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

MOTION FOR INJUNCTION PENDING APPEAL

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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.

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INTRODUCTION

Pursuant to Fed. R. App. P. 8, Plaintiffs-Appellants move this court for the entry of an order granting an injunction pending appeal against Defendants-Appellees' enforcement of a portion of the preventive services coverage provision of the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and related regulations ("the mandate"). Several Courts have granted this relief.[1] Without relief here, Michael Potter and Eden Foods are being forced to pay for and provide contraceptives, including abortion-inducing drugs, in violation of Catholic religious beliefs and the ethical standards of his company in order to avoid

[1] Out of the twenty three challenges to the mandate outside of this case, nineteen are protected by the preliminary injunctive relief sought by Plaintiffs. *Monaghan v. Sebelius*, No. 12-15488, slip op. (E.D. Mich. Dec. 30, 2012 & Mar. 14, 2013); *Legatus v. Sebelius*, No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. Nov. 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).

crippling penalties imposed by the federal government. Contrary to the decision of the court below, which denied Plaintiffs' motion for a preliminary injunction on May 21, 2013, the Mandate substantially burdens Plaintiffs' religious exercise and violates their rights under the Religious Freedom Restoration Act ("RFRA").[2]

A party must ordinarily move first in the District Court for an injunction pending appeal. Fed. R. App. P. 8(a)(1). Yet, due to the District Court's decisions to deny both its motion for a temporary restraining order and its motion for preliminary injunction and because Plaintiffs are now being coerced into violating their religious beliefs to avoid substantial financial penalties, filing first in the District Court would be "impracticable." *Id.* at 8(a)(2)(A)(i).

Since this Court's 2-1 decision in *Autocam v. Sebelius*, No. 12-2673, order (6th Cir. Dec. 28, 2012), three other Courts of Appeals have echoed five times in favor of granting injunctive relief. *Gilardi*; *O'Brien*; *Annex*; *Korte*; *Grote*. Furthermore, this case is distinguishable from *Autocam*.

PROCEDURAL BACKGROUND

On March 20, 2013, Plaintiffs brought suit alleging that the mandate violated their rights under RFRA and the First Amendment and violates the Administrative Procedure Act. (R-1: Page ID # 1-40). On March 22, 2013, Plaintiffs filed a motion for a temporary restraining order and preliminary

[2] Due to constraints on time and page limitations, Plaintiffs' motion is based on the RFRA claim alone, since full relief can be provided through that statute.

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 Notice of Appeal that day. (R-23: Page ID #619-620).

INJUNCTION PENDING APPEAL STANDARD

In deciding a motion for an injunction pending appeal pursuant to Fed. R. App. 8, this court uses the same sliding scale approach used to decide a motion for a preliminary injunction. *Michigan Coalition v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "[L]ikelihood of reversal" is required. *Id.* *But the burden is lessened when the irreparable harm is great*. *Id.* This case is about religious freedom; irreparable harm is great. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

FACTUAL BACKGROUND

I. The Mandate, Its Exception, and Penalties

Facts surrounding the mandate are set forth in the District Court opinion. (R-22: Page ID # 606-610). In sum, most group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage must provide coverage for certain preventive services without cost-sharing. 42 U.S.C. § 300gg-13. These services have been defined by the Health Resources and Services Administration to include "[a]ll Food and Drug Administration approved

contraceptive methods, sterilization procedures, and patient education counseling for all women with reproductive capacity.[3]

Not all employers are required to comply with the mandate. Grandfathered health plans, i.e. plans in existence on March 23, 2010 that have not undergone any of a defined set of changes, are exempt from compliance with the mandate.[4] Even though the mandate does not apply to grandfathered health plans, many provisions of the ACA do. 75 Fed. Reg. 34,538, 34,542. Courts estimate that "191 million Americans" are in grandfathered plans to which the mandate does not apply. *See Newland, slip op. at *14*; *Tyndale, slip op.* at *32, 34.[5] Also exempt are "religious employers," defined as organizations whose "purpose" is to inculcate religious values, that "primarily" employ and serve co-religionists, and that qualify as

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[3] HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited May 22, 2013).

[4] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140; 75 Fed. Reg. 41,726; 41,731; *see also* 42 U.S.C. § 18011; 76 Fed. Reg. 46,621, 46,623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").

[5] The government calls the ability to maintain a grandfathered plan a "right." 42 U.S.C. § 18011; 75 Fed. Reg. 34,538, 34,540, 34,562, 34,566. Moreover, "[e]xisting plans may continue to offer coverage as grandfathered plans in the individual and group markets . . . *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (emphasis added). The government asserts that "most" plans from employers the size of Eden Foods will maintain grandfathered status (and therefore not be subject to the mandate). http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited May 22, 2013).

churches or religious orders under the tax code.[6] In addition, employers with fewer than fifty full-time employees will not be fined by Defendants if they opt not to provide any health insurance for their employees, which may allow them to avoid the mandate as employers. 26 U.S.C. § 4980H(c)(2)(A).

Non-exempt employers that fail to comply with the mandate or fail to provide insurance at all face severe penalties. Non-exempt employers that fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee (not counting the first thirty employees).[7] Employers with non-compliant insurance plans are subject to an assessment of $100 per day, per employee, and potential enforcement suits.[8]

II. Plaintiffs Michael Potter and Eden Foods

Michael Potter owns and operates Plaintiff Eden Foods, Inc. ("Eden Foods"),[9] which is a privately held business of which he is the sole shareholder. (R-10 at Ex. 4, Page ID# 185-192). Eden Foods has approximately 128 employees. *Id.* Michael Potter has run Eden Foods in a manner that reflects his sincerely held religious beliefs, and seeks to continue doing so. *Id.* Michael Potter strives to adhere to business practices that are in line with the teachings, mission,

[6] 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4).
[7] *See* 26 U.S.C. §§ 4980H(a), (c)(1).
[8] *See* 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1).
[9] Genesis 1:1-31.

and values of his faith. *Id.* Michael Potter sincerely holds the belief that "[i]t would be impossible to compartmentalize my conscience" or operate Eden Foods with amoral business practices. *Id.* Michael Potter bases his sincerely held religious beliefs as formed by the moral teachings of the Catholic Church, believes that God requires respect for the sanctity of human life as it bears His image and likeness. *Id.* Michael Potter also believes, in accordance with the teachings of the Catholic Church, that abortion and contraception prevents and ends human life. *Id.* Applying this religious faith and the teachings of the Catholic Church, Michael Potter has concluded that it would be sinful and immoral for him to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs or contraception through health insurance coverage he offers at Eden Foods. *Id.* As a consequence, Michael Potter provided health insurance benefits to his employees that omits coverage of abortifacient drugs and contraception. *Id.*

On February 5, 2013, Eden Foods was contacted by its insurance provider Blue Cross/Blue Shield of Michigan communicating that due to the mandate, contraceptive and abortifacient coverage would need to be added to its health insurance coverage. *Id.*; *see also* (R-10 at Ex. 5, Page ID #194-197); (R-10 at Ex. 6, Page ID #198-201). On February 21, 2013, Plaintiffs were presented with a contract to add the contraceptive and abortifacient coverage. *Id.* Plaintiffs refused to sign the contract. *Id.* On March 15, 2013, it was discovered that contraceptive

and abortifacient coverage was added to Plaintiffs' health insurance coverage without notice, knowledge, or approval. *Id.* Within three business days, this lawsuit was filed. And with the denial of the preliminary injunction in the district court, it is now mandatory for Eden Foods to include the contraceptives and abortifacients in their health insurance policy to avoid crushing penalties imposed by the mandate which could devastate the company. Therefore, the mandate is presently coercing Eden Foods to violate its religious beliefs on the pain of draconian penalties.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM

A. Mandate imposes a substantial burden on religious exercise.

The purpose of RFRA is "to restore the compelling interested test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)" and "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Under RFRA, the federal government may only substantially burden a person's exercise of religion if "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added); *Gonzales v. O Centro Espirita Beneficente Uniao de*

Vegetal, 546 U.S. 418, 430 (2006). To trigger RFRA's strict scrutiny, Plaintiffs must show that a federal policy or action substantially burdens their sincerely held religious beliefs. *Id.* A regulation that substantially burdens religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). Religious exercise becomes effectively impracticable, when the government exerts "***substantial pressure on an adherent to modify his behavior or violate his beliefs***." *Id.* (emphasis added).

Therefore a law substantially burdens religious exercise where one is required to choose between (1) doing something his faith forbids (or not doing something his faith requires), and (2) incurring financial penalties, legal enforcement by the government, or even the loss of a government benefit. For example, in *Sherbert*, the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Saturday substantially burdened her exercise of religion. The regulation:

> 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. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

274 U.S. at 404. Also, in *Yoder* the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who

refused to send their children to high school. The parents "were fined the sum of $5 each." 406 U.S. at 208. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

Plaintiffs face a direct and inescapable burden. Under the mandate, they must either provide coverage believed to be immoral or suffer severe penalties. This is an archetypal burden: to "make unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The mandate explicitly makes unlawful Plaintiff's religious practice of refraining from covering contraceptives. The mandates is a "fine imposed against appellant for" his religious practice, *Sherbert*, 374 U.S. at 404, and requires Plaintiffs "to perform acts undeniably at odd with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Contrary to the District Court's decision, the mandate bears "direct responsibility" for placing "substantial pressure" on Plaintiffs to provide a health plan that violates their religious and ethical beliefs, rendering their religious exercise—refraining from immoral acts and operating Eden Foods in a manner consistent with deeply held religious beliefs—effectively impracticable.

Defendants expressly acknowledged the burden that the mandate imposes upon religious exercise. Recognizing that providing insurance coverage of contraceptive services conflicts with "the religious beliefs of certain religious

employers," Defendants have granted exemptions for a class of employers, e.g. churches and their auxiliaries. 76 Fed. Reg. 46,621, 46,623; 77 Fed. Reg. 8,725. In addition, Defendants have provided a temporary enforcement safe harbor for any employers that fail to cover some or all recommended contraceptive services and that are sponsored by a non-profit organization that meets certain criteria.[10] During this temporary safe harbor, Defendants refrain from enforcing the mandate against qualifying entities, thereby providing such entities with the equivalent of the injunction Plaintiffs seek. Defendants are formulating the accommodation for "non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16,501, 16,503. Defendants are also considering whether "for-profit religious employers with [religious] objections should be considered as well," *id.* at 16504, underscoring Defendants' acknowledgement that the mandate even burdens the religious exercise of some for-profit companies.

In denying the preliminary injunction, the District Court wrongly determined that the mandate does not place a substantial burden on the Plaintiffs. (R-22: Page ID # 612). The District Court determined that any burden on Plaintiffs' religious

[10] Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited May 22, 2013).

exercise was "remote and too attenuated to be considered substantial." *Id.* This exact argument has been rejected time and time in again other courts,

> With respect, we think this misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception related services.[11]

The instant action is not based upon objection to employees' life choice, or to employees' use of their own money.[12] Rather, this litigation stems from Plaintiffs' objection, based on their faith, to providing insurance coverage for drugs and information, because they believe providing such coverage is immoral. (R-10: Ex. 4, Page ID #185-192). This religious faith does not merely object to Michael Potter or Eden Foods' own use of such items, but also prohibits them from providing health insurance coverage for such items. *Id.* ***Neither a corporate veil nor other legal technicalities give Plaintiffs moral absolution to providing coverage for items that they have religious beliefs against covering.*** This realization underscores the District Court's fundamental error: conceiving of the substantial burden analysis as an exercise in moral theology. The analysis does not measure moral beliefs, or weigh how morally "attenuated" one's theological

[11] *Korte, slip op. at *5*; *see supra* note 1.

[12] Unlike in *Autocam*, where the court made issue that Plaintiffs offered a flex-spending account, here Plaintiffs do not offer such account. *See Monaghan*, slip op. at *12.

objection is in relation to other immoral activity. It analyzes a "substantial burden," not "substantial beliefs."

The Supreme Court explicitly rejected the kind of moral theologizing that the District Court employed here. In *Thomas v. Review Board*, a plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714, 716 (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. Court should not undertake to dissect religious beliefs." *Id.* Likewise here, the notion that direct penalties and lawsuits are somehow not "substantial" burdens on an explicit religious belief (objecting to certain insurance coverage), because the court deems that activity morally insulated or attenuated from use of contraceptives, is plain legal error.

The District Court's error is not limited to for-profit plaintiffs. Under its rationale, churches themselves as well as Catholic hospitals, religious non-profit groups and others, would not even be able to bring RFRA claims against the mandate. Its rationale also applies beyond contraception and abortifacients, allowing the government to force even churches to include things such as surgical

abortions in their health insurance coverage on the theory that insurance is "too attenuated" to merit moral offense. The mandate requires that Plaintiffs pay for and provide a health plan with contraception and abortifacients to employees. Plaintiffs' religious beliefs forbid such coverage—not just Plaintiffs' own use of the items but also covering these items. (R-10: Ex. 4, Page ID #185-192). The burden is *directly imposed on Plaintiffs* by the mandate, and not alleviated by an employee's decision whether to make use of these drugs or services. The burden is not alleviated by the corporate form when the mandate is being directly imposed on Eden Foods and forcing action by Michael Potter.[13] Indeed, forcing Plaintiffs to pay for and provide a health plan that includes contraception is tantamount to forcing Plaintiffs to provide employees with vouchers for contraception paid for entirely by Plaintiffs themselves. This is exactly the type of direct burden RFRA was enacted to prevent.[14]

Several courts have also rejected the district court's inclination to find an insufficient burden on Plaintiffs' religious beliefs arising out of the distinction

[13] As in *Monaghan*, this case is also distinguishable from *Autocam* in that Michael Potter is the "*sole* shareholder, director, and decisionmaker." *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.*

[14] As noted in *Tyndale*, "Because it is the *coverage*, not just the use, of contraceptives at issue to which plaintiffs object, it is irrelevant that the use of 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." *Tyndale*, slip op. at *13 (citing *Thomas*, 450 U.S. at 718)(emphasis added).

between Michael Potter as an individual and his life's work (his company Eden Foods).[15] The mandate imposes the same substantial burden on Eden Foods as it does on the sole owner and sole shareholder of Eden Foods. *Korte*; *Monaghan*. The mandate requires Michael Potter to manage his company in a way that violates his religious faith. All penalties assessed against Eden Foods have a direct financial and practical impact on Michael Potter. The mandate on Eden Foods applies unquestionably "substantial pressure" on Michael Potter to violate his beliefs. As in the many injunctions issued against the mandate at this point, multiple other courts have recognized that an owner of a company can bring religious exercise claims, because he/she is impacted by government burden on his/her business without a moral distinction between themselves and their companies. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 111-20 & n.9 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n. 15 (9th Cir. 1988); *McClure v. Sports and Health Club, Inc.*, 370 N.W. 2d 844, 850 (Minn. 1985); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2d Cir. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, slip op. at *5-9.[16]

[15] *See supra* note 1.

[16] Corporations have also brought free exercise cases. *See, Church of the Lukumi Babalu Aye, **Inc.** v. City of Hialeah*, 508 U.S. 520, 525 (1993) (involving "not-for-profit corporation organized under Florida law"); *Okleveuha Native Am. 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); Durham & Smith, *1 Religious*

Just because Michael Potter and Eden Foods have entered the commercial marketplace, they have not abandoned their constitutional rights to the free exercise of religion. In *Lee*, for example, the Supreme Court held that the requirement to pay social security taxes sufficiently burdened a for-profit Amish employer's religious exercise. Noting courts "are not arbiters of scriptural interpretation," the Court held that it is beyond "the judicial function and judicial competence" to determine the proper interpretation of religious faith or belief. *U.S. v. Lee*, 455 U.S. 252 at 257 (1982) (quoting *Thomas*, 450 U.S. at 716). The Court therefore accepted Lee's own interpretation of his own faith and held that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* Although the *Lee* Court ultimately held that the tax survived the scrutiny it applied,[17] it did not deny—as the District Court did here—the existence of a substantial burden. *Id.*

Organizations and the Law § 3:44 (2012) (explaining reasons religious organizations use the corporate form).

[17] *Lee* did not apply the strict scrutiny now required. *Lee*, instead, was a precursor to *Smith*'s lower level of scrutiny that RFRA later rejected. *See Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA itself, when referring to the compelling interest test, cites *Sherbert* and *Yoder* but notably omits *Lee*. 42 U.S.C. § 2000bb. The point for present purposes is that whatever level of scrutiny applied in a particular case, *Lee* teaches that it cannot be sidestepped on a theory that the burden is not substantial. Under RFRA, full strict scrutiny must be imposed.

The fact that Eden Foods is a distinct legal entity from Michael Potter is also not relevant.[18] The violation at issue here is moral and religious, not strictly legal. Michael Potter is morally the same actor vis-à-vis the mandate, even if for some purposes the company is legally distinct. Eden Foods does not think, act, and establish business values and practices, except through Michael Potter its human agency. The human agency is moral: it defines the purpose of the company, gives it character, hires employees, and complies with laws. The mandate forces Michael Potter to violate his beliefs as he must run his company pursuant to the tenets of his Catholic faith. The mandate prohibits Michael Potter from doing so.

B. RFRA imposes strict scrutiny.

The Defendants must demonstrate a compelling interest and the use of the least restrictive means, even at the preliminary injunction stage. *Gonzales*, 546 U.S. at 428-30; *Newland*, slip op. at *11. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

[18] The Supreme Court has expressly held that "First Amendment protection extends to corporations," and a 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); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *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").

There is "no actual problem in need of solving," and forcing Plaintiffs to violate their religious beliefs fails to offer any "actually necessary solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738-39 (2011). Defendants offer an ambiguous interest that *at best* would serve the interest of *marginally* increasing access to contraceptives. What radically undermines any claim that the mandate is needed to address a compelling harm to its asserted interests: *the tens of millions of employees and participants* for whom Defendants have voluntarily omitted. *Newland*, slip op. at *23; *Tyndale*, slip op. at *17. Defendants' interests cannot be compelling against these Plaintiffs when, by the government's own choice in ***not*** applying this mandate to grandfathered plans, millions fall outside of the mandate.

Notably, the ACA does impose multiple requirements on grandfathered health plans, but the government has decided that the mandate is not of a high enough order to be imposed. The mandate, listed at § 2713 of ACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. 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 deemed that many interests were of the "highest order" to impose on 2/3 of the nation covered in grandfathered plans, but not this mandate.

Congress deemed the mandate to be of a lower order, which fails the compelling interest standard. Defendants have voluntarily granted the equivalent of a preliminary injunction to all non-profit companies satisfying the one-year non-enforcement "safe harbor," and state that a permanent exemption for non-profit companies is in the rulemaking stage. 77 Fed. Register 8725 (Feb. 15, 2012); (http://www.hhs.gov/news/press/2013pres/02/20130201a.html) (*last visited* May 6, 2013). Furthermore, Defendants have agreed not to enforce the mandate against at least six for-profit companies.[19] As in *Gonzales*, where exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception" for Plaintiffs. *Id.* at 433.

The mandate is not the least restrictive means of furthering Defendants' interests. In *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), the Court required the government to use alternatives, even when alternatives are more costly or less directly effective.

Defendants could further their interests without coercing Plaintiffs to violate their religious exercise. The government could subsidize contraception for

[19] *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) (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).

employees at exempt entities; this in and of itself shows the mandate fails RFRA's least restrictive means elements.[20] *Gonzales*, 546 U.S. at 428-30. Defendants admit "preventive services" are readily available at community health centers, public clinics, and hospitals,[21] and *already* subsidize contraception.[22] Of the options, Defendants chose perhaps the *most burdensome* for non-exempt employers with religious objections. If women receive free contraception from a different source, there is no evidence these women would face grave or paramount harms. *Gonzales*, 546 U.S. at 435-37. There are less restrictive ways for the Defendants to achieve their stated goals.

II. PLAINTIFFS SATISFY THE REMAINING INJUNCTION FACTORS

[20] Also, the government could offer tax deductions, reimburse citizens who pay to use contraceptives, provide incentives for pharmaceutical companies to provide such products free of charge, or offer tax credits to those companies who comply with the Mandate while not punishing those who do not based upon religious beliefs. As in *Riley*, Defendants could add to the already existing HHS website or the website for the exchanges to provide for the availability of free contraceptives.

[21] (http://www.hhs.gov/news/press/2012pres/01/20120120a.html) (*last visited* May 23, 2013).

[22] 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).

Because Plaintiffs have shown a likelihood of success on the merits, "the balance of harms favors granting preliminary injunctive relief. The public is not harmed by preliminarily enjoining the enforcement of a statute violating constitutional rights. *Monaghan*, slip. op. at *19; *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Legatus*, slip op. at 28. Furthermore, Defendants are not harmed by the injunction. *Seneca Hardwood Lumber*, slip op. at *22.[23] However, Plaintiffs are irreparably harmed absent an injunction. The mandate deprives Plaintiffs of their fundamental rights; "[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).[24]

CONCLUSION

Plaintiffs request that this Court grant this motion and enter an injunction pending appeal from the substantive requirement imposed in 42 U.S.C. § 300gg-13, as well as any penalties and fines for non-compliance.

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[23] "[D]efendants cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases. In light of the exemptions granted [exempting 2/3 of the nation through its exemptions and thousands others through the non-enforcement against non-profit companies], and defendants' position with respect to injunctive relief in other cases, this factor weighs strongly in favor of granting the requested relief."; *see supra note 17*.

[24] The mandate is not a universal tax as hypothesized by the District Court. The mandate specifically forces action by Plaintiffs to supply insurance which violates their religious beliefs. Plaintiffs do not fund the government but directly give specific services to private citizens.

Respectfully submitted this 23rd day of May, 2013.

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THOMAS MORE LAW CENTER

By: /s/ Erin Mersino
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2013 I served a true and correct copy of the foregoing by electronic mail and U.S. Mail on the following:

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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Page ID# Range	Description	
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R-10	82-114	Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	
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	130-150	Exhibit 2	*Monaghan v. Sebelius*
	151-183	Exhibit 3	*Legatus v. Sebelius*
	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' Group Plan
	220-222	Exhibit 8	Proposed Order
R-12	225-234	Opinion Denying Temporary Restraining Order	
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R-18	415-431	Plaintiffs' Reply	
R-22	606-618	Opinion Denying Preliminary Injunction	

R-23	619-620	Notice of Appeal