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' REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Even while this motion is pending, Plaintiffs are suffering irreparable harm by being forced into making the untenable choice of violating their religious beliefs or facing fines that could put Eden Foods into bankruptcy. As a result, Plaintiffs are now being coerced to pay for contraceptive procedures, including abortion-inducing drugs, in violation of the Catholic faith and the ethical standards of Eden Foods and in violation of Plaintiffs' First Amendment rights. That fact, by itself, establishes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (the deprivation of First Amendment rights constitutes irreparable harm).

Remarkably, Defendants oppose allowing Plaintiffs to act pursuant to their religious beliefs and ethical guidelines in choosing a group health plan during the pendency of their appeal, even though Defendants already allow wholesale categories of employers nationwide not to comply with the mandate, encompassing tens of millions of women. There is no equitable reason to allow these employers to avoid compliance with the mandate indefinitely (e.g., those employers with grandfathered health plans) or temporarily (e.g., those employers who fall within the temporary safe harbor) and prevent Plaintiffs from doing so in accordance with their religious beliefs while this appeal is pending.

ARGUMENT

I. There is No Business Exception under RFRA and Plaintiffs Fall Within the Protections of RFRA

Defendants argue that Eden Foods is a "secular" for-profit corporation, as opposed to a religious, non-profit corporation, so that it cannot be a person exercising religion under RFRA. Notably, Defendants ignore much of the language of RFRA itself, pointing elsewhere to support their position. i.e., Title VII, the National Labor Relations Act, and case law interpreting those statutes. Defendants evade this point because the text of RFRA defeats their position. RFRA provides: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. . . ." 42 U.S.C. §§ 2000bb-1(a). Neither here, nor anywhere else in RFRA, are its terms limited to individuals and religious or non-profit organizations. A corporation is a "person" under RFRA, see I U.S.C. § 1, and "religious exercise" under RFRA "includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), incorporated by 42 U.S.C. § 2000bb-2(4) (emphasis added). Defendants would have this court rewrite RFRA to apply only to the exercise of religion by a narrow category of groups

specified in other statutes, as opposed to what RFRA explicitly protects: any religious exercise of a person.[1]

The government misconstrues *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), which nowhere states that only "religious organizations" can exercise religion, but merely observes that the selection of "ministers" does receive special protection. Opposition at 10. Nothing in *Hosanna-Tabor* means that the Free Exercise Clause (or RFRA, for that matter) only protects religious organizations. Just as a for-profit corporation need not be organized, operated, and maintained for the primary purpose of engaging in free speech activity to invoke First Amendment free speech protections, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), a for-profit corporation need not be organized, operated, and maintained for the primary purpose of religious activity to invoke First Amendment religious protections. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120, n.9 (9th Cir. 2009) ("[A]n organization that asserts the free exercise rights of its owners need not be primarily religious."). "First Amendment

[1] Defendants state that when Congress passed RFRA in 1993, it did so against the "backdrop" of laws, such as Title VII, that grant religious employers certain prerogatives. This fact *undermines* Defendants' position. Congress, well aware of this backdrop, declined to include language in RFRA limiting it to primarily religious or non-profit entities. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (Courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Muscogee Nation v. Hodel*, 851 F.2d 1439 (3rd Cir. 1988) ("It is contrary to common sense as well as sound statutory construction to read the later, more general language to incorporate the precise limitations of the earlier statute.").

protection extends to corporations." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

Defendants try to foreclose any claim by Plaintiffs under RFRA by drawing hard and fast lines between a group health plan and its issuer, and between the business and its management that arranges for the plan. Opposition at 14-16. Defendants take these distinctions too far. Although a group health plan might be a separate legal entity, as Defendants state, such a plan does not will itself into existence. It can only be created through a business that arranges for the plan with its carrier. And a business, also a distinct legal entity, does not make such decisions except through human agency, i.e. through its managers, officers, and owners pursuant to the policies of the business established by these same individuals. Here, Michael Potter is the only owner and sole shareholder. He makes the policies for Eden Foods, including its ethical guidelines and the type of health plan it should have.[2] Defendants provide no relevant support for its proposition that a business cannot be operated according to the ethics, morals, and

[2] Michael Potter's religious beliefs are sincerely held. There is no issue in this regard. There was *no* dispute in the lower court that Plaintiffs' religious beliefs are deeply held. (R-22 at 7, Page ID # 612); (R-15 at 9, Page ID# 279) (citing the same exact blog that Defendants recycle in Opposition at 4). It is inexplicable that Defendants previously cited to this out of context, out of court quotation on a blog but now come to a different conclusion than in the lower court. It appears this may have been added to Defendants' opposition in an effort to degrade plaintiff. However, the lower court's record should speak for itself, including the sworn declarations describing Plaintiffs' religious beliefs. *See* (R-10 at Ex. 1-7, Page ID# 184-219).

values of its owners or management. Nor can Defendant support the proposition that a business cannot be operated according to the religious values of its owners or management.[3] This is because a corporation can only act through its human agency in accordance to their conscience (including with respect to the mandated services here) which is established through policies created by the corporation's owner according to his/her own moral, ethical, and religious beliefs.

Under the Defendants' view of the law, a business operated with religious values, like Eden Foods, would be foreclosed from ever challenging a law that imposes a burden on religious exercise, no matter how extreme, and no matter how trivial the government's asserted interests. Thus a kosher deli would have no claim against a mandate forcing it, under pain of penalty, to sell pork, and a physicians' practice operated by a pro-life doctor would have no claim against a mandate, under pain of penalty, to perform abortions. In fact, the Defendants' position against exercise of religion in business is the very definition of substantial burden. Forcing a religious person to abandon the corporate form when she earns a living in business, or to exit commerce altogether, is forcing her "to choose between following the precepts of her religion and forfeiting benefits." *Sherbert v. Verner*,

[3] Defendants cite the *Amos* decision. Opposition at 11-13. Justice Brennan's concurrence in *Amos* recognizes that it is possible "that some for-profit activities could have a religious character." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring in the judgment).

374 U.S. 398, 404 (1963). Defendants' position that RFRA categorically excludes employers like Plaintiffs, therefore, is untenable.[4]

II. The Mandate Fails Strict Scrutiny as Applied to Plaintiffs

Defendants pay scant attention to demonstrating that the mandate satisfies strict scrutiny for an obvious reason: they cannot articulate a compelling governmental interest in requiring Plaintiffs to comply with the mandate while, for example, employers with grandfathered plans, in which tens of millions of women are enrolled do not have to do so. *See Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418, 431-21 (2006) (under RFRA the focus is on "the particular claimant whose sincere exercise of religion is being substantially burdened").

Defendants try to minimize the glaring grandfather exception by stating that this is not a permanent exception, but merely a transitional one. Opposition at 19-20. According, however, to the Congressional Research Service, not to mention the regulatory framework of the ACA itself, "[e]xisting plans may continue to offer coverage as grandfathered plans in the individual and group markets…. Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May

[4] Contrary to Defendants' suggestion, Plaintiffs do not assert a right to tell their employees what they must do with salaries or benefits provided to them by Eden Foods. Just as their employees have the right to purchase contraceptives with their salary according to their own beliefs, Plaintiffs have the right to choose a health plan for Eden Foods that excludes contraception according to their religious beliefs.

4, 2012) (emphasis added); 42 U.S.C. § 18011 ("Preservation of right to maintain existing coverage"); 45 C.F.R. § 147.140 (same).[5]

Defendants fail to effectively rebut the point that its litigation position conflicts with the ACA itself, since Congress considered this mandate too insubstantial to impose it on grandfathered plans while it imposed many other similar conditions on those plans.[6] *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest

[5] Defendants also try to claim that Plaintiffs voluntarily prevented their plan from attaining grandfathered status. This is factually unsupported. The mandate was enacted subsequent to Plaintiffs making alterations to their plan to ensure its sustainability. Plaintiffs could not have known the Defendants' would mandate they cover contraceptives prior to March 23, 2010 (the cut-off date for grandfathered plans) when the mandate was decided upon two years later. 77 Fed. Reg. 8725 (Feb. 15, 2012).

[6] A summary of the applicability of the ACA provisions to grandfathered plans can be found at: Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Acts to Grandfathered Plans, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited June 3, 2013). Moreover, the mandate does not apply to non-profit companies with a religious objection to the mandate, nor cases where Defendants have simply decided to consent to the same relief sought by Plaintiffs for identically situated plaintiffs. *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); *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-609, minute order (D.D.C. May 24, 2013).

order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (citations and internal quotation marks omitted).

Defendants give even less attention to RFRA's least restrictive means prong. Defendants do not even attempt to demonstrate, for example, how providing a tax credit or deduction for the preventive services at issue, or liberalizing the eligibility requirement of already existing federal programs that provide free contraception, or incorporating this into the exchanges, instead of conscripting religious employers like Plaintiffs into paying and providing for them, would require the government to establish new programs with attendant costs and burdens on others. "When a plausible, less restrictive alternative is offered . . . it is the *Government's obligation to prove* that the alternative will be ineffective to achieve its goals." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (emphasis supplied). Defendants have failed in this obligation.

III. Plaintiffs Satisfy all Factors for an Injunction Pending Appeal

Defendants do not address nor rebut Plaintiffs' position regarding the other factors for an injunction. Plaintiffs had the freedom to fashion a health plan in accordance with their religious beliefs. Because of the mandate, Plaintiffs no longer have that freedom. Moreover, owing to the massive number of employers that the government voluntarily allows not to abide by the mandate, granting Plaintiffs' motion would not harm the public's interests. In short, an injunction

would preserve the status quo, the last peaceable event between the parties, and allow Plaintiffs to keep the group plan they had pursuant to their religious beliefs.

CONCLUSION

The Court should grant Plaintiffs' motion for injunction pending appeal.

Respectfully submitted this 4th day of June, 2013.

Attorneys for Plaintiffs-Appellants:

THOMAS MORE LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 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

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