NO. 13-1944

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MERSINO MANAGEMENT COMPANY, KAREN A. MERSINO, AND RODNEY A. MERSINO,
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 PAUL D. BORMAN
Civil Case No. 2:13-cv-11296

REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

RICHARD THOMPSON, ESQ.
THOMAS MORE LAW CENTER
P.O. BOX 393
ANN ARBOR, MI 48106
(734)827-2001

ERIN ELIZABETH MERSINO, ESQ.
THOMAS MORE LAW CENTER
P.O. BOX 393
ANN ARBOR, MI 48106
(734)827-2001

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. There is No Business Exception under RFRA, and Plaintiffs Fall Within the Protections of RFRA 2

II. The Mandate Fails Strict Scrutiny as Applied to Plaintiffs 7

III. Plaintiffs Satisfy All Factors for an Injunction Pending Appeal 9

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases **Page**

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 8

Citizens United v. Federal Election Comm'n,
130 S. Ct. 876 (2010) 4

Conestoga Wood Specialties Corp. v. Sebelius,
No. 13-1144, Slip. Op. (3rd Cir. July 26, 2013) 5

Elrod v. Burns,
427 U.S. 347 (1976) 1

Hobby Lobby v. Sebelius,
2013 WL 3216103 (10th Cir. July 18, 2013) .... *passim*

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,
132 S. Ct. 694 (2012) 4

First National Bank v. Bellotti,
435 U.S. 765 (1978) 4

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 2, 7

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 3

Muscogee Nation v. Hodel,
851 F.2d 1439 (3rd Cir. 1988) 3

Sherbert v. Verner,
374 U.S. 398 (1963) 6

Stormans, Inc. v. Selecky,
586 F.3d 1109 (9th Cir. 2009) 4

Thomas v. Collins,
323 U.S. 516, 530 (1945) 8

United States v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000) 9

Statutes and Rules

1 U.S.C. § 1 2

42 U.S.C. § 18011 7

42 U.S.C. § 2000bb-1(a) 2

42 U.S.C. § 2000cc-5(7)(A) 3

42 U.S.C. § 2000bb-2(4) 3

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 Mersino Management into bankruptcy. If Plaintiffs were to pay for and provide contraceptive procedures, including abortion-inducing drugs, Plaintiffs would violate their Catholic faith and the ethical standards of Mersino Management. 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.[1]

---

[1] In their opposition, Defendants simply state, "[t]his Court previously denied the plaintiffs' motions for injunctions pending appeal in *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012), and *Eden Foods, Inc. v. Sebelius*, No. 13-

ARGUMENT

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

Defendants argue that Mersino Management 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

---

1677 (6th Cir. June 28, 2013). This Court should deny the plaintiffs' motion for injunction pending appeal in this case for the same reasons." Op. at 1-2. However, the Sixth Circuit notably relied on *Hobby Lobby*, a case where the Tenth Circuit has now reversed its prior decision and ruled en banc that the mandate is unconstitutional. *Hobby Lobby v. Sebelius*, 2013 WL 3216103, at *9-23 (10th Cir. July 18, 2013). Furthermore, each particular claimant under RFRA plaintiff is entitled to bring their unique factual circumstances before the Court. Therefore *Autocam* and *Eden Foods* do not strip the instant Plaintiffs from presenting their request for relief before the Court. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

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.[2]

In *Hobby Lobby*, the Tenth Circuit *en banc* held that corporations, such as Mersino Management, that bring religious objections to the mandate are "persons exercising religion for purposed of RFRA," stating to "end the matter here since the plain language of the text [of RFRA] encompasses 'corporations'" such as Mersino Management. *Hobby Lobby*, 2013 WL 3216103 at *9. "[A]s a matter of statutory interpretation [] Congress did not exclude for-profit corporations from RFRA's protections." *Id.* Narrower religious employer exemptions found in other statutes, such as Title VII, "rather than providing contextual support for excluding

---

[2] Defendants argued in *Autocam* and *Eden Foods* 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.").

for-profit corporations from RFRA . . . show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA." *Id.* at 10.

There is no reason here to justify a holding contrary to the plain language of RFRA. The *Hobby Lobby* is instructive and the panels in *Autocam* and *Eden Foods* did not have the benefit of the Tenth Circuit's en banc analysis.

In *Autocam* and *Eden Foods*, the government misconstrued *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), which nowhere states that *only* "religious organizations" can exercise religion. 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 protection extends to corporations." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

Furthermore, the mandate substantially burdens the Plaintiffs' free exercise of religion. In *Hobby Lobby*, the Court held that a plaintiff's exercise of religion through its objection to the mandate's application to its health plan "is substantially burdened with the meaning of RFRA." *Hobby Lobby* at *17. In fact, the courts should not "characterize the pressure as anything but substantial." *Id.* at 10. Just as Hobby Lobby is substantially burdened by this mandate, Rodney and Karen Mersino, and Mersino Management are presented with the same "Hobson's choice" of suffering the mandate's penalties or the violation of their religion. *Id.* at 20.

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. Defendants cannot foreclose Plaintiffs' claim by alleging a nonexistent attenuation of the substantial burden at play here.[3] A business is operated according to the ethics, morals, and values of its owners or

[3] ". . . one need not have looked past the first row of the gallery during the oral argument . . where the [plaintiffs] were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the [plaintiffs] bury their religious scruples or watch while their business gets buried." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, Slip. Op. at *32 (3rd Cir. July 26, 2013) (Jordan) (dissent).

management. A business is necessarily operated according to the religious values of its owners or management. 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 *Autocam/Eden Foods* view of the law, a business operated with religious values, like Mersino Management, 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*, 374 U.S. 398, 404 (1963). Defendants' position that RFRA categorically excludes employers like Plaintiffs, therefore, is untenable.

II. The Mandate Fails Strict Scrutiny as Applied to Plaintiffs

The mandate fails to satisfy strict scrutiny for an obvious reason: Defendants 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 have tried to minimize the glaring grandfather exception by stating that this is not a permanent exception, but merely a transitional one. 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, 2012) (emphasis added); 42 U.S.C. § 18011 ("Preservation of right to maintain existing coverage"); 45 C.F.R. § 147.140 (same).

Defendants cannot rebut the language of the ACA itself, and the fact that Congress considered this mandate too insubstantial to impose it on grandfathered

plans while it imposed many other similar conditions on those plans.[4] *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 order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (citations and internal quotation marks omitted). Therefore, just as in *Hobby Lobby*, "[t]he interest here cannot be compelling because the contraceptive-coverage requirement does not apply to tens of millions of people." *Id.* at *23.

If Defendants' "supposedly vital" health and equality interests in providing the mandated item were really "grave" and paramount," as they must be under strict scrutiny, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), Defendants could not be content to impose this mandate in such a massively inapplicable or haphazard way. This mandate is simply not a concern that the Defendants treat as compelling, except for when religious people object.

Defendants also fail to substantiate RFRA's least restrictive means prong. Defendants have not even attempted 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

[4] 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).

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

Plaintiffs had the freedom to fashion a health plan in accordance with their religious beliefs. Because of the mandate, Plaintiffs can only exercise that freedom while incurring crippling fines and penalties which may ultimately result in bankruptcy. 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 7th day of August, 2013.

Attorneys for Plaintiffs-Appellants:

THOMAS MORE LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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
Erin Mersino (P70886)