

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

RESPONSE IN OPPOSITION OF HOLDING APPEAL IN ABEYANCE

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Plaintiffs, by and through their undersigned counsel, respectfully oppose Defendants' "Motion to Hold Appeal in Abeyance," filed on May 31, 2013.

An interlocutory district court order expressly denying a preliminary injunction is generally appealable under 28 U.S.C. § 1292(a)(1). 28 U.S.C. § 1292(a)(1) gives an aggrieved party the right to take an immediate appeal. If no interlocutory appeal is taken from the district court's order on the injunction, the decision can be reviewed on appeal from the final judgment. *See, e.g., Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998). Here, Plaintiffs have exercised their right to immediate appeal instead of waiting for a final judgment. Plaintiffs seek this interlocutory appeal from a denial of a preliminary injunction. Plaintiffs seek for this appeal to be heard and not be held in abeyance as the denial of Plaintiffs' preliminary injunction in the lower court is exposing Plaintiffs to the irreparable harm of the deprivation of their First Amendment rights. *Elrod v. Burns*, 427 U.S. 347 (1976).

The Plaintiffs in the instant case do not present identical factual pleadings as the plaintiffs in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.). Numerous factual distinctions exist throughout the record, and Plaintiffs' claim involves the Religious Freedom Restoration Act, where the appropriate focus is on "the particular claimant" and the individualized case before the court. *Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418 (2006). The proceedings below may be

stayed in the district court pending this appeal. (R-25: Joint Mtn. to Stay Proceedings; Page ID# 622-25). Defendants also want to halt litigation in the appellate court as well. It would be improper to indeterminately pause the litigation of this case, forcing the case into a state of inactivity, only to wait for a distinguishable case to be decided.

Here, Defendants' request would simply extend the amount of time Plaintiffs' interlocutory appeal stays in the appellate court without alleviating the need for the instant matter to be heard. Such action is contrary to the purpose of an interlocutory appeal. Cluttering the court's dockets with stayed cases does not serve judicial economy. It would be a more expeditious and logical use of this Court's resources to hear the instant appeal as scheduled, as Plaintiffs seek immediate relief.

Respectfully submitted,

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/s/ Erin Mersino

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June 4, 2013

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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