No. 13-1677

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDEN FOODS, INC.; MICHAEL POTTER, Chairman, President and Sole Shareholder of Eden Foods, Inc.,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al.,

Defendants-Appellees.

O R D E R

Before: CLAY and COOK, Circuit Judges; HOOD, District Judge.*

Plaintiffs appeal the district court's denial of their motion to preliminarily enjoin defendants from enforcing the contraceptive coverage provisions of the Patient Protection and Affordable Care Act and related regulations. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). They move for an injunction pending a decision on the merits of their appeal. The government opposes the motion and moves to hold the appeal in abeyance pending a decision in *Autocam v. Sebelius*, No. 12-2673 (6th Cir.).

We are authorized pursuant to Federal Rule of Appellate Procedure 8(a)(2) to grant an injunction pending appeal. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). "In granting such an injunction, the Court is to engage in the same analysis that

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id*. Four factors are weighed: (1) whether the movant has made a "strong showing that he is likely to succeed on the merits"; (2) whether he will be "irreparably injured" absent an injunction; (3) whether issuance of the injunction "will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012).

Plaintiffs allege that the contraceptive coverage provisions of the Affordable Care Act violate their free-exercise rights under the First Amendment and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. The Supreme Court "has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion." *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). The district courts that have considered whether to grant a preliminary injunction on similar claims are split, and the circuit courts that have reviewed these lower court decisions are also split on whether to grant an injunction pending appeal. *Compare Autocam v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012) (order) (denying an injunction pending appeal), *and Hobby Lobby*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (same), *with Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting motion for an injunction pending appeal).

We are not persuaded, at this stage of the proceedings, that a for-profit corporation has rights under the RFRA. Moreover, the burden Potter claims is too attenuated. The contraceptive mandate is imposed on Eden Foods, not Potter. To demonstrate a likelihood of success on the merits, it is not enough that the chance of success "be better than negligible." *Nken*, 556 U.S. at 434 (internal

quotation marks omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks omitted). Plaintiffs have not made a strong showing that they are likely to succeed on the merits.

We acknowledge 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), *see Overstreet*, 305 F.3d at 578. But, as discussed above, plaintiffs have not made a strong showing that their constitutional rights have been impinged. To the extent that they may be fined if they refuse to comply with the contraception mandate, purely monetary damages do not warrant an injunction. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992) ("[A] plaintiff's harm is not irreparable if it is fully compensable by money damages."); *see also Overstreet*, 305 F.3d at 579.

The equities do not weigh in favor of granting an injunction pending appeal. Neither do they weigh in favor of holding this appeal in abeyance. Rather, expedited consideration of the issues on appeal is warranted.

Plaintiffs' motion for an injunction pending appeal is **DENIED**. Defendants' motion to hold the appeal in abeyance is **DENIED**. The clerk shall expedite the appeal for briefing and submission.

ENTERED BY ORDER OF THE COURT

Clerk