenuated" because employees use the contraceptives. As the Court in *Tyndale* correctly noted, "Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Id.* at 13 (citing *Thomas v. Review Brd.*, 450 U.S. 707, 718 (1981)). Defendants seek to judicially amend RFRA and the Free Exercise Clause. Defendants want to exclude certain categories of individuals from the free exercise of religion that Congress and the Constitution did not exclude.

law. Once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens.") (quoting *Gonzales*, 546 U.S. at 429). The government presents no evidence that the mandate will work or that it is necessary; therefore, the government's "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. Twenty eight states have similar mandates, but the government has cited zero evidence that health and equality has improved for women in any of those states, much less that one of those laws did so more than "marginal[ly]" as required by *Brown v. Entm't Merchs*. *Id.* at 2741.

The government points to generic interests, marginal benefits, correlation not causation, and uncertain methodology. The Institute of Medicine ("IOM") report on which the mandate is based does not demonstrate the government's conclusions.[6] These studies lack the specificity required by *Gonzales*, 546 U.S. 430-31. IOM does nothing to evidence that contraceptive use will increase, which would be a necessary corollary for the government's argument. Instead the IOM shows that most women are already practicing contraception, and lack of access or cost is not the reason the remaining women are not using contraceptives.[7] The studies cited at 2011 IOM pp. 109 referred to by the government do not show that cost leads to non-use generally, but instead relate only to women switching from one contraception method to another. The government also fails to make any correlation the mandate has any effect on its target population, women who are employed with health insurance. The government asserts that

[6] Inst. Of Med., *Clinical Preventative Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Apr. 21, 2013).

[7] *See* The Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010), available at http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Apr. 21, 2013); R. Jones et al, Contraceptive Use Among U.S. Women Having Abortions, 34 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 294 (2002) (a Guttmacher Institute publication); Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births—Pregnancy Risk Assessment Monitoring System (PRAMS), 2004-2008, 61 MORBIDITY AND MORTALITY WEEKLY REPORT 25 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid+mm6102a1_e (last visited Apr. 21, 2013).

women incur more preventive care costs generally, 2011 IOM at 19-20, but IOM's studies don't say they specifically include contraception as part of that cost, nor at what percentage. There is no evidence that any preventive services cost gap exists at Eden Foods with their comprehensive insurance coverage.[8]

Furthermore, what radically undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests is the massive number of employees and participants, tens of millions in fact, for whom the government has voluntarily decided to omit what they call a compelling need to protect health and equality. *Newland, et al. v. Sebelius, et al.*, No. 12-1123, slip op. at *23 (D. Colo. July 27, 2012); *Tyndale*, slip op. at *17. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Defendants cannot explain how their interests can be compelling against these Plaintiffs when, by the government's own choice in not applying this Mandate to grandfathered plans, nearly 200 million Americans will not receive the Mandate's benefits. The Mandate also does not apply to plans meeting the religious exemption.

[8] The government cannot show that the mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotes omitted). IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is cause by or merely associated with unwanted pregnancy." Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), *available at* http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited Apr. 21, 2013).

The 1995 IOM Report admits that no causal link exists for most of its alleged factors. For example, the government states that contraception and abortifacients should be provided free of charge because it helps reduce premature birth and low birth rate due to being able to lengthen intervals between pregnancy. However, several studies show no connection between contraception and pregnancy-spacing. *Id.* at 70-71. Further studies showed that in 48% of all unintended pregnancies, contraception was actually used. L.B. Finer & S.K. Henshaw, Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90(2006), *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited Apr. 22, 2013).

The government itself has granted the equivalent of a preliminary injunction to all non-profit companies satisfying the one-year non-enforcement "safe harbor," so that their employees too are omitted from the Mandate's allegedly compelling benefits. Because there is little that is uniform about the Mandate, as demonstrated by the massive number of employees that are untouched by it, this is not an instance where there is "a need for uniformity [that] precludes the recognition of exceptions to generally applicable laws under RFRA." *Gonzales*, 546 U.S. at 436.[9]

Notably, the Affordable Care Act does impose multiple requirements on grandfathered health plans, but the government has decided that this Mandate is not of a high enough order to be imposed. The preventive services Mandate, listed at § 2713 of PPACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. See list at 75 Fed. Reg. 34,538, 34,542. These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions and annual or lifetime limits. Thus Congress itself has deemed that many interests are of the "highest order" to impose on 2/3 of the nation covered in grandfathered plans, but not this Mandate. (The statutory text of § 2713 does not even mention contraception.) It is therefore necessarily true that Congress deemed the Mandate to be of a lower order, which fails the compelling interest standard. The government cannot demonstrate a compelling need to require Plaintiffs to comply with a Mandate that it has chosen not to apply to millions of employees nationwide. As in *Gonzales*, where government exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception for the [hundreds] or so" implicated by Plaintiffs here. *Id.* at 433.

[9] The HHS Mandate is not uniform, and RFRA is impatient with its insistence on uniformity: "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operated by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." *Gonzales*, 546 U.S. at 436.

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 Apr. 21, 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 Plaintiffs. Congress deemed certain interests in the Affordable Care Act to be "of the highest order" for all health plans, but not the HHS Mandate.

The government cannot claim that the grandfathering exclusion is transitory, as such a claim contradicts the text of the Affordable Care act which gives no expiration date for the grandfathering provision, the government's website and its own data. The government boasts

that grandfathering "preserves the ability of the American people to keep their current plan if they like it" and that "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." (http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html) (last visited Apr. 21, 2013). There is no sunset on grandfathering status in the Affordable Care Act. Instead, the government affirmed that it is a "right" for a plan to maintain grandfathered status. 75 Fed. Reg. 34,538; 34,540; 34,558; 34,562; & 34,566.

III. DEFENDANTS FAIL TO EMPLOY THE LEAST RESTRICTIVE MEANS

The mandate is also not the least restrictive means of furthering the cited interests. 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. 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.*

Defendants could further their interests without coercing Plaintiffs in violation of their religious exercise. As proffered, the government could subsidize contraception itself and give it to employees at exempt entities. This in and of itself shows the mandate fails RFRA's least restrictive means elements. *Gonzales*, 546 U.S. at 428-30. The government could offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, provide these services to citizens itself, or provide incentives for pharmaceutical

companies to provide such products free of charge. As in *Riley*, the Defendants could add to the already existing Health and Human Services website or the website for the exchanges to provide for the availability of free contraceptives. The government does nothing to rebut these options other than providing conclusory statements that other options would not work. In fact the government *already* subsidizes contraception for certain individuals.[10] Indeed, of the various ways the government could achieve its interests; it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Plaintiffs. *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").

The government arguing that it is interested in women's health and equality is an exceptionally positive and innocuous goal. But then, the government claims that women's health and equality can only be achieved through free contraception. And then the government claims that women's health and equality are harmed depending on who gives them the free contraception—This is what Defendants are arguing, and this is what comprises religious freedom. There is no evidence that women are helped by making sure that their *religious employers* provide contraception for them. If women received free contraception from a difference source, there is no evidence these women would face grave or paramount harms. Therefore, "*the Government has not offered evidence demonstrating" compelling harm from an alternative*. *Gonzales*, 546 U.S. at 435-37 (*emphasis added*). No evidence shows that the HHS

[10] *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).

Mandate could not use a less restrictive method to provide contraception and abortifacients. Such evidence would not be possible as the effect of contraception does not differ based upon who has purchased it. There are less restrictive ways for the Defendants to achieve their stated goals.

IV. AUTOCAM IS NOT CONTROLLING

The Sixth Circuit's decision, which defendants characterize as "not binding on this Court," fails to control the outcome in the instant case. (Def. Br. at 2). In *Autocam v. Sebelius*, the W.D. of Michigan focused on the fact that those Plaintiffs "have not claimed that any such payment obligation [*the taxes and fines attached to noncompliance of the mandate*] would be ruinous." *Autocam v. Sebelius, et al.*, No. 12-1096, slip op. at *3 (W.D. Mich. Dec. 24, 2012). Here, Plaintiffs claim such payment obligation *would* be ruinous. *See* (Potter Decl. at ¶ 36, 47, 48). Plaintiffs do not supply a health savings account that was determinative to the district court in *Autocam*. *See Monaghan*, slip op. at *12. The Court in *Autocam* stated that those Plaintiffs were not compelled by the Mandate "to do anything." *Autocam* at 7. However as the owner of Plaintiff Eden Foods, Plaintiff Potter is compelled by the Mandate to provide abortifacients and contraception that he morally objects to. Furthermore the Court in *Autocam* focused on the Mandate's monetary sanctions and failed to focus on the true challenge at hand: the constitutional violation which tramples upon the free exercise of religion.

V. LOSS OF CONSTITUTIONAL FREEDOM EQUATES IRREPARABLE HARM

Lastly, Defendants assert that the Plaintiffs do not face irreparable harm by the imposition of the Mandate. This assertion is categorically false. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that even a momentary loss of constitutional freedom equates irreparable harm). Furthermore, "defendants cannot claim irreparable harm in this case while acquiescing to

preliminary injunctive relief in several similar cases. In light of the exemptions granted, and defendants' position with respect to injunctive relief in other cases, this factor weighs strongly in favor of granting the requested relief." *Seneca Hardwood Lumber*, slip op. at *22.

CONCLUSION

For these reasons and the reasons offered in their opening brief, the Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction.

Respectfully submitted this 1st day of May, 2013.

Attorneys for Plaintiffs:

THOMAS MORE LAW CENTER

s/ Erin Mersino
Erin Mersino, Esq. (P70886)
Richard Thompson, Esq. (P21410)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001
emersino@thomasmore.org

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 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)