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; SETH D. HARRIS, IN HIS OFFICIAL CAPACITY AS ACTING 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

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants, Eden Foods, Inc. and Michael Potter (hereinafter "Plaintiffs") state the following:

None of the Plaintiffs are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this court hear oral argument. This case presents for review important questions of law arising under the Religious Freedom Restoration Act, and the First and Fourteenth Amendments to the United States Constitution.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

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STATEMENT OF JURISDICTION

On March 20, 2013, Plaintiffs filed their initial Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the United States Constitution, the Religious Freedom Restoration Act, and 42 U.S.C. § 1983. (R-1: Page ID # 1-40). The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On March 22, 2013, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction. (R-10: Page ID #82-114, 115-222). The District Court denied the motion for a temporary restraining order, (R-12: Page ID #225-234), and on May 21, 2013 denied the motion for preliminary injunction. (R-22: Page ID #606-618). Plaintiffs filed their timely Notice of Appeal that day, (R-23: Page ID #619-620), seeking review of the district court's opinion. This Court has jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

PRELIMINARY STATEMENT

It is not surprising that in our country founded by individuals who sought refuge from religious persecution, the Supreme Court has succinctly avowed,

> 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*.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added). The statement written by Justice Jackson in his majority opinion is considered one

of the Court's greatest statements about our fundamental freedoms established by the Bill of Rights. It is against this backdrop, and resting upon this body of jurisprudence built upon deference to the inalienable freedom of religion, that the constitutionality of the H.H.S. Mandate must be decided.

Plaintiffs Eden Foods and Michael Potter brought this motion for a preliminary injunction to enjoin the unconstitutional and illegal directives of the HHS Mandate. Currently, the Defendants are forcing businesses and organizations which hold sincerely held religious beliefs to violate those beliefs by supplying contraceptive and abortifacient coverage. Such action blatantly disregards religious freedom and the right of conscience, and is nothing short of irreconcilable with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* and the First Amendment.

The burden forced on the Plaintiffs cannot be justified by the Defendants as using the least restrictive means or furthering a compelling interest. The Defendants offer numerous secular and even religious exemptions to the H.H.S. Mandate, but fail to offer the same respect to the Catholic beliefs of the Plaintiffs—showing that Defendants either care so little about those professing religious beliefs that they will not be bothered to address their concerns or that Defendants are blatantly discriminating and disrespecting those holding such religious beliefs. Neither provides the Defendants with a constitutional

justification for violating the law. The scheme of exemptions imposed by the Defendants is not neutral nor generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 432-87 (2006).

Defendants' illegal mandate threatens the irreparable harm of the loss of Plaintiffs' constitutional freedoms. Under the HHS Mandate, Plaintiffs are forced to choose between violating their religious beliefs or violating federal law. Plaintiffs Eden Foods and Michael Potter face penalties for noncompliance of the law with fines of $196,000 or $4,672,000 per year absent the District Court's injunction. (R-12: Page ID # 228). Considering the imminent, irreparable harm to Plaintiffs' religious freedom and Constitutional rights, the District Court improperly denied injunctive relief to Plaintiffs Michael Potter and Eden Foods.

STATEMENT OF THE ISSUES FOR REVIEW

I. Did the District Court properly deny a preliminary injunction for Plaintiffs Michael Potter and Eden Foods when the HHS Mandate unconstitutionally strips Michael Potter and Eden Foods of their religious freedom guaranteed under RFRA and the First Amendment?

STATEMENT OF THE CASE

On March 20, 2012, Plaintiffs filed their initial Complaint against all Defendants, alleging violations of the First and Fourteenth Amendments to the

United States Constitution and 42 U.S.C. § 1983. (R-1: Page ID # 1-40). Specifically, Plaintiffs allege that Defendants violated their rights to free exercise of religion under the First Amendment and the Religious Freedom Restoration Act, violated their freedom of speech, and violated the Administrative Procedures Act by forcing business owners and their businesses to violate their sincerely held beliefs which forbid providing insurance coverage for contraception, abortion, and abortifacients.

On March 22, 2012, Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction. (R-10: Page ID #82-114, 115-222). On May 21, 2013, the District Court entered its memorandum opinion denying Plaintiffs' motion for preliminary injunction. (R-22: Page ID #606-618). Plaintiffs immediately appealed the District Court's order. (R-23: Page ID #619-620).

STATEMENT OF FACTS

The material facts are based on the Complaint and the sworn affidavits attached to the preliminary injunction motion (R-1: Page ID # 1-40; R-10: Page ID #82-114, 115-222), and were incorporated in part in the District Court's May 21, 2013 preliminary injunction opinion. (R-22: Page ID #606-618). The material facts are undisputed.

Plaintiff Michael Potter is a Catholic. (R-10: Page ID # 187 (Potter Decl. at ¶¶ 15-16); R-22: Page ID# 612) ("The Court takes as true, Plaintiffs' deeply held

religious beliefs."). Michael Potter is the Chairman, President, and sole shareholder of his company, Plaintiff Eden Foods. (R-10: Page ID # 186-87 (Potter Decl. at ¶ 2, 13, 14)). Plaintiff Michael Potter, as the Chairman, President, and sole shareholder of Eden Foods, is responsible for setting all policies governing the conduct of all phases of Plaintiff Eden Foods. (R-10: Page ID#187, 191 (Potter Decl. at ¶¶ 14, 44)). Eden Foods is a for-profit business incorporated under the laws of Michigan with over 50 full time employees. (*Id.* at Page ID # 186 (Potter Decl. at ¶¶ 9-10). Plaintiff Michael Potter strives to follow the teachings, mission, and values of the Catholic faith in his daily life—which includes running Eden Foods. (*Id.* at Page ID # 187 (Potter Decl. at ¶ 13).

As a practicing Catholic, the Plaintiff Michael Potter aligns his beliefs, and therefore the beliefs of Plaintiff Eden Foods, with Pope Paul VI's 1968 encyclical Humanae Vitae, which states "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception—is a grave sin. (*Id.* at Page ID # 187 (Potter Decl. at ¶¶ 13-18)). Plaintiffs subscribe to authoritative Catholic teaching regarding the proper nature of health care and medical treatment. *Id.* For instance, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical Evangelium Vitae, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care

profession, which is meant to be an impassioned and unflinching affirmation of life." *Id.* Plaintiffs do not believe that contraception properly constitutes health care, but rather, involves immoral practices and the destruction of innocent human life. *Id.*

Due to these beliefs, Plaintiffs designed insurance policies which specifically exclude coverage for contraception, abortion, and abortifacients. (*Id.* at Page ID # 187-88 (Potter Decl. at ¶ 19-21)). Plaintiff Michael Potter, on behalf of Plaintiff Eden Foods, worked with his insurance agent to ensure his group health insurance plan specifically excluded abortifcients and contraception. *Id.* Plaintiffs were able to secure this plan design through Blue Cross/Blue Shield of Michigan. *Id.* However on February 5, 2013, a representative of Blue Cross/Blue Shield of Michigan communicated to Plaintiffs' insurance agent that Plaintiffs would no longer be able to exclude contraceptives and abortifacients from their group insurance plan due to the Mandate. (R-10: Page ID # 200 (Huntzicker Decl. at ¶¶ 9-10); R-10: Page ID #196 (Hughes Decl. at ¶ 17)). On February 21, 2013, Plaintiffs were presented with a contract from Blue Cross/Blue Shield of Michigan to change their plan to include coverage for abortifacients and contraception. (R-10: Page ID# 201 (Huntzicker Decl. at ¶ 11); R-10: Page ID # 196 (Hughes Decl. at ¶ 18)). Plaintiffs refused to sign the contract and refused to agree to cover abortifacients and contraception in accordance with their sincerely held religious

beliefs. (R-10: Page ID # 201 (Huntzicker Decl. at ¶ 12); R-10: Page ID # 196 (Hughes Decl. at ¶ 18)). On on March 15, 2013, Plainitffs were informed for the first time that Plaintiffs' group insurance policy now includes abortifacients and contraceptive coverage against their wishes and without their authority. (R-10: Page ID # 201 (Huntzicker Decl. at ¶ 13); R-10: Page ID # 196 (Hughes Decl. at ¶ 19)). Plaintiffs never agreed to this change made pursuant to the Mandate. (R-10: Page ID # 201-01 (Huntzicker Decl. at ¶¶ 9-12); R-10: Page ID # 196 Hughes Decl. at ¶ 19)). Five days later, Plaintiffs filed this lawsuit. (R-1: Page ID # 1-40).

Due to the Mandate, Plaintiffs have lost the right to make health care insurance decisions in line with their religious and spiritual views. The Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate") is forcing Plaintiffs to pay, fund, contribute, provide, or support artificial contraception and abortifacients or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs beginning at the end of their plan year. *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

The Affordable Care Act called for health insurance plans to provide coverage and "not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in

comprehensive guidelines" and directed the Secretary of the United States Department of Health and Human Services, Defendant Sebelius, to determine what would constitute "preventive care." 42 U.S.C § 300gg-13(a)(4). Defendants United States Health and Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care Act, 75 Fed. Reg. 41726 (2010), requiring providers of group health insurance to cover "preventive care" for women as provided in guidelines to be published on a later date. [1] *Id.* Prior to adopting those guidelines, Defendants accepted public comments. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception and abortifacients.

On February 15, 2012, Defendant United States Department of Health and Human Services ("HHS") promulgated the mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive

[1] Defendants directed the Institute of Medicine ("IOM") to compile recommended guidelines describing which drugs, procedures, and services should be covered as preventative care for women. (http://www.hrsa.gov/womensguidelines). IOM invited select groups to make presentations on the preventive care that should be mandated by all health plans. (http://www.nap.edu/openbook.php?record_id=13181&PAGE=217). No religious groups or groups opposing government-mandated coverage of contraception, abortion, and related education and counseling were invited to present. Defendants adopted the IOM recommendations in full. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

capacity in plan years beginning on or after August 1, 2012 (the "HHS Mandate"). *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines). All FDA-approved contraceptives included contraception, abortion, and abortifacients such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures. (http://www.hrsa.gov/womensguidelines).

The HHS Mandate applies to almost all group health plans and health insurance issuers, 42 U.S.C. § 300gg-13 (a)(1),(4), and forces Plaintiffs to provide "preventive care" by making available and subsidizing contraception, abortion, and abortifacients such as the "morning-after pill," "Plan B," and "ella." The HHS Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity—even if paying for or providing such "services" violates one's consciences and deeply held religious beliefs.

The Affordable Care Act and the HHS Mandate include a number of exemptions; however, Plaintiffs do not fall under any of these exemptions. The allowable factors for receiving exemptions under the Affordable Care Act include:

the age of the plan (42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140 (exempting plans that qualify for "grandfathered" status by meeting criteria such as abstaining from plan changes since the date of March 23, 2010)); a non-profit company which qualifies as a "religious employer" (45 C.F.R. § 147.130 (a)(iv)(A) and (B) (exempting non-profit companies which adopt certain hiring practices and exist to further the organization's religious doctrine)); and individuals of certain religions which disapprove of insurance in its entirety such as the Muslim or Amish religion 926 U.S.C. § 5000A(d)(2)(A)(i)-(ii) (exempting members of "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds)).

Plaintiffs' health insurance plan is not "grandfathered." (R-10: Page ID # 201 (Huntzicker Decl. at ¶ 15); R-10: Page ID # 189 (Potter Decl. at ¶ 31)).[2] Plaintiffs do not qualify for the "religious employer" exemption contained in 45

[2] Plaintiffs' health care plan is not a grandfathered plan as: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Plaintiffs do not take the position that its health care plan is a grandfathered plan and thus do not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140; R-10: Page ID # 201 (Huntzicker Decl. at ¶ 15); R-10: Page ID # 189 (Potter Decl. at ¶ 31).

C.F.R. § 147.130 (a)(iv)(A) and (B). (R-10: Page ID # 189 (Potter Decl. at ¶¶ 32-34)).[3] The HHS Mandate indicates that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Plaintiffs cannot be considered for such an exemption as Eden Foods is a for-profit business. On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption. She added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. This announcement provided no relief to the Plaintiffs. Plaintiffs have not applied, as a for-profit company could not even be considered for the temporary safe-harbor provision. 77 Fed. Register 8725 (Feb. 15, 2012)

Defendant Sebelius also announced on January 20, 2012 that HHS "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available

[3] The HHS Mandate allows HRSA to grant exemptions for "religious employers" who "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

at sites such as community health centers, public clinics, and hospitals with income-based support," inherently acknowledging that contraceptive services are readily available without mandating Plaintiffs subsidize them. Yet, Defendants have forced the Plaintiffs to face this decision: comply with their deeply held religious beliefs or comply with federal law.

Plaintiffs' plan year began on September 1, 2012. (R-10: Page ID # 200 (Huntzicker Decl. at ¶ 8)). Plaintiffs' insurance policy was changed in the middle of their plan year without Plaintiffs' authority or consent, but in compliance with the Mandate. (R-10: Page ID # 200-01 (Huntzicker Decl. at ¶¶ 8-12); R-10: Page ID # 196 (Hughes Decl. at ¶¶ 16-19); R-10: Page ID # 188 (Potter Decl. at ¶ 26)).

Without the injunctive relief of this Court, Plaintiffs are forced to choose: comply with the HHS Mandate and violate their deeply held religious beliefs, or disobey federal law and incur the consequences. If Plaintiffs were to decide to terminate health care entirely in order to comply with their deeply held religious beliefs, the Plaintiffs face severe burdens. Plaintiffs face enormous penalties. Upon not providing insurance to its employees, Plaintiffs would incur a $2,000 annual fine *per employee*, of which they have 128 employees. 26 U.S.C. § 4980H. The fines are even more insurmountable if Plaintiffs were to decide to offer insurance that did not comply with the HHS Mandate.

Plaintiffs would face substantial competitive disadvantages upon discontinuing employee health insurance in that the Plaintiffs would no longer be able to offer health care and would face disadvantages in employee recruitment and retention. Plaintiffs and their employees would be forced to seek expensive insurance on the private market. All Plaintiffs wish to do is simply continue providing health insurance in compliance with their sincere and deeply held religious beliefs, as they did since Plaintiff Eden Foods' inception. (R-10: Page ID # 196 (Hughes Decl. at ¶¶ 20-21); R-10: Page ID # 188 (Potter Decl. at ¶¶ 41)). Without immediate relief from this Court, the Plaintiffs must choose between abandoning their faith to comply with federal law or violating federal law and incurring enormous consequences.

SUMMARY OF THE ARGUMENT

Of the twenty-four rulings on the likelihood of success of RFRA challenges to the HHS Mandate involving for-profit companies, twenty of them have issued preliminary injunctions, including four injunctions from the Court of Appeals.[4]

[4] *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*

The District Court abused its discretion in not siding with this clear majority as it pertains to Plaintiffs Michael Potter and Eden Foods. The District Court ruling on this issue should be reversed.

The District Court's decision rests on the false premise which artificially constricts religious exercise: a business owner cannot exercise religion in business. There is *no* "business exception" in RFRA or the Free Exercise Clause. Nothing in the Constitution, precedent, or law requires—or even suggests—that a person forfeits religious liberty protection when he/she tries to earn a living by operating a business. The idea that "a corporation has no constitutional right to free exercise of religion" is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W. 2d 844, 850 (Minn. 1985).

The government argued in the lower court that specific limitations enacted in the Civil Rights Act, which is separate and distinct from RFRA, should constrain

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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); *Hall v. Sebelius*, No. 13-0295, (Doc. # 10) (D. Minn. Apr. 2, 2013);*Tonn and Blank Construction v. Sebelius*, No. 12-325, order (N.D. Ill. Apr. 1, 2013); *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-609, minute order (D.D.C. May 24, 2013).

the meaning not only of RFRA but also the First Amendment itself. Of course, no statute can alter the First Amendment. Congress could have written into RFRA the government's proposed prohibition on free exercise of religion in business, but chose not to. Instead, RFRA protects "*any*" exercise of religion, and requires strict scrutiny when government tries to substantially burden that free exercise.

The HHS Mandate forces Plaintiffs and the entity through which they act to choose between violating their religious beliefs, paying crippling fines on their property and livelihood, or abandoning business altogether. Strict scrutiny as required by RFRA cannot be satisfied where, as here, the government exempts so many other people and organizations. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 433 (2006). In Gonzales, the government's exemption of "hundreds of thousands" led the Supreme Court to require a RFRA exemption for a few hundred more. *Id.* Here, the government has exempted tens of millions of women from the Mandate under its politically motivated "grandfathering" clause. *Newland*, slip op. at 14. The government cannot then claim that "paramount" interests will suffer from an injunction protecting Plaintiffs' religious beliefs. The government incorrectly labels its grandfathering exclusion as temporary, but in fact it lasts *indefinitely* and encompasses millions more than the few religious objecting entities.

The government could fully accomplish its purported interests in giving women free contraception by providing such items instead of forcing the Plaintiffs to do so against their beliefs. The government seeks to neuter the least-restrictive-means test by not actually considering alternative options. This is incompatible with RFRA and precedent.

STANDARD OF REVIEW

The District Court's decision rests upon a misapplication of the governing law. This Court reviews such an error in the application of law "de novo." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). This Court should correct such a decision when the lower court has "improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also Hamilton's Bogarts, Inc. v. Michigan, 501 F.3d 644, 649 (6th Cir. 2007).

ARGUMENT

The District Court's ruling should be reversed in favor of maintaining the status quo and protecting the constitutional rights of Plaintiffs Michael Potter and Eden Foods. Such a holding would run consistent with the twenty (20) preliminary injunctions granted nationally in favor of for-profit entities and address the harm suffered by Plaintiffs.

I. Plaintiffs Michael Potter and Eden Foods are Likely to Succeed on their RFRA Claims.

Plaintiffs demonstrated a likelihood of success on the merits because the HHS Mandate violates the Religious Freedom Restoration Act (RFRA). The District Court's holding in effect, judicially amends RFRA and the Free Exercise Clause. The lower court's findings exclude entire categories of individuals from the free exercise of religion that Congress and the Constitution did not exclude. The lower court erroneously created a new distinction under RFRA: profit vs. non-profit activity, corporate vs. individual activity, direct vs. indirect activity. RFRA, however, 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 analogous cases presented "a sufficient likelihood of success on the merits." *See Annex Medical*; *O'Brien*; *Grote*; *Korte*. And the Eastern District of Michigan, in

the cases most factually analogous to the Plaintiffs Michael Potter and Eden Foods's case, found that Plaintiffs established a "likelihood for succeeding on the merits of their RFRA claim." *Monaghan*, slip op. at 18; *Legatus*, slip op. at 26.

Congress enacted the RFRA in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), purposefully adopting a statutory rule comparable to that rejected in *Smith*.

RFRA strictly prohibits the Federal Government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the Government can "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(b). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that RFRA applies to the federal government).

In its formulation of RFRA, Congress expressly adopted the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In both cases, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants." *Gonzales* at 431. *See also Yoder* at 213, 221, 236; *Sherbert* at 410.

In *Sherbert*, the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. In *Sherbert* the court held that the government could not impose the same kind of burden upon the free exercise of religion as it would impose a fine against noncompliant parties of the law. *Id.* at 402 ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.") (internal citations omitted).

In *Yoder*, Amish and Mennonite parents of teenaged children held religious beliefs that prohibited them from sending their children to high school in violation of Wisconsin law. *Yoder* at 207. Each parent was fined $5 per child for failing to comply with state law for not sending their children to school beyond the eighth grade in accordance with their sincerely held religious belief that "higher learning tends to develop values they reject as influences that alienate man from God." *Id.* at 208-13. The Court held that the impact of Wisconsin law, while recognizing the "paramount" interest in education that the law sought to promote, impermissibly

compelled the parents to perform acts undeniably at odds with the fundamental tenets of their religious beliefs. *Id.* at 218, 213, 221; *see also Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). The Court found that this compulsion "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder* at 218. The same constitutionally forbidden compulsion is before the Court in this case.

In accordance with the Supreme Court rulings in *Sherbert* and *Yoder*, under the plain language of RFRA expressly enacted by Congress to protect religious freedom, the HHS Mandate substantially burdens the Plaintiffs' sincere exercise of religion. Furthermore, the federal government cannot "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that interest." 42 U.S.C. § 2000bb-1(b).

A. Plaintiffs are protected under RFRA and the First Amendment.

Plaintiffs Michael Potter and Eden Foods do not lose all of rights protected by Congress under RFRA by entering the workforce. RFRA protects "any" free exercise of religion. 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5). Conduct constitutes the exercise of religion if it is based upon a religious belief that is both sincere and founded on an established religious tenet. *Yoder* at 210-19.

Plaintiffs do not forfeit their rights to religious liberty by earning a living and running a corporation. Precedent proves to the contrary. 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). 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 HHS Mandate interferes with the Plaintiffs' free exercise rights.

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 conclusion that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profits cannot bring claims either under RFRA or under the Free Exercise Clause.

The Supreme Court has emphasized 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"). 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 other elements of the claim, the Court specifically recognized that 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. *See, e.g., McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (finding that a health club and its owners could assert free exercise claims). The Ninth Circuit allowed two for-profit corporations to assert 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 Second Circuit allowed a kosher deli and its owners 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. *Id.* at 200. *See also Tyndale House Publishers, Inc. v. Sebelius, et al.*, No. 12-1635, slip op. at 5-9 (D.D.C. Nov. 16, 2012).

Furthermore, the lower court is incorrect in asserting that the substantial burden placed on Plaintiffs' free exercise is "too attenuated" because employees use contraceptives. Plaintiffs do not object to the HHS Mandate because their *employees* may use certain drugs; they object because the HHS Mandate forces *them* to provide and subsidize those drugs. As the Court in *Tyndale* correctly noted, "[b]ecause 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 Bd.*, 450 U.S. 707, 718 (1981)).

Contrary to the lower court's argument 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.

Congress also contradicts the government's argument. 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 unsupported view that religious exercise cannot occur in the world of commerce.

The government's central argument in the lower court was 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. 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.

In the lower court, the government stated that 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 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. Title VII addresses only one issue—employment discrimination—it does not address the myriad ways a businesses can and should be able to exercise religion. Title VII has not been canonized into the Bill of Rights.

Furthermore, in the lower court, the government misconstrued the holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), and contended 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 did not limit religious exercise or conclude that no company has protection unless it is a religious non-profit.

In trying to define religion as wholly separate from business, the government asserts a view best characterized as essentially theological and not supported by legal precedent. 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. Under the law, a person is not required to attend weekly mass, uphold the sacraments, and tithe before being able to hold religious beliefs. Therefore, such practices cannot then be required of a corporation.

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). Religion is also not purely "personal." 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.

B. Plaintiffs are directly burdened by the HHS Mandate which forces Plaintiffs to provide insurance contrary to Plaintiffs' religious beliefs.

The HHS Mandate is an archetypal substantial burden, because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Plaintiffs exercise their religious beliefs in this case by refraining from covering abortifacient items, contraception, and related counseling in their employee health insurance plan. To outlaw that religious exercise and "compel a violation of conscience," as here, is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

The argument that because the HHS Mandate applies to Plaintiff Eden Foods, its owner and president, Plaintiff Michael Potter, is isolated from its effect—flies in the face of logic and is plainly wrong. *U.S. v. Lee*, *Stormans*, *Townley*, *Monaghan*, the other cases cited above, and the twenty (20) injunctions against the HHS Mandate instead recognize the commonsense view that an imposition on a corporation is no less an imposition on the owner. This can be seen in the present case. Plaintiff Eden Foods has only one shareholder. The HHS Mandate can only be implemented by Plaintiff Michael Potter, the sole owner, sole shareholder, and president of Eden Foods. The corporate papers cannot implement the HHS Mandate, nor can its brick-and-mortar buildings.

The argument that since a corporation has limited liability it cannot exercise religion does nothing to negate the right to free exercise of religion. Limited liability is only one characteristic of a corporation, and not relevant here. The duty imposed by the Mandate falls directly onto Plaintiff Michael Potter. The corporate form does not isolate Plaintiff Michael Potter—it is actually the mechanism the HHS Mandate uses to impose its burden. *See Monaghan*, slip op. at 9 ("The Court sees no reason why [the corporate Defendant] cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of Monaghan [its owner], while at the same time being an instrument through which Monaghan may assert a claim under RFRA."). This is even more so when a company has only one shareholder. *Monaghan*, slip op. at 8. As such, Eden Foods is even more closely-held and making the beliefs of Eden Foods "and its owner even more indistinguishable." *Id.*

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 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.

RFRA protects "a person's exercise of religion." 42 U.S.C. § 2000bb-1. Under the basic rules of construction: "In determining the meaning of any Act of Congress, . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Unless the plain language excludes corporations, the inclusion of corporations runs consistent with the statutory scheme that laws covering persons are construed to cover corporations. *See Bennett v. MIS Corp.*, 607 F. 3d 1076, 1085 (6th Cir. 2010) (applying 1 U.S.C. § 1). 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 conclusion that corporations can exercise religion. Concluding otherwise 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).

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for contraception, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The HHS Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception and abortifacients—or in other words, *to change or violate their beliefs*. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on religion. *Sherbert*, 374 U.S. at 403-04. By failing to provide an exemption for the Plaintiffs' religious beliefs, the HHS Mandate not only exposes Plaintiff Eden Foods and Plaintiff Michael Potter to substantial per employee fines for their religious exercise—roughly $2,000 annually per employee, a fine significantly more severe than the $5 per student fine struck down by the Court in *Yoder*— , but also exposes all Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs. 26 U.S.C. §§ 4980D & 4980H; *see also Sherbert* at 374 U.S. at 403-04 (finding "a fine imposed against appellant" to be a quintessential burden).

The coercion here is even more direct than in *Sherbet* because it requires the Plaintiffs to purchase and provide coverage for medications and devices that can bring about early abortions and contraception. Not only is the religious belief of

the Plaintiffs clear—that they cannot in good conscience facilitate such coverage—the substantial burden is also clear—penalties of at minimum $2,000 per year per employee. Eden Foods employs 128 full-time employees. (R-10: Page ID #186 (Decl. of Michael Potter at ¶ 9)). Therefore with the calculations of the Affordable Care Act and the mandate, Plaintiff will sustain yearly penalties of $196,000 or $4,672,000. (R-12: Page ID #228). Such penalties are an intense burden on the sustainability of Plaintiff Eden Foods, as well as Plaintiff Michael Potter's livelihood, property, employment, and family history. The HHS Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held religious beliefs and the teachings of the Catholic Church to which they belong.

In *Thomas v. Review Board*, the plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714-16 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs. . . ." *Id.* Likewise here, it is plain legal error to contend that direct penalties are

somehow not a "substantial" burden on an explicit religious belief (objecting to certain insurance coverage) because the government deems them theoretically attenuated.

C. The HHS Mandate is not narrowly tailored to advance a compelling governmental interest.

i. The HHS Mandate fails to use the least restrictive means and fails to justify a compelling interest.

The HHS Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as contraceptives are currently readily available through other means without forcing the Plaintiffs to provide them.

It is the Defendants, not the Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzalez*, 546 U.S. at 428-30. In order to prove that Defendants' substantial burden on the Plaintiffs' religious liberties is justified, the Defendants would need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Defendants are charged to "specifically identify an 'actual problem' in need of solving" and show that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*,

131 S. Ct. 2729, 2738 (June 27, 2011). The government bears the burden of proof and "ambiguous proof will not suffice." *Id.* at 2739.

Forcing the Plaintiffs to provide and fund health insurance which makes contraceptives and abortifacients available to their employees serves only an ambiguous, non-compelling interest, and *at best* would serve the interest of *marginally* increasing access to contraceptives and abortifacients. There is "no actual problem in need of solving," and forcing the Plaintiffs to violate their religious beliefs fails to offer any sort of "actually necessary solution." Defendant Kathleen Sebelius herself has admitted that contraceptive services are already readily available "at sites such as community health centers, public clinics, and hospitals with income-based support." (R-10: Page ID # 105). Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the HHS Mandate to take the matter one step further by forcing employers, such as the Plaintiffs, objecting upon sincere religious grounds to subsidize these services through the insurance plans they sponsor. If the Defendants were truly concerned with the lack of access to contraceptives and abortifacients in this country, the Defendants could provide those "preventative services" itself without burdening the Plaintiffs' religious beliefs.

Furthermore, the HHS Mandate fails to provide the least restrictive means of furthering Defendants' stated interests of providing contraceptives and abortifacients, as Defendant Health and Human Services has carved out a number of exemptions for secular purposes such as size of employer, the age and grandfathered status of a health insurance plan, waivers for high grossing employers, *etc*. The HHS Mandate imminently threatens violation of the Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

In *Church of the Lukumi*, *supra*, the City of Hialeah enacted an ordinance prohibiting the public sacrifice of animals. *Id.* at 527. The ordinance also contained exemptions for the slaughtering of animals raised for food purposes and for sale in accordance with state law. *Id.* at 528. The ordinance had the stated purpose of promoting "public health, safety, welfare, and the morals of the community" and carried a maximum fine of $500. *Id.* at 528. The ordinance, however, prevented members of the church of Santeria from engaging in a principle aspect of their religious worship, which was the public, sacrificial killing of animals. *Id.* at 524-25. This practice was known to the Defendant prior to the enactment of the ordinance. *Id.* at 526-27.

Similarly here, the Defendants knew of Plaintiffs' Catholic beliefs prior to finalizing the mandate into law, but acted to impose a substantial burden on the

plaintiffs' religious beliefs. As in both *Lukumi* and also *Gonzalez*, where the Court examined whether the law "infringe[d] upon or restrict[ed] practices because of their religious motivation," or "in a selective manner impose[d] burdens only on conduct motivated by religious belief," this Court should analyze whether a compelling interest exists under the same analysis. *Id.* at 533, 543. *Gonzalez* required that the government demonstrate a compelling interest *against* "granting specific exemptions to particular religious claimants." 546 U.S. at 431.

ii. By excluding tens of millions of women for various reasons, the government shows that its interest is not compelling.

What radically undermines the government's alleged compelling interest is the massive number of people who the government has voluntarily decided to omit from its supposedly paramount health and equality interests. *Tyndale*, slip op. at 32-35; *Newland*, slip op. at 14. By design, the Defendants imposed the mandate on some religious companies or religious individuals but not on others, resulting in discrimination among religions. The Defendants have created a number of categorical exemptions and individualized exemptions, none of which alleviate the chill imposed on the Plaintiffs' free exercise of religion. The Affordable Care Act and the HHS Mandate include exemptions for:

- Individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as members of the Islamic faith or the Amish. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii).

- Employers with fewer than 50 full time employees are not subject to certain fines and penalties. 26 USC § 4980H(c)(2)(B)(i). Employers with more than 50 full time employees must provide federal government-approved health insurance or pay substantial per-employee fines. 26 U.S.C. § 4980H.

- Employers with health care plans that are considered to be "grandfathered," which, in addition to criteria, have been in place and remain unchanged since March 23, 2010. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. This exemption will cover *tens of millions* of women as far out as the government's data projects. 75 Fed. Reg. at 34,540-53.

- Non-profit employers who qualify under the narrow exemption of a "religious employer." 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

- Non-profit employers who do not qualify under the narrow exemption of a "religious employer" but still object to complying with the HHS Mandate. 77 Fed. Register 8725 (Feb. 15, 2012); *see also* (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013).

This scheme of exemptions flies in the face of the legal precedent that "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to the supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. No compelling interest exists when the government "fails to enact feasible measures to retract other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546-47.

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

women from the mandate. The pedestrian reason for the grandfathering exemption illustrates this point: it exists because "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'" (HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered" Health Plans," available at http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited 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, (see § 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 Section 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.

It cannot be claimed 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.

The HHS Mandate is *not* uniform, and RFRA is explicit in 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."

Gonzalez, 546 U.S. at 436.

The government argued in the lower court that the instant case is similar to *U.S. v. Lee* where the Court upheld a universal tax. The HHS Mandate, as shown above, is far from universal with its varied scheme of exemptions. *Lee* was decided on the premise that a government cannot function without taxes. 455 U.S. at 260. Here, the U.S. government has functioned for over two hundred years without a federal mandate demanding the employers provide free abortifacients and contraceptives to their employees. Moreover, this Mandate is not a tax and not a "government program." The Plaintiffs do not fund the government but are mandated to 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.

iii. The government failed to present evidence that its interests are compelling.

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*, 546 U.S. at 428-30. *See also Newland*, slip op. at 11 ("The initial burden is borne by the party challenging the 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 only 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.[5] These studies lack the specificity required by *Gonzalez*, 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.[6] The studies cited at 2011 IOM pp. 109 referred to

[5] 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).

[6] *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

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 demonstrate that the Mandate has any effect on its target population, women who are employed with health insurance. The government asserts that 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.

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

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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).

pregnancies are "unintended," and "whether the effect is caused 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).

No evidence shows that the HHS 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.

iv. The HHS Mandate fails 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. *Gonzalez*, 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. 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.[7] 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").

Plaintiffs are *not* asking the government to subsidize their private religious practices. Plaintiffs *only* seek for the government to leave them alone, *not force them to violate their religious beliefs*, and *honor the freedoms granted by the First Amendment* which protects *our free exercise of religion*. The Plaintiffs are not asking the government to subsidize them or any religious practice. They are not

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

even asking the government to buy contraceptives and abortifacients. The Plaintiffs simply assert that if the government wants to give private citizens contraceptives and abortifacients free of charge, it can do so itself instead of forcing the Plaintiffs to do it. Such an alternative renders the Mandate a violation of RFRA.

The government's claim that it is interested in women's health and equality is inarguably a positive stated goal. But then, the government claims, without basis, 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. There is no evidence, however, that women are helped by receiving free contraception or by making sure that their religious employers are coerced into providing it for them. If women received free contraception from a difference source, there is no evidence these women would face grave or paramount harms. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative. *Gonzalez*, 546 U.S. at 435-37.

D. *Autocam* is Factually Dissimilar.

Defendants continual reliance upon *Autocam* is misplaced as the two cases are factually distinguishable. *See Monaghan*, slip op. at 12. 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* (R-10: Page ID # 191-92 (Decl. of Michael Potter at ¶¶ 46-48)). 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.

As the owner, president, chairman, and the *sole shareholder* of Plaintiff Eden Foods, Plaintiff Michael Potter is compelled by the Mandate to provide abortifacients and contraception that he morally objects to and will be individually responsible for penalties of noncompliance. *Monaghan*, slip op. at 12. 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. The court employs an individualized factual inquiry when determining if a plaintiff's religious freedom is substantially burdened. *Living Water Church of God v. Charter Twp. Meridian*, 258 Fed. Appx. 729, 734 (6th Cir. 2007). Here, as the Court held in the analogous case *Monaghan v. Sebelius*, slip op. at 11-13, the instant case is distinguishable from *Autocam*.

E. Plaintiffs meet the other preliminary injunction qualifications.

i. Plaintiffs suffer irreparable harm without injunctive relief.

Plaintiffs are being irreparably harmed absent the issuance of an injunction. The HHS Mandate deprives Plaintiffs of their fundamental First Amendment rights. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Legatus*, slip op. at 26 (holding that the HHS Mandate causes irreparable harm to First Amendment rights: "The potential for harm to Plaintiffs exists, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case at trial, *it is properly characterized as irreparable*.") (emphasis added); *see also Connection Distributing Co.*, 154 F.3d at 288 (quoting *Elrod*); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." (citing *Elrod*)). If an injunction does not issue, Plaintiffs will continue to be forced to violate their religious beliefs or forfeit health insurance.

ii. Granting a preliminary injunction will cause no substantial harm to others.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs' First Amendment freedoms and Plaintiffs' freedom of religion are at issue, and the deprivation of these rights, even for minimal periods, constitutes irreparable injury. On the other hand, if Defendants are restrained from enforcing

the HHS Mandate against Plaintiffs, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of the Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288; *see also Legatus*, slip op. at 28 (holding that the HHS Mandate should be enjoined: "The Government will suffer some, but comparatively minimal harm if the injunction is granted. . . . The balance of harms tips strongly in Plaintiffs' favor.").

The Defendants already exempt a number of other employers and individuals from the HHS Mandate. Allowing the Plaintiffs an exemption in order to stop a violation of their deeply held religious beliefs fails to cause harm to the Defendants. Defendants have even consented to enjoin the HHS Mandate and agreed to provide injunctive relief to similarly situated Plaintiffs in several cases. *See, e.g.*, *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order and Defendants subsequently consenting to a preliminary injunction); *Sioux Chief Mfg. Co., Inc. et al. v. Sebelius, et al.*, No. 13-0036, order (W.D. Mo. February 28, 2013) (Defendants consenting to a preliminary injunction).

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ."

Connection Distribution Co., 154 F.3d at 288. If Plaintiffs show that their First Amendment rights have been violated, then the harm to others is inconsequential. As demonstrated, the enforcement of Defendants' HHS Mandate on Plaintiffs violates the First Amendment; therefore, any "harm" to others is inconsequential.

iii. The impact of the preliminary injunction on the public interest favors granting the injunction.

The impact of the preliminary injunction on the public interest turns in large part on whether Plaintiffs' Constitutional rights are violated by the enforcement of Defendants' HHS Mandate. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's Constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). As discussed above, the enforcement of Defendants' HHS Mandate is a direct violation of Plaintiffs' fundamental rights protected by the First Amendment. Therefore, the public interest is best served by preventing the Defendants from compelling individuals to violate their religious beliefs and rights of conscience, protected by RFRA and the First Amendment. *Monaghan*, slip. op. at 19 (March 14, 2013) ("It is in the best interest of the public that [the Plaintiff] not be compelled to act in conflict with his religious beliefs.")

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

CONCLUSION

Based on the foregoing, this Court should reverse the District Court's decision denying Plaintiffs' Motion for Preliminary Injunction and remand this case with instructions that the District Court enter a preliminary injunction enjoining Defendants from enforcing the HHS Mandate against Plaintiffs Michael Potter and Eden Foods.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Erin Mersino
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Attorneys for Plaintiffs-Appellees/ Cross-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,177 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 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.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Page ID# Range	Description	
R-1	1-40	Complaint	
R-10	82-114	Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	
	116-129	Exhibit 1	*Monaghan v. Sebelius*, No.12-15488, slip op. (E.D. Mich. Dec. 30, 2012)
	130-150	Exhibit 2	*Monaghan v. Sebelius*, No. 12-15488, slip op. (E.D. Mich. March 14, 2013)
	151-183	Exhibit 3	*Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012)
	184-192	Exhibit 4	Declaration of Michael Potter
	193-197	Exhibit 5	Declaration of James Hughes
	198-201	Exhibit 6	Declaration of David F. Huntzinger
	202-219	Exhibit 7	Plaintiffs' Insurance Plan
	220-222	Exhibit 8	Proposed Order

R-12	225-234	Order Denying Temporary Restraining Order
R-15	261-408	Defendants' Opposition
R-18	415-431	Plaintiffs' Reply
R-22	606-618	Opinion Denying Preliminary Injunction
R-23	619-620	Notice of Appeal