No. _____

In the Supreme Court of the United States

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

v.

KATHLEEN SEBELIUS, Secretary, United States Department of Health and Human Services; THOMAS E. PEREZ, Secretary, United States Department of Labor; JACK LEW, Secretary, United States Department of the Treasury,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case challenges the Secretary of Health and Human Services' mandate (hereinafter "mandate") which requires private companies and their owners to purchase and provide contraceptive and abortifacient drugs and devices, under penalty of federal law and under threat of crippling fines pursuant to the Patient Protection and Affordable Care Act.[1] Petitioners, who are subject to the mandate, seek review of the opinion of the Sixth Circuit, which upheld the constitutionality of the mandate as a proper burden of our liberty under the Religious Freedom Restoration Act, ("RFRA"), and the First Amendment Free Exercise Clause.

1. Whether the mandate, which effectively fines Petitioners $4,672,000.00 per year for providing health insurance pursuant to their religious beliefs or forces Petitioners to directly violate the tenets of their religious beliefs, violates the RFRA and the First Amendment?

2. Whether the Sixth Circuit permissibly called into question the sincerity of Petitioner's religious beliefs by citing and giving evidentiary weight to a hearsay statement from a "blog" over Petitioners' sworn declarations filed with the court?

3. Whether, assuming Petitioners' beliefs are sincerely held, the harm Petitioner Michael Potter, the sole

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[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (hereinafter "Affordable Care Act" or "Act"). The HHS Mandate, 45 C.F.R. § 147.130, was promulgated pursuant to 42 U.S.C. § 300gg-13 et seq.

owner and shareholder of Eden Foods, suffers is distinct from the harm Petitioner Eden Foods suffered based on the Sixth Circuit's conclusion that a for profit corporation cannot exercise religion?

PARTIES TO THE PROCEEDING

The Petitioners are Michael Potter and Eden Foods, Inc. (collectively referred to as "Petitioners").

The Respondents are Kathleen Sebelius, in her official capacity as Secretary, United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as the Secretary of the United States Department of Labor; United States Department of Labor; Jack Lew, in his official capacity as Secretary, United States Department of Treasury (collectively referred to as "Respondents").

CORPORATE DISCLOSURE STATEMENT

Petitioner Eden Foods, Inc. is solely owned by Petitioner Michael Potter, an individual person. Petitioner Eden Foods, Inc. does not have parent companies. No publicly held company owns 10% or more of the company's stock; Petitioner Eden Foods, Inc. is not publicly held.

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JURISDICTION

The judgment of the court of appeals was entered on October 24, 2013. App. 19a-34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ….

U.S. CONST. amend. I.

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," with the exception that "Government may substantially burden a person's exercise of religion only 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."

RFRA, 42 U.S.C. § 2000bb-1(c) provides judicial relief, "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title." 42 U.S.C. § 2000bb-2(4). "The term 'religious exercise' 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).

The Dictionary Act provides, in relevant part, that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise," the word "person . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13, provides in relevant part:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources

and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4).

77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) clarified that all group health plans require preventive health care including "preventive care and screening provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) that were issued on August 1, 2011 (HRSA Guidelines). As relevant here, the HRSA Guidelines require coverage, without cost sharing, for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a provider. Except as discussed below, non-grandfathered group health plans and health insurance issuers are required to provide coverage consistent with the HRSA Guidelines, without cost sharing, in plan years (or, in the individual market, policy years) beginning on or after August 1, 2012." (citing http://www.hrsa.gov/womensguidelines, last visited Nov. 10, 2013).

26 U.S.C § 4980H penalizes a "large employer [who] fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" and "hereby impose[s] on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month. . . . The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000."

26 U.S.C. § 4980D proscribes that "[t]here is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements). . . . The amount of the tax imposed . . . on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates."

STATEMENT

This case challenges the Health and Human Services Mandate ("mandate")—under the First Amendment Free Exercise clause and the RFRA—which requires private companies and, *ipso facto*, their owners and decision makers to purchase and provide healthcare insurance coverage under penalty of federal law.[2] The combination of issues presented in this petition ensures that the Court will be able to reach the merits of the critical issues raised in this case and in similar cases presently before the Court.[3]

The questions before this Court are strictly legal. At its core, this case is about the constitutional and statutory limits of the federal government on our

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[2] *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

[3] Similar petitions for certiorari challenging the mandate have been filed in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (petition filed Sept. 19, 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3rd Cir. 2013) (petition filed Sept. 19, 2103); *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 U.S. App. LEXIS 19152 (6th Cir. Sept. 17, 2013) (petition filed Oct. 15, 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.,* No. 13-5069, 2013 U.S. App. LEXIS 22256 (Nov. 1, 2013) (petition filed Nov. 6, 2013).

religious freedom. When an unelected official acts beyond those limits, as here, the judicial branch should exercise its authority as the guardian of our Constitution and our liberties and enjoin the *ultra vires* act.

Petitioners request that the Court grant review of this case and strike down the mandate which substantially burdens one of our most fundamental freedoms, our free exercise of religion.

I. The Mandate

The ACA, PUB. L. NO. 111–148, 124 Stat. 119 (2010), requires that employers with over fifty employees provide health insurance which includes preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). The ACA exempts from the mandate grandfathered plans (those having made little to no changes since 2010), as well as churches and their most closely related entities. 42 U.S.C. § 18011; 45 C.F.R. § 147.131. The ACA does not require companies with less than fifty employees to offer insurance coverage. 26 U.S.C. § 4980H. As the Sixth Circuit described below, "[t]he cornerstone of the Act is the requirement that all non-exempt, nongrandfathered employers of 50 or more people ensure that their employees receive a minimum level of health insurance." App. at 4a.

Congress did not require contraceptive or abortifacient coverage in the ACA's plain text. Instead, the ACA leaves up to unelected officials the decisions of what constitutes "preventive care." App. at 4a-7a. Defendant Department of Health and Human Services incorporated guidelines formulated by the private

Institute of Medicine (IOM) into its preventive regulations. *Id*. 4a-6a. The IOM guidelines mandate that Petitioners include all FDA-approved contraceptives, sterilization procedures, and related counseling in their healthcare plan. *Id.*; *see also* 45 C.F.R. § 147.130; 77 Fed. Reg. 8725, 8725 (Feb.15, 2012). It is this act of an unelected government official that Petitioners challenge.

As the Sixth Circuit noted, "[s]ignificant taxes are imposed upon a non-exempt employer who fails to provide the required insurance coverage." App. at 7a. Employers that violate the mandate face government lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D. Multiplied by 128 employees, the financial penalty here is $4,672,000 annually, an amount that would cripple Petitioners' ability to keep their doors open. App. at 23a, 93a. If Petitioners attempted to avoid these fines by dropping its healthcare plan altogether, it would still incur a massive government penalty of $2,000 per full-time employee per year, totaling $196,000, as well as put itself at a steep competitive disadvantage in the marketplace. *Id.* at 23a; 26 U.S.C. § 4980H.

As one circuit court has noted, "[t]he contraception mandate was instantly controversial," and "was so circumscribed that it left out . . . for-profit, closely held businesses managed in accordance with a religious mission or creed." *Korte v. Sebelius*, Case No. 12-3841, slip op. at * 12 (7th Cir. Nov. 8, 2013).

II. Lower Court Proceedings

Petitioner Michael Potter is the founder, chairperson, president, and sole shareholder of Eden Foods, Inc. App. at 8a. Petitioner Michael Potter started Eden Foods, Inc. in the late 1960's, and Petitioner Eden Foods is the oldest natural and organic food company in North America. App. at 86a-87a. Petitioner Eden Foods employs 128 individuals, with more the 50 of its employees working full-time. *Id.* at 8a, 87a.

Petitioner Michael Potter is a Roman Catholic who follows the teachings of the Catholic Church. App. at 22a, 87a-93a, 97a-98a. As a practicing and faithful Catholic, Petitioner Michael Potter believes that each human being bears the image and likeness of God and that all human life is sacred and precious from the moment of conception. *Id*. Therefore, in accordance with the Church's teachings, Petitioner Michael Potter cannot purchase and provide contraception and abortifacients—both in his capacity as an individual person and in his capacity as the sole shareholder, owner, and final decision maker of Petitioner Eden Foods. *Id*.; *see* App. at 87a ("It would be impossible to compartmentalize my conscience."). Prior to the mandate, Petitioner Eden Foods, Inc. historically excluded contraceptives and abortifacients to comport with both the company's views and Petitioner Michael Potter's. App. at 87a-92a, 98a. Petitioners sought injunctive relief in the district court, as the mandate imposes a Hobson's choice: comply with the mandate and violate your conscience or violate the mandate and incur huge tax penalties. App. at 93a.

The district court upheld the mandate under the RFRA and the Free Exercise Clause of the First Amendment. In its RFRA analysis, the district court held that while the Petitioners' religious beliefs were deeply held, the mandate failed to impose a substantial burden on Petitioner Michael Potter's religious beliefs as the burden is "remote" and "too attenuated" because the mandate applies to the corporation and not to the business owner individually. App. at 26 a. The district court held any burden is indirect because the employee chooses whether or not to use abortifacients and contraceptives, so the decision does not lie with Petitioners. App. at 28a.

After upholding the mandate under the RFRA, the district court turned to its analysis under the First Amendment Free Exercise Clause. App. at 30a. The court held that Petitioner Eden Foods, Inc. failed to bring a claim because "[r]eligious belief takes shape within the mind and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution" and consequently a corporation cannot exercise religion. App. at 30a. The district court then held that Petitioner Michael Potter's free exercise claim failed as well because the mandate is a law of general applicability. App. at 31a-32a. "Even though exemptions were made for religious employees, this does not indicate that the regulations seek to burden religion but that the government made efforts to accommodate religious beliefs." App. at. 32a.

The Sixth Circuit affirmed the district court. App. at 15a-16a. Although the Sixth Circuit disregarded the district court's finding that Petitioners' religious beliefs are sincerely held, the appellate court upheld the

mandate under the RFRA and the Free Exercise Clause of the First Amendment. App. at 8a. In its RFRA analysis, the court relied heavily on *Autocam*, 2013 U.S. App. LEXIS 19152, and held that Petitioner Michael Potter lacked standing to bring a challenge to the mandate. Quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001), the court stated that a business owner could not bring a claim belonging to his company because "incorporation's basic purpose is to create a distinct entity." App. at 13a. The court also held that Eden Foods did not have a claim as a corporation because the RFRA excluded corporations from its definition of "person." App. at 15a.

In addressing Petitioners' First Amendment claim, the court quoted *United States v. Lee*, which declined "to grant a Social Security tax exemption under the Free Exercise Clause to Amish employers." *Id*.; 455 U.S. 252, 261 (1982). The court held that "Potter voluntarily forfeited his rights to bring individual actions for alleged corporate injuries in exchange for the liability and financial protections otherwise afforded him by utilization of the corporate form." App. at 14a. In ruling that neither Petitioners could challenge the mandate, the Sixth Circuit stated "a secular, for-profit corporation, cannot establish that it can exercise religion" and its owner "cannot establish standing." App. at 15a.

REASONS FOR GRANTING THE PETITION

Review is necessary to clarify the critical limitation on a political appointee's power to substantially burden religious freedom established by the Free Exercise Clause of the First Amendment and the RFRA. As this Court's own rules provide, certiorari is appropriate

when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This is the case here.

By ruling that neither an employer nor his/her company can exercise freedom of religion within the meaning of the First Amendment or the RFRA, the Sixth Circuit has created an important question of federal law not yet settled by this Court. *Can an entire class of people, here corporations and their owners, be excluded from First Amendment freedoms?* The necessity for this Court to settle the legal issues presented in this petition is manifestly recognizable by the circuit split between the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals. *Compare*, *e.g.*, *EEOC v. Townley Engineering & Mfg Co.*, 859 F.2d 610 (9th Cir. 1988) (holding a corporation's owners can assert free exercise rights); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (same); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3rd Cir. 2013) (holding a corporation cannot exercise religion and an individual owner lacks standing to bring a challenge to the mandate); *Autocam Corp. v. Sebelius*, 12-2673, 2013 U.S. App. LEXIS 19152, *11 (6th Cir. Sept. 17, 2013) (holding a corporation is not a "person" under the RFRA and an individual owner lacks standing to bring a challenge to the mandate); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013) (holding individual business owners showed a substantial likelihood of success of their RFRA claims, but that a corporation could not exercise religion in its own right); *Korte v. Sebelius*, Case No.

12-3841, 2013 U.S. App. LEXIS 22748 (7th Cir. 2013) (holding a corporation can exercise religion and both business owners and their corporations were likely to succeed on their RFRA claims).

While the Court upheld the ACA's individual-coverage mandate two terms ago, the Court did warn that "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, *interfered with the free exercise of religion*, or infringed on a liberty interest protected by the Due Process Clause." *National Fed'n of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) (Ginsburg, J., concurring in part and dissenting in part) (emphasis added). This petition presents this very issue: whether a mandate requiring an employer and his/her company to purchase and provide health insurance in contravention to his/her religious tenets interferes with the free exercise of religion.

The mandate's enforcement started on August 1, 2012. Employers are currently facing the choice of crippling fines and penalties or abandonment of their religious beliefs. There are 39 cases currently pending in federal courts across the country which present the same issues herein. The widely divergent opinions from the appellate and district courts demonstrate confusion and necessitate a uniformed decision from the highest Court. *See Hobby Lobby v. Sebelius*, 133 S.Ct. 641 (Dec. 26, 2012) (Sotomayor, J., in chambers) (recognizing divergence of opinions in the lower courts). Judicial review from this Court is needed without delay.

I. Important Question of Federal Law

As stated in the first line of Petitioners' complaint, "This is a case about religious freedom," and "protect[ing] the rights of conscience against the enterprises of the civil authority." App. at 36a (citations omitted). This petition presents an important question regarding the federal government's regulatory power under the ACA when it clashes with its citizens' religious beliefs.

Petitioners argue that the mandate overreaches to substantially burden their religious freedom under the coercion of "[s]ignificant taxes," which for Petitioners would equal $4,672,000.00 per year. App. at 7a, 23a. However, the Sixth Circuit and the district court both held that neither Petitioner Michael Potter nor his incorporated company could bring a claim under the RFRA or the Free Exercise Clause. App. at 1a-34a. The Sixth Circuit's opinion effectively erodes the RFRA and the Free Exercise clause and closes off the federal courts to their redress.

A. Petitioner Eden Foods, Inc.

Contrary to the Sixth Circuit's opinion that Petitioner Eden Foods is left unprotected by the RFRA and the Free Exercise Clause, there is no restriction in present Supreme Court precedent that restricts the RFRA or the Free Exercise Clause from applying to for-profit businesses. Nor is there Supreme Court precedent that the RFRA and the Free Exercise Clause create a categorical distinction that non-profit companies have religious freedom, while other corporations are deemed solely "secular" and relinquish any rights to religious freedom upon incorporation.

A business may be animated by religious principles, even if the tasks it performs are secular in nature. This is true whether it is Petitioner Eden Foods, Inc. producing organic foods, a Jewish-owned deli that does not sell non-Kosher foods, a Muslim-owned financial brokerage that will not lend money for interest, or a hotel chain with religious owners who will not carry pornographic broadcasting. The insidious effect of the Sixth Circuit's holding is to limit religious beliefs and their redress as never before.

Consider a Jewish-deli that is privately owned by a Jewish business owner that decides that his company will not sell non-Kosher food. The holding of the Sixth Circuit that this is a privately owned business that has no religious protections because it has engaged in "secular," for-profit business presents an impoverished view of both the First Amendment and of RFRA, and one repeated by the Sixth Circuit in *Autocam* and the Third Circuit in *Conestoga*. A federal mandate to sell pork would offend the religious practice of such a business and its owner, but under the holding of the Sixth Circuit—there would be no available recourse. The claim otherwise would limit the religious practice in an unprecedented fashion.[4]

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[4] It is no coincidence that the reading at Catholic Mass this past Sunday was 2 Maccabees, Chapter 7 where a mother and her seven sons are martyred when their government forces her family to act contrary to their faith and what they believe is God's law. Indeed, regulations that violate and curtail religious exercise are readily ubiquitous throughout history and in many parts of the world today. This petition presents no new expansion of liberties; it only seeks to protect the freedoms private business owners and their companies held prior to the creation of the mandate.

The RFRA "provide[s] a claim or defense to persons whose religious exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b)(2). While no express limitation exists in the statute, the Sixth Circuit held that "persons" failed to include corporate entities. The Sixth Circuit's restriction only applies to for-profit corporations, as the courts have traditionally been a forum for claims of non-profit corporations. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

The Dictionary Act in Title 1 of the United States Code defines "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Furthermore, as one district court has analyzed,

> The statute itself purports to impose a heightened burden on the free exercise claims of "persons." While the RFRA does not define the term "person," it is evident that Congress responded to what it perceived as an incorrect decision in *Smith*. See 42 U.S.C. §§ 2000bb(a)(l) (referring to the recognition of free exercise by the Framers of the Constitution); (b)(1) (finding that the "compelling interest test in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests"). Recognizing that Congress only has the power to enforce—but not redefine constitutional principles, *see Boerne*, 521 U.S. at 519, it seems likely that Congress used the term

> in the statute as being co- extensive with the term "person" as used in the Constitution.

Beckwith v. Sebelius, Case No. 8:13-cv-648, 2013 U.S. Dist. LEXIS 94056 at *23 (M.D. Fla. June 25, 2013) (citing *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

Furthermore, First Amendment case law from this Court seemingly favors the finding that a corporation is capable of religious exercise. In *Citizens United*, the Court held that First Amendment protection extends to corporations, and a First Amendment right "does not lose [its] First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 899 (2010) (regarding political speech).[5] In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), the Supreme Court held in its determination of the constitutionality of a law identified as § 8,

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of

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[5] *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"). For-profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

> natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does. . . . We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 775-76, 784 (1978).

The protections articulated in *Bellotti* and *Citizens United* appear to present an irreconcilable conflict with the Sixth Circuit's stance that incorporation must exclude the First Amendment freedom of religious exercise.

B. Standing for the Individual Business Owner

Additionally, contrary to the Sixth Circuit's holding, Petitioners advance that Petitioner Michael Potter's

claims under the RFRA and the Free Exercise clause do not fail for want of standing. The Sixth Circuit held that an individual business owner relinquishes rights when he chooses to operate his business in the corporate form. App. at 12a-13a. However, "[i]t is not sound, therefore, to rely on the premise that individuals bartered for the privilege of limited personal liability in exchange for the relinquishment of their free exercise rights when engaging in commerce under the corporate form." *Beckwith*, 2013 U.S. Dist. LEXIS 94056, *34.[6]

It is not a requirement of any state that in order to take advantage of the state's incorporation laws, the company must abstain from religious activities. A corporation is free to hold optional Mass or religious services at an on-site chapel, donate to a church or religious charity, hire corporate chaplains, or implement policies and practices in line with the religious tenets or Christian Stewardship.

The corporate structure cannot be used to strip employers of their Constitutional rights. There is no factual or sound legal basis for the notion that Plaintiffs forfeit their constitutional rights when they chose to conduct business through a for-profit

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[6] Defendants conceded that if a business owner brought a suit on behalf of his company which was organized as a partnership, instead of in the corporate form, the business owner would be able to bring this claim. *See Gilardi v. Sebelius,* Audio File of Oral Argument, Sept. 24, 2013, *available at* http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=20130920130923&Count=13&scode=1, last visited Sept. 27, 2013. Therefore, the Sixth Circuit's decision here and in *Autocam* boils down to the effect of the corporate form.

corporation authorized by state law. This is as it should be because any effort to make the Plaintiffs' surrender their fundamental rights in order to use the corporate form would itself be unconstitutional. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [First Amendment rights] even if he has no entitlement to that benefit"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government").

It is well established that in our RFRA and First Amendment jurisprudence that an employee may practice his or her religion concurrently with pursuing commercial goals.[7] In *Sherbert v. Verner*, the plaintiff, a Seventh Day Adventist holding her Sabbath on Saturdays, was fired because she could not violate the tenets of her faith by working on Saturdays. 374 U.S. 398, 401 (1963). The government refused her unemployment benefits. *Id*. Under Free Exercise jurisprudence, the State in *Sherbert* had to yield because it could not demonstrate a compelling interest in enforcing this law against her. This was so even

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[7] "RFRA operates as a kind of utility remedy for the inevitable clashes between religious freedom and the realities of the modern welfare state, which regulates pervasively and touches nearly every aspect of social and economic life." *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 at *47 (7th Cir. 2013) (citation omitted).

though the plaintiff was engaged in a "secular" occupation. The plaintiff was not forced to leave her religious convictions at the corporate door. *See also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). The Sixth Circuit articulated no justification for allowing an employer, Petitioner Michael Potter, less freedoms than an employee nor did it offer reason for straying from the precedent of allowing religious freedom in the commercial sphere as protected in *Sherbert* and *Thomas*.

C. The Shareholder Standing Rule

Although not expressly articulated by the Sixth Circuit's appellate opinion, it appears that the court adopted *Autocam*'s incomplete application of the shareholder standing rule.

In *Autocam*, the court expressed that the shareholders of a corporation cannot bring claims intended to redress injuries to a corporation, even when the corporation is closely held. *Franchise Tax Bd. v. Alcan Aluminum Ltd.,* 493 U.S. 331, 336 (1990) (holding indirect sole shareholders have Article III standing to challenge taxes assessed against their wholly owned subsidiaries); *see also Canderm Pharmacal, Ltd. v. Elder Pharms., Inc.,* 862 F.2d 597, 602-03 (6th Cir. 1988).

There is an exception to the shareholder standing rule for shareholders who are injured as individuals rather than as shareholders. 12B *Fletcher Cyclopedia of Corporations* § 5911. In such cases, the shareholder may be said to hold a "direct, personal interest," and may pursue a direct action even if the wrongful act also implicates the corporation's rights. *Id.*; *see also*

Franchise Tax Bd., 493 U.S. at 336; Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 2.13 at 259 (3d ed. 1999). State law controls the determination of whether a shareholder's claim is derivative or direct, allowing the shareholder to bring an independent suit. *Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 645 (7th Cir. 2006).

Michigan Law directs that when an injury is "separate and distinct" from those suffered by that corporation, the individual is not barred by the shareholder standing rule. *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 603 (6th Cir. 1988); *Club Xtreme, Inc. v. City of Wayne*, 2010 U.S. Dist. LEXIS 39080 (E.D. Mich. Apr. 21, 2010).

Therefore while Petitioners assert that both a company and its owner may successfully challenge the mandate on religious freedom grounds, Petitioners must point out—the very argument the Sixth Circuit and district court assert for why a corporation cannot practice religious exercise, if accepted as true, provides the basis for why the claims of the individual and the corporation are distinct. The court held that a corporation has no religious exercise, only the individual does.

The district court held that First Amendment freedoms were "purely personal" and "take[] shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution." App. at 30a. If a corporation is unable to practice religion, and that right is solely left up to the individual business owner—the individual owner's claim must only be classified as

"separate and distinct," as the corporation's claim does not exist. The Sixth Circuit never completed this logical analysis.

The flaws of the Sixth Circuit's analysis are highlighted by the conflicting opinion of the D.C. Circuit in *Gilardi* where the Court holds, in direct contention with the court in *Autocam*, that "[t]he shareholder-standing rule gives us little pause; we are satisfied that the [plaintiffs] have been 'injured in a way that is separate and distinct from an injury to the corporation. . . .' If the companies have no claim to enforce—and as nonreligious corporations, they cannot engage in religious exercise—we are left with the obvious conclusion: the right belongs to" Petitioner Michael Potter as an individual. *U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256, *21 (D.C. Cir. Nov. 1, 2013).

D. Sincerity of Beliefs

The Sixth Circuit erred by calling into question the sincerity of Petitioner Michael Potter's sincerely held religious beliefs based upon unsubstantiated, unauthenticated hearsay statements of a web "blog." The Sixth Circuit disregarded sworn testimony that was actually admitted and uncontested in the lower court in favor of new factual findings in the form of unauthenticated hearsay from an internet "blog." Rather than investigative journalism, this "blog" can more accurately be described as a tabloid. It contains such other noteworthy articles as:

- "The best of vine porn- it may be difficult to find adult material on the app, but it's there alright -- and some of it doesn't suck," Clark-Flory,

Tracey, available at http://www.salon.com/2013/07/31/the_best_of_vine_porn/, last visited Nov. 10, 2013.

- "Why I won't call myself a slut - when only white women like Miley are defending against 'slut-shaming,' I have no interest in reclaiming the word," B., Lutze, available at http://www.salon.com/2013/10/22/why_i_wont_call_myself_a_slut/, last visited Nov. 10, 2013.
- "What I learned from my Sex and the City Parody Account," D'Addario, Daniel, available at http://www.salon.com/2013/11/04/what_i_learned_from_my_sex_and_the_city_parody_account/, last visited Nov. 10, 2013.
- "The 10 Strangest Facts about Penises - Surprising trivia about the male organ, from strange implants to (yes) size data," Clark-Flory, Tracey,http://www.salon.com/2013/11/03/the_10_strangest_facts_about_penises/, last visited Nov. 10, 2013.

Despite the low-quality and gossip-column attributes of this site, the Sixth Circuit dedicated two paragraphs of its scant opinion to discussing excerpts of a "blog" posting from this tabloid, and then used it to call into question Petitioners' religious sincerity. The website citation was submitted to the Sixth Circuit by Defendants who solely relied upon statements extracted from the "blog" in their efforts to submit a new theory of Petitioner Michael Potter's religious beliefs to the court. The Sixth Circuit's flawed finding of fact was in direct contravention to the district court's findings. Indeed, based upon sworn declarations and

the conceded position of the Defendants, the district court held "[t]he Court takes as true, Plaintiffs' deeply held religious beliefs." App. at 26a; *see also id*. at 85a-103a. The Sixth Circuit failed to establish that the district court's fact finding was in clear error, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011), especially in light of the sworn declarations admitted under penalty of perjury and relied upon by the district court. App. at 85a-103a.

Although the appellate court's discussion is found in a footnote, its implication to the rest of the opinion is significant as the court clearly disregarded the sincerity of Petitioners' religious beliefs and the severe implications the mandate has on religious adherents. The court summarily states "even if the Autocam decision had not been issued, we would not have ruled differently on Potter's claims." App. at 13a.

Due to the Defendants' use of a "blog" reference, the Sixth Circuit replaced a formerly uncontested fact in the district court with denigration of Petitioners' sincerely held religious beliefs. Such careless handling of evidentiary materials should be reversed. Such inappropriate reliance on an authenticated "blog" exhibits the pandemic of confusion which lies with the admissibility of web postings. Indeed, a great divergence exists amongst the circuits regarding the admissibility of web postings. The Sixth Circuit, as it appears in this decision, has employed a relaxed and blanket admission approach to web postings, while the Third, Fifth, Seventh, and Eighth Circuits use a more careful approach.

In the Seventh Circuit in *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000), the court held that web

postings were inadmissible hearsay when the statements lack authentication and failed to fall under a hearsay exception. See *also Hickory Farms, Inc. v. Snackmasters, Inc.*, 509 F. Supp. 2d 716, 724-725 (N.D. Ill. 2007) (interpreting *United States v. Jackson* and clarifying that "evidence from the Internet" does not " stand[] for 'nil,' but . . . it must be scrutinized carefully."). The Eighth Circuit uses a similar approach. *ACTONet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836 (8th Cir. 2000) (holding that a web posting was admissible, but only after the evidentiary foundation for admission of the evidence was laid).

The Fifth Circuit scrutinizes reliance upon third party sources, such as the "blog" relied upon here, when those sources include such mediums as "'newspapers,' 'leaflets,' the 'internet,' and 'friends.' These sources constitute classic hearsay rather than personal knowledge." *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (quoting *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005) (newspapers are hearsay); *United States v. Jackson*, 208 F.3d at 637 (web postings from the Internet were inadmissible hearsay).

The Third Circuit, in agreement with the Fifth, Seventh, and Eighth Circuits, refuses to allow information from a website without authentication. *Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007) ("[S]everal concerns come into play here. First, we require that evidence be authenticated before it can be admitted."). In *Tieman*, the Court refused to allow a webpage judicial notice, noting that "[a]nyone may purchase an internet address," that information "from a web site do[es] not bear the indicia of reliability

demanded for other self-authenticating documents," and that statements from a website may be skewed in a manner that is self-serving to the purpose the website promotes, warning that a web posting can be "full of imprecise puffery that no one should take at face value." *Id*. (quoting *Catrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993); *see also Osunde v. Lewis*, 281 F.R.D. 250 (D. Md. 2012) ("I am not able to take judicial notice of these sources because the content of the websites do not deal with facts that are generally known within the territorial jurisdiction of this Court, or which have been shown to be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1990) ("While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation."); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 555-56 (D. Md. 2007) (holding citation to unauthenticated websites as support for a party's legal arguments may be problematic); *Trademark Props., Inc. v. A&E Television Networks*, No. 2:06-cv-2195-CWH, 2008 U.S. Dist. LEXIS 87731, at *2 n. 2 (D.S.C. Oct. 28, 2008) ("The accuracy and reliability of information from the Internet is highly questionable.").

However, the Central District of California, like the Sixth Circuit, allows unauthenticated statements from a web posting of a third party to be admitted when the posting contains what purports to be a party admission. *Fla. Conf. Ass'n of Seventh-Day Adventists v. Kyriakides*, 151 F. Supp. 2d 1223, 1225-1226 (C.D. Cal. 2001); *see also Perfect 10, Inc. v. Cybernet*

Ventures, Inc., 213 F. Supp. 2d 1146, 1153-54 (C.D. Cal. 2002) (taking a more permissive approach); *United States v. Cameron*, 762 F. Supp. 2d 152, 161 (D. Me. 2011) (same).

In the instant case, the Sixth Circuit, without hesitation, diminished Petitioners' sincerely held religious beliefs due to a mere reference in the Defendants' briefing to a third party website. App. at 8a; *compared to* App. at 85a-103a. There is a great divergence amongst the courts nationwide with how to handle the admissibility of web postings. Review of this issue by the Court is necessary to prevent our Federal Courts of Appeals from continuing to allow unauthenticated web postings to seep into their opinions and replace reliable evidence.

E. The Sixth Circuit misapplied *Lee*

The Sixth Circuit heavily relied upon a statement the Court made in *United States v. Lee*, that: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." App. at 9a (*quoting United States v. Lee*, 455 U.S. 252, 261 (1982).

The Sixth Circuit interpreted this statement as justification for interfering with religious exercise. However, as the majority in *Gilardi* explained "context is important."[8] The *Gilardi* Court recognized that the

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[8] While the district court held that the mandate passed strict scrutiny, Petitioner does not specially address this analysis in this

above statement from *Lee* was made "while evaluating whether the 'limitation on religious liberty . . . [was] essential to accomplish an overriding governmental interest.'" *Gilardi* at *30 (*quoting Lee*, 455 U.S. at 257). Consequently, *Lee* examined whether accommodating the burdened religious belief would "unduly interfere with fulfillment of the governmental interest" and determined that "a comprehensive national social security system providing for voluntary participation would be . . . difficult, if not impossible to administer." *Lee,* 455 U.S. at 258–259.

The *Gilardi* Court correctly realized that "*Lee* was a rare case in which the government fended off a strict-scrutiny challenge by proving exemptions would 'present an administrative problem of such magnitude . . . that such a requirement would have rendered the entire statutory scheme unworkable.'" *Gilardi* at *31 (quoting *Sherbert*, 374 U.S. at 408-09). Such is clearly not the case here considering the myriad of exemptions the government has already granted. The Sixth Circuit failed to adequately address *Lee* in context. *Lee* was decided on the premise that a government cannot function without taxes. 455 U.S. at 260. In contrast here, the U.S. government has functioned for in excess of two hundred years without a federal mandate demanding the employers provide free abortifacients

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petition. App. at 17a-34a; *see also Eden Foods, Inc. v. Sebelius*, Case No. 13-11229, 2013 U.S. Dist. LEXIS 40768 (E.D. Mich. Mar. 22, 2013). Where the mandate has been upheld at the appellate level in the Sixth and Third Circuits, the claims have failed for the reasons addressed in this petition. In the Seventh, Tenth, and D.C. Circuits where the mandate has been struck down, the mandate has failed strict scrutiny analysis each time.

and contraceptives to their employees. Secondly, the mandate, which requires Petitioners to contract with a private insurance company, is not a tax and not a "government program." Here, Petitioners do not fund the government but directly give specific services to private citizens. The government has decided not to pursue its goals with a governmental program, but instead to conscript religiously objecting citizens.

Additionally, the Sixth Circuit relied on *Lee*'s statement that "[g]ranting an exemption from [statutory schemes] to an employer operates to impose the employer's religious faith on the employees." *Id.* This statement makes little sense in the context of the contraceptive mandate. Petitioners are not banning their employees from accessing contraception, they simply wish to be left out of the decision and the mandated purchase entirely. Notably, this statement from *Lee* also highlights the error in reasoning employed by the *Eden Foods* line of decisions. Whose religious faith is being imposed on employees? According to the Sixth Circuit, it could not possibly be Petitioner Eden Foods Inc.'s because a company cannot have a religious faith, and consequently, according to the Sixth Circuit, cannot be harmed by being forced to provide products and services that violate Catholic teachings. If it is Petitioner Michael Potter, then he is directly involved with implementing the mandate in his individual capacity and satisfies standing.

In *United States v. Lee*, the Supreme Court explained that the inquiry of whether a business owner can exercise religious beliefs is a simple one: "Because 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." 455 U.S. at 257. Although that employer lost on other elements of the claim, the Court specifically recognized he exercised religion. *Id.* The same is true here: because providing coverage of abortifacients and contraception violates beliefs that are sincerely held, compulsory compliance with the mandate interferes with the Plaintiffs' free exercise rights.

While the case at hand is similar to *Lee* in analysis of standing and substantial burden, it differs in its analysis of strict scrutiny, as here the mandate cannot pass strict scrutiny

II. Circuit Split

The existing circuit split only exemplifies the national dissonance surrounding our RFRA and Free Exercise jurisprudence on this issue.

The Tenth Circuit held that closely held, for-profit businesses and their owners are likely to succeed on a claim for an exemption from the mandate under RFRA. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). The Sixth Circuit in this case and in *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013) disagreed, finding that for-profit businesses, unlike their non-profit counterparts, are not "persons" under the RFRA and their owners are unable to bring a challenge to the mandate. The Third Circuit essentially agreed; however, it analyzed more generally that a for-profit business could not exercise religious freedom. *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013). The D.C. Circuit held that the owners of

closely held, for-profit businesses are likely to succeed on a RFRA challenge to the mandate, although their companies are not. *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 U.S. App. LEXIS 22256 (D.C. Cir. Nov. 1, 2013). Meanwhile the Seventh Circuit ruled that "business owners *and* their companies—may challenge the mandate" and "compelling them to cover [contraceptive and abortifacient] services substantially burdens their religious exercise rights." *Korte v. Sebelius*, Case No. 12-3841, 2013 U.S. App. LEXIS 22748 at *7 (7th Cir. 2013) (emphasis in original).

This division simply cannot be ignored and necessitates a unified decision of this Court.

III. Petitioners Provide the Simplest Record and Seek a Decision on Purely Legal Issues

Petitioners' case provides the cleanest record and simplest procedural history amongst the pending petitions before this Court, while uniquely also providing the instrument to enable the Court to review all pending issues before the Court under both the RFRA and the Free Exercise Clause. The simplicity of the district court's and Sixth Circuit's opinion allows the Court the ability to fully explore the legal issues before it, without having to dissect a piecemealed lower court opinion. Furthermore, redress from this Court is necessary to undo the mishandling by the Sixth Circuit by giving superior evidentiary weight to an unauthenticated "blog."

The mandate requires Petitioners and other similarly situated persons to purchase and provide specific items in their insurance coverage that violate

Petitioners' religious beliefs, or suffer the consequences of a formidably weighty, federally-imposed penalty. At its heart, this petition seeks to preserve the religious freedom that businesses and their owners enjoyed prior to the mandate. Courts have sharply disagreed about the scope of this right to religious freedom. Consequently, the Court should grant the petition to answer this important question of federal law, *see* Sup. Ct. R. 10(c), to ensure that our religious freedom has received its constitutional and statutory protections.

CONCLUSION

The petition for a writ of certiorari should be granted. This petition should be reviewed independently or in tandem with *Hobby Lobby* (No. 13-354), *Conestoga Wood* (No. 13-356), *Autocam* (No. 13-482), and *Gilardi* (No. 13-5069). Pursuant to Sup. Ct. R. 15.5, Petitioners expressly waive the fourteen-day waiting period prior to the Clerk's distribution of this petition.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13-1677

[Filed October 24, 2013]

EDEN FOODS, INC. and MICHAEL POTTER, Chairman, President and Sole Shareholder of Eden Foods, Inc., *Plaintiffs-Appellants*, *v.*

KATHLEEN SEBELIUS, Secretary, United States Department of Health and Human Services; THOMAS E. PEREZ, Secretary, United States Department of Labor; JACK LEW, Secretary, United States Department of the Treasury, *Defendants-Appellees*.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:13-cv-11229—Denise Page Hood, District Judge.

Decided and Filed: October 24, 2013

Before: DAUGHTREY, COLE, and WHITE, Circuit Judges.

COUNSEL

ON BRIEF: Erin Elizabeth Mersino, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, for Appellants. Mark B. Stern, Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Mailee R. Smith, AMERICANS UNITED FOR LIFE, Washington, D.C., Kimberlee Wood Colby, CENTER FOR LAW AND RELIGIOUS FREEDOM CHRISTIAN LEGAL SOCIETY, Springfield, Virginia, Deborah J. Dewart, LIBERTY, LIFE, AND LAW FOUNDATION, Swansboro, North Carolina, Thomas W. Ude, Jr., LAMBDA LEGAL AND DEFENSE AND EDUCATION FUND, INC., New York, New York, Camilla B. Taylor, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Chicago, Illinois, Jennifer C. Pizer, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Los Angeles, California, Charles E. Davidow, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, Washington, D.C., Bruce H. Schneider, STROOCK & STROOCK & LAVAN LLP, New York, New York, Daniel Mach, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Washington, D.C., Ayesha N. Khan, Gregory M. Lipper, Caitlin E. O'Connell, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Jessica Ellsworth, HOGAN LOVELLS US LLP, Washington, D.C., for Amici Curiae.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. To comply with the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), collectively known as the Affordable Care Act (the Act), most businesses employing 50 or more individuals must provide female employees with health-insurance coverage that includes, at no cost to the employee, "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4). Those guidelines require plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." 77 Fed. Reg. 8725 (Feb. 15, 2012).

The plaintiffs, Eden Foods, Inc., and Michael Potter, appeal from a denial of their request for a preliminary injunction that would forbid federal agencies from enforcing that mandate against them. They contend that offering such contraceptive services to the employees of Eden Foods would substantially burden the plaintiffs' religious beliefs and thus would contravene the protections afforded them under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (RFRA). However, the law of the circuit, announced in the recent decision in *Autocam Corp. v. Sebelius*, __ F.3d ___, 2013 WL 5182544 (6th

Cir. Sept. 17, 2013), convincingly establishes that the district court did not abuse its discretion in denying the plaintiffs' requests for injunctive relief.

FACTUAL AND PROCEDURAL BACKGROUND

The Affordable Care Act

In March 2010, Congress passed, and President Obama signed, the Affordable Care Act. The cornerstone of the Act is the requirement that all non-exempt, non-grandfathered employers of 50 or more people ensure that their employees receive a minimum level of health insurance. As part of that coverage, Congress mandated:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for –
>
> > * * *
> >
> > (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4).

The Health Resources and Services Administration (HRSA) then delegated the task of developing appropriate preventive-services guidelines to the Institute of Medicine (IOM), an arm of the National Academy of Sciences funded by Congress to provide the

government with expert advice on matters of public health. The IOM reviewed "what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women." HRSA, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Oct. 22, 2013). The Institute recommended, and the HRSA supported the suggestions, that the following preventive services be required to be provided to women employees at no cost to the women themselves: well-woman visits; screening for gestational diabetes; human papillomavirus testing; counseling for sexually transmitted infections; counseling and screening for human immune-deficiency virus; contraceptive methods and counseling; breast-feeding support, supplies, and counseling; and screening and counseling for interpersonal and domestic violence. *Id.*

With respect to contraceptive methods and counseling, the guidelines require non-exempt employers and insurance plans to provide "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Id.* Nevertheless, HRSA explained:

> The guidelines concerning contraceptive methods and counseling . . . do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is

> organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement.

Id.

Pursuant to the Act, therefore, exemptions from the contraceptive-coverage mandate are limited to certain sizes and types of employers. Specifically, the insurance requirements are not applicable to companies with fewer than 50 employees, *see* 26 U.S.C. §§ 4980H(a), (c)(2)(A); companies with health-insurance plans in existence on March 23, 2010, and unchanged

after that date, *see* 45 C.F.R. § 147.140; and "religious employers," *see* 45 C.F.R. § 147.130(a)(1)(iv)(B).[1]

Significant taxes are imposed upon a non-exempt employer who fails to provide the required insurance coverage. For example, an employer who offers its employees a health plan but omits items of required coverage shall be taxed "$100 for each day in the noncompliance period with respect to each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). Complete failure to offer employees any health-insurance coverage will result in the imposition upon the employer of "an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month." 26 U.S.C. § 4980H(a).[2]

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[1] The regulations define a "religious employer" as an organization that meets each of the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B) (2012).

[2] "The term 'applicable payment amount' means, with respect to any month, 1/12 of $2,000." U.S.C. § 4980H(c)(1).

The Plaintiffs

Plaintiff Michael Potter is the founder, chairperson, president, and sole shareholder of Eden Foods, Inc., a for-profit, natural-foods corporation that employs 128 individuals, more than 50 of whom work full-time for the company. The complaint in this matter alleges that Potter is a Roman Catholic, follows the teachings of the Catholic Church, and has "deeply held religious beliefs" "that prevent him from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients." In fact, Potter claims that "these procedures almost always involve immoral and unnatural practices."[3]

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[3] Interestingly, in a conversation with salon.com's Irin Carmon, Potter's "deeply held religious beliefs," *see* Complaint ¶ 83, more resembled a laissez-faire, anti-government screed. Potter stated to Carmon, "I've got more interest in good quality long underwear than I have in birth control pills." Carmon then asked the Eden Foods chairman why he didn't seem to care about birth control when he had taken the step to file a lawsuit over the contraceptive mandate. Potter responded, "Because I'm a man, number one[,] and it's really none of my business what women do." The article continued:

> So, then, why bother suing? "Because I don't care if the federal government is telling me to buy my employees Jack Daniel's or birth control. What gives them the right to tell me that I have to do that? That's my issue, that's what I object to, and that's the beginning and end of the story." He added, "I'm not trying to get birth control out of Rite Aid or Wal-Mart, but don't tell me I gotta pay for it."

Irin Carmon, Eden Foods doubles down in birth control flap, SALON.com (Apr. 15, 2013, 7:45 am), http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage.

In his capacity as chairman of Eden Foods, Potter has for years negotiated health-insurance policies for his employees with Blue Cross Blue Shield of Michigan. Those previous policies "specifically excluded contraception and abortifacients, and exempted [Potter] from providing, paying, contributing, or supporting contraception or abortifacients for others." On March 15, 2013, however, Potter was informed that, in compliance with the requirements of the Affordable Care Act, Blue Cross Blue Shield of Michigan would no longer offer such limited medical coverage; consequently, the corporation's group plan "had been changed to include abortifacients and contraceptive coverage."

Potter concedes that Eden Foods "does not fall under any sort of exemption" provided in the Affordable Care Act, and thus the corporation is subject to the Act's requirement that its health-insurance policy provide no-cost coverage for contraceptives for women employees. He alleges, however, that adherence to his claimed religious beliefs would necessitate him and his company violating the Act's mandate, resulting in the imposition of significant penalties. For example, were the corporation "to violate the law by ceasing to offer employee health insurance altogether, [it would] be penalized with fines of $2,000 per employee per year. The fines [would be] even more insurmountable [were the corporation to] decide to offer insurance without the objectionable coverage." Faced with this prospect, Potter and Eden Foods filed a complaint in federal district court, challenging the legality of the contraceptive mandate. The plaintiffs also filed with the court a motion for issuance of a temporary restraining order and a preliminary injunction.

District Court and Motions Panel Rulings

The district court denied the plaintiffs' motion for injunctive relief. In doing so, the court first noted that the plaintiffs failed to satisfy their RFRA burden of showing that the contraceptive mandate substantially burdened their exercise of their religion. Quoting from the district court opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp.2d 1278, 1294 (W.D. Okla. 2012), *rev'd* 723 F.3d 1114 (10th Cir. 2013), the district judge explained:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

(Internal quotation marks and citation omitted.)

The district court further concluded that the plaintiffs established no likelihood of success on their First Amendment free-exercise claim, noting that free-exercise-of-religion rights have never been extended to secular, for-profit corporations like Eden Foods, which are "not the alter ego[s] of [their] owners for purposes of religious belief and exercise." Moreover, Potter's First Amendment rights were not infringed by the mandate because that regulation does not seek to burden religion, but rather to promote public health and gender equality.

Both Eden Foods and Potter then appealed to this court, claiming as their sole issue that "Plaintiffs Michael Potter and Eden Foods are Likely to Succeed on their RFRA Claims." Pending resolution of the appeal, the plaintiffs sought issuance of an injunction restoring Eden Foods and Potter to the positions in which they found themselves prior to the implementation of the challenged provisions of the Affordable Care Act. A motions panel of this court unanimously denied that request, noting that the three judges were "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." *Eden Foods, Inc. v. Sebelius*, No. 13-1677 (6th Cir. June 28, 2013) (order).

DISCUSSION

In reviewing whether the plaintiffs have demonstrated entitlement to injunctive relief, we examine four factors: (1) the movants' likelihood of success on the merits of their claim; (2) whether the movants would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether issuance of the injunction would serve the public interest. *See, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 590-91 (6th Cir. 2012). We examine the district court's decision on the likelihood of the movants' success on the merits *de novo*, but we will reverse the district court's decision to grant or deny an injunction only for an abuse of discretion. *Id.* at 591. "Although no one factor is controlling, a finding

that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000).

Given intervening events since the plaintiffs' filing of this appeal, we conclude that the plaintiffs in this matter have "simply no likelihood of success on the merits." On September 17, 2013, another panel of this court released its opinion in *Autocam Corp. v. Sebelius*, __ F.3d ___, 2013 WL 5182544 (6th Cir. Sept. 17, 2013), a case that resolved a similar challenge to the Affordable Care Act's contraceptive mandate. Like the case presently before us, *Autocam* involved claims by a for-profit, secular, incorporated business and the owners of that closely-held corporation. Like Eden Foods and Potter, the plaintiffs in *Autocam* alleged that the mandate forces practitioners of the Roman Catholic faith to choose between incurring substantial financial penalties for disobeying duly-promulgated regulations and ignoring sincerely held religious beliefs concerning the use of artificial contraceptives. *Id.* at *1. As in this case, the plaintiffs in *Autocam* argued that compliance with the dictates of the contraceptive mandate would substantially burden their exercise of religion in contravention of the protections afforded by RFRA. *Id.*

Claims Raised by Plaintiff Potter

Addressing those concerns and allegations, the *Autocam* opinion relied on basic, well-established principles of corporate law to hold that the individual owners/shareholders of Autocam had no standing to bring their claims against the government "in their individual capacities under RFRA, nor [could] Autocam assert the [individual plaintiffs'] claims on their behalf." *Id.* at *5. According to the court,

"incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Id.* (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)).

Autocam's resolution of that standing issue now constitutes the law of this circuit. Consequently, we may not ignore that published circuit precedent, absent an intervening Supreme Court decision or an overruling of the prior decision by this court sitting *en banc*. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Moreover, even if the *Autocam* decision had not been issued, we would not have ruled differently on Potter's claims.

As the Supreme Court held in *United States v. Lee*, 455 U.S. 252 (1982):

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from [statutory schemes] to an employer operates to impose the employer's religious faith on the employees.

Id. at 261 (declining to grant a Social Security tax exemption under the Free Exercise Clause to Amish employers). The Affordable Care Act's contraceptive mandate imposes duties and potential penalties upon Eden Foods only, not upon Potter, despite his status as the sole shareholder of the corporation. By

incorporating his business, Potter voluntarily forfeited his rights to bring individual actions for alleged corporate injuries in exchange for the liability and financial protections otherwise afforded him by utilization of the corporate form. Adoption of Potter's argument that he should not be liable individually for corporate debts and wrongs, but still should be allowed to challenge, as an individual, duties and restrictions placed upon the corporation would undermine completely the principles upon which our nation's corporate laws and structures are based. We are not inclined to so ignore law, precedent, and reason.

As this court held in *Autocam*, individual shareholders/owners of a corporation have no standing to challenge provisions of laws that the corporation must obey under risk of legal penalty. It follows that Potter's claims must be dismissed for lack of jurisdiction.

Claims Raised by Eden Foods

In pertinent part, RFRA provides that the "[g]overnment 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). Relying on this statutory prohibition, Eden Foods claims that the Affordable Care Act's contraceptive mandate does indeed burden *the corporation's* exercise of religion. Such an assertion necessarily raises a threshold issue: "whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377,

381 (3d Cir. 2013), *petition for cert. filed*, (U.S. Sept. 19, 2013) (No. 13-356).

We need not engage in an extensive discussion of the pros and cons of the query because this court, in *Autocam*, already has resolved the issue for this circuit. Relying in large part on the Third Circuit's analysis in *Conestoga Wood Specialties*, *Autocam* held that a for-profit corporation "is not a 'person' capable of 'religious exercise' as intended by RFRA." *Autocam*, __ F.3d at ___, 2013 WL 5182544, at *7. Such a holding necessarily guides our analysis of the identical issue in this case. Thus, as in *Autocam*, the corporate plaintiff here has failed to carry its burden of demonstrating that it has a strong likelihood of succeeding on the merits of its RFRA claims. Because Eden Foods cannot establish this first and most critical of the four criteria for justifying issuance of a preliminary injunction, *see Gonzales*, 225 F.3d at 625, the district court's denial of the relief sought by Eden Foods was proper and not an abuse of discretion.

CONCLUSION

Plaintiffs Eden Foods and Michael Potter have attempted to distinguish their challenges to the applicability of the Affordable Care Act's contraceptive mandate from those raised by the plaintiffs in *Autocam*. They have failed to do so. Thus, in accordance with the law of the circuit announced in *Autocam*, we hold that Eden Foods, a secular, for-profit corporation, cannot establish that it can exercise religion, and that Potter cannot establish his standing to challenge obligations placed only upon the corporation, not upon him as an individual. Consequently, we AFFIRM the district court's denial of

Eden Foods's motion for a preliminary injunction and REMAND the case to the district court with instructions to DISMISS Potter's claims for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-1677

[Filed October 24, 2013]

EDEN FOODS, INC. and MICHAEL POTTER, Chairman, President and Sole Shareholder of Eden Foods, Inc., Plaintiffs - Appellants, v. KATHLEEN SEBELIUS, Secretary, United States Department of Health and Human Services; THOMAS E. PEREZ, Secretary, United States Department of Labor; JACK LEW, Secretary, United States Department of the Treasury, Defendants - Appellees.	)

Before: DAUGHTREY, COLE, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the denial of Eden Foods's motion for a

preliminary injunction is AFFIRMED, and the case is REMANDED to the district court with instructions to dismiss Potter's claims for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 13-11229
Honorable Denise Page Hood

[Filed May 21, 2013]

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

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR ACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

I. BACKGROUND

On March 20, 2013, Plaintiffs filed the instant action against Defendants Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services ("HHS"); Seth Harris, Acting Secretary of the United States Department of Labor ("DOL"); Jack Lew, Secretary of the United States Department of the Treasury; and United States Department of the Treasury ("Treasury"). Plaintiffs allege the following claims: Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count I); Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count II); Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count III); Violation of the First Amendment to the United States Constitution Establishment Clause (Count IV); Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count V); Violation of the Religious Freedom Restoration Act ("RFRA") (Count VI); Violation of the Administrative Procedure Act (Count VII); Violation of the Administrative Procedure Act (Count VIII); Violation of the Administrative Procedure Act (Count IX); and Violation of the Administrative Procedure Act (Count X).

The Complaint is a challenge to the regulations issued under the Patient Protection and Affordable Care Act (Pub. L. 111-148, March 23, 2010, 124 Stat. 119) and the Health Care and Education Reconciliation

Act (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively, the "Affordable Care Act"). (Comp., ¶ 2) The Affordable Care Act mandates that health plans provide coverage with respect to women, such as additional preventive care and screenings and directs the Secretary of HHS to determine what would constitute "preventive care" under 42 U.S.C. § 30066-13(a)(4). (Comp., ¶ 4) Without notice of rulemaking or opportunity for public comment, HHS, DOL and the Treasury, adopted the Institute of Medicine ("IOM") recommendations in full and promulgated an interim final rule ("Mandate") which requires all group health plans and health insurance insurers offering group or individual health insurance coverage provide all FDA-approved contraceptive methods and procedures. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. (Comp., ¶ 5) The Mandate requires all insurance carriers, including Blue Cross/Blue Shield of Michigan, to provide coverage for contraception, abortion, and abortifacients in all of its insurance plans, group and individual. (Comp., ¶ 6)

Plaintiffs assert that the Mandate forces employers and individuals to violate their religious beliefs because it requires employers and individuals to pay for insurance from insurance issuers which fund and directly provide for drugs, devices, and services which violate their deeply held religious beliefs. (Comp., ¶ 9) Plaintiffs seek to enjoin Defendants from implementing and enforcing provisions of the regulations, specifically the Mandate, asserting that the Mandate violates Plaintiffs' rights to the free exercise of religion under the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. (Comp., ¶ 12) Plaintiffs seek a Declaratory Judgment

that the regulations, specifically the Mandate, violate Plaintiffs' rights to the free exercise of religion under the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. (Comp., ¶ 13)

Potter is the Chairman, President and sole shareholder of Eden Foods. (Comp., ¶ 15) Plaintiffs employ 128 full-time employees, are subject to the monetary penalties under the Affordable Care Act, and are forced under the Mandate by penalty of heavy fines to conduct business in a manner that violates their deeply held religious faith by providing and funding contraceptives and abortifacients. (Comp., ¶ 16) Eden Foods is a for-profit, natural foods company. (Comp., ¶ 76) Potter asserts he cannot compartmentalize his conscience or his religious beliefs from his daily work and actions as Chairman, President, and sole shareholder of Eden Foods. (Comp., ¶ 77) Plaintiffs share a common mission of conducting their business operations with integrity and consistent with the teachings, mission, and values of the Catholic Church. (Comp., ¶ 77) Plaintiffs purchase and provide group insurance through Blue Cross/Blue Shield of Michigan and provide this insurance to their employees. (Comp., ¶ 78)

Due to the Mandate, Plaintiffs are no longer allowed to exclude contraception and abortifacients from their insurance plan–and are forced to provide and pay for these services which violate their religious beliefs. (Comp., ¶ 89) Since Eden Foods' inception, Plaintiffs have excluded objectionable coverage such as providing contraception and abortifacients from their insurance plan. (Comp., ¶ 90) When presented with a contract on

February 21, 2013 amending the group insurance plan to include the contraception and abortifacients coverage, Plaintiffs refused to sign the contract. (Comp., ¶ 91) Plaintiffs learned on March 15, 2013 that their group insurance plan added the contraception and abortifacients coverage without their consent. (Comp., ¶ 93) Plaintiffs wish to conduct their business in a manner that does not violate the principles of their religious faith. (Comp., ¶ 94)

Plaintiffs assert they do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130(a)(1)(A) and (B). Since Plaintiffs do not qualify for the "religious employer" exemption, they are not permitted to take advantage of the "temporary safe-harbor" set forth at 77 Fed. Register 8725 (Feb. 15, 2012). (Comp., ¶ 119) Plaintiffs assert they must provide federal government-approved health insurance under the Affordable Care Act or pay substantial per-employee fines at $196,000 per year tax penalty. (Comp., ¶¶ 122-23) In addition, Plaintiffs assert that the Internal Revenue Code imposes a tax on any failure of a group plan to meet the requirements relating to group plan requirements which, for Plaintiffs, would be at $4,672,000 per year. (Comp., ¶ 124)

Plaintiffs assert that the Affordable Care Act is not neutral because some groups, both secular and religious, enjoy exemptions from the law, while certain religious groups do not. (Comp., ¶ 127) Plaintiffs claim that HHS has issued more than a thousand waivers regarding particular employers and other health insurance plan issuers from compliance with certain provisions of the Affordable Care Act. (Comp., ¶¶ 130-132) The Mandate indicates that the Health

Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers if they meet certain criteria and the organization is a non-profit organization. 45 C.F.R. § 147.130(a)(iv)(A) and (B). (Comp., ¶¶ 184-85) There is no exemption for a for-profit company. (Comp., ¶ 188)

Plaintiffs filed a Motion for an Emergency Temporary Restraining Order and Preliminary Injunction. The Court denied the Motion for Emergency Temporary Restraining Order on March 22, 2013 and scheduled a hearing on the Motion for Preliminary Injunction. (Doc. No. 12) Defendants filed a response on April 19, 2013 and Plaintiffs replied on May 1, 2013. A Motion for Leave to File *Amicus Cureae* Brief was filed by the American Civil Liberties Union and American Civil Liberties Union Fund of Michigan (collectively, "ACLU") on April 19, 2013. To date, no opposition has been filed to the ACLU's motion.

II. ANALYSIS

A. Preliminary Injunction Standard

"The court may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1). Four factors must be balanced and considered before the Court may issue a preliminary injunction pursuant to Fed. R. Civ. P. 65(b): 1) the likelihood of the plaintiff's success on the merits; 2) whether plaintiff will suffer irreparable injury without the injunction; 3) the harm to others which will occur if the injunction is granted; and 4) whether the injunction would serve the public interest. *In re Delorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *In re Eagle-Pitcher Industries, Inc.*, 963 F.2d 855, 858 (6th Cir. 1992); and

N.A.A.C.P. v. City of Mansfield, Ohio, 866 F.2d 162, 166 (6th Cir. 1989). The first factor is the most critical inquiry of the four criteria. *Mason County Med. Ass'n v. Knebel,* 563 F.22d 256, 261 (6th Cir. 1977). In making its determination the "district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.,* 119 F.3d 393, 399 (6th Cir. 1997).

B. Likelihood of Plaintiff's Success on the Merits

In their Motion for Preliminary Injunction, Plaintiffs assert that the Mandate violates Plaintiffs' rights under the RFRA and the First Amendment of the Constitution. Defendants respond that Plaintiffs have not shown a likelihood of success on their claim under the RFRA and the First Amendment's Free Exercise and Free Speech Clauses. The ACLU argues in support of Defendants' response that Plaintiffs are unlikely to succeed on the merits of their claim that the federal contraception rule infringes on Plaintiffs' religious liberty. The ACLU asserts that courts have squarely rejected Plaintiffs' argument that they have a right to discriminate against women and deny them benefits because of the companies' owners' religious beliefs. The Court addresses below Plaintiffs' RFRA and First Amendment claims.

1. RFRA

Plaintiffs argue that the HHS Mandate violates the RFRA, 42 U.S.C. § 2000bb *et seq.* The RFRA strictly prohibits the Government from substantially burdening a person's exercise of religion, 42 U.S.C.

§ 2000bb-1(a), except when the Government can demonstrate that application of the burden to the person furthers a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). The RFRA was enacted in response to the Supreme Court's decision in *Employment Division, Department of Human Services of Oregon v. Smith,* 494 U.S. 872 (1990). In that case, the Supreme Court held that the right to the free exercise of religion under the First Amendment does not exempt an individual from a law that is neutral and of general applicability. The Supreme Court explicitly disavowed the test used in earlier decisions which prohibited the government from substantially burdening a plaintiff's religious exercise unless the government could show that its action served a compelling interest and was the least restrictive means to achieve that interest. 42 U.S.C. § 2000bb. The purpose of the RFRA was to "restore the compelling interest test" as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 204 (1972).

The Court takes as true, Plaintiffs' deeply held religious beliefs. However, courts have held that the Mandate in question applies only to the corporate entity, not to its officers or owners, and that as to the individual owners, any burden imposed on them individually by the contraception mandate is remote and too attenuated to be considered substantial for purposes of the RFRA. *See Hobby Lobby Stores, Inc. v. Sebelius,* 870 F.Supp.2d 1278, 1294 (W.D. Okla. 2012); *Gilardi v. Sebelius,* 2013 WL 71150, at *9 (D.D.C. Mar. 3, 2013); *Conestoga Wood Specialties Corp. v. Sebelius,* 2013 WL 140110, at **10, 14 (E.D. Pa. Jan. 11, 2013);

Grote v. Sebelius, 2013 WL 362725, at *6 (7th Cir. Jan. 30, 2013)(dissent).

The Tenth Circuit, in addressing a motion for an injunction pending resolution of the appeal on the Mandate issue, found that the plaintiffs/appellants failed to demonstrate entitlement to such relief. *See Hobby Lobby Stores, Inc. v. Sebelius,* 2012 WL 6930302 at *1 (10th Cir. Dec. 20, 2012). Three types of preliminary injunctions noted by the Tenth Circuit are specifically disfavored: injunctions that alter the status quo (the last peaceable uncontested status existing between the parties before the dispute developed); mandatory injunctions (requiring the nonmoving party to take affirmative action before trial on the merits); and injunctions that afford the movant all of the relief it could recover at the conclusion of a full trial on the merits. *Id.* The movant must show the preliminary injunction factors "weigh heavily and compellingly in its favor." *Id.* The Tenth Circuit, in denying the request for injunction, found that the plaintiffs/appellants failed to satisfy their burden as to the first element on their RFRA claim, that the challenged mandate substantially burdened their exercise of religion. *Id.* at *2. Since the plaintiffs/appellants could not meet this burden, there is no need to further consider whether the defendants have shown that the mandate is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *Id.* The Tenth Circuit agreed with the district court's substantial-burden analysis that:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will

> contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the [corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Id. at *3 (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012).

Plaintiffs in this case raise a similar argument that the Mandate substantially burdens their religious beliefs since the corporate entity providing at least part of the funds for its employees and its shareholder hold religious beliefs contrary to the Mandate's requirement that women be provided with birth control choices. The Tenth Circuit's analysis on this issue applies in this instance because an employee's participation (specifically women), after consultation with healthcare providers as to whether to take advantage of the birth control choices in the Mandate, is indirect and attenuated to the Plaintiffs' religious beliefs. The employee may or may not participate in the Mandate's offer.

On leave to appeal to the United States Supreme Court as to the denial of the preliminary injunction motion, Justice Sonya Sotomayor found that the applications did not satisfy the demanding standard for extraordinary relief sought because it is not "indisputably clear" that the applicants are entitled to such relief. *Hobby Lobby Stores, Inc. v. Sebelius,* 133. S.Ct. 641, 643 (Dec. 26, 2012) (in chambers). Justice Sotomayor noted that the Supreme Court has yet to

address similar RFRA or free exercise of religion 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. *Id.* Justice Sotomayor recognized that lower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims and that no court has issued a final decision granting permanent relief with respect to such claims. *Id.* While the applicants allege irreparable harm if they are forced to choose between complying with the contraception-coverage requirement and paying significant fines, they cannot show that an injunction is necessary or appropriate to aid in the Supreme Court's jurisdiction. *Id.*

The Sixth Circuit has addressed a motion for an injunction pending an appeal of the plaintiffs' motion for preliminary injunction which was denied by the district court in the Western District of Michigan. *Autocam Corp. v. Sebelius,* Case No. 12-2673 (Dec. 28, 2012) (Moore, Rogers and Griffin). The panel noted Justice Sotomayor's decision addressed above. Although the panel wrote that the divergence of opinion by the district courts establishes the possibility of success on the merits, in light of the lower court's reasoned opinion and the Supreme Court's recent denial of an injunction pending appeal, the panel concluded that the plaintiffs have not demonstrated more than a possibility of relief. *Id.* at 2. The panel further stated that purely monetary damages, in this case the penalty the corporate entity may have to pay, do not warrant an injunction. *Id.* at 3. Also, if the penalties are codified as a tax, which the district court

so noted, then taxes cannot be subject to a preliminary or permanent enjoinment. *Id.; see Autocam Corp. v. Sebelius,* 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012)(Jonker).

As stated by Justice Sotomayor and the Sixth Circuit, there are divergent opinions as to whether preliminary injunction should be granted pending a hearing on the merits before the district court on the Mandate issue based on a claim under the RFRA. In light of the above and that the initial issue of whether a corporate entity and its shareholder do not have such an established right under the RFRA, Plaintiffs in this case have not carried their burden to show that they are likely to succeed on the merits.

3. First Amendment Free Exercise Clause

Plaintiffs assert that the HHS Mandate violates the Free Exercise Clause of the First Amendment to the United States Constitution.

The Free Exercise Clause is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. *Sch. Dist. of Abington Twp. v. Schempp,* 377 U.S. 203, 223 (1963). Religious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution. Courts have held that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the "purely personal" rights and, as such, is unavailable to a secular, for-profit corporation. *See, Conestoga Wood,* 2013 WL 140110 at * 7. An incorporation's basic purpose is to create a legal entity,

with legal rights, obligations, powers, and privileges different from those of natural individuals who created it, who own it, or whom it employs. *Id.* at *8, citing *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 163 (2001). The separation between a corporation and its owners means the corporation is not the alter ego of its owners for purposes of religious belief and exercise. *Conestoga Wood,* 2013 WL at *8.

For the reasons set forth above under the RFRA analysis and the law cited regarding corporate entities, Eden Foods has not carried its burden to show that it will likely succeed on the merits that it is able to proceed under the Free Exercise Clause of the First Amendment.

Regarding the individual Plaintiff Potter, as sole shareholder of Eden Foods, the Court is not persuaded at this time that he has demonstrated that the Mandate violates the Free Exercise Clause based on his argument that the Mandate is not neutral nor generally applicable.

The protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993). Where a law is found to violate the Free Exercise Clause, it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. *Id.* at 533. The Free Exercise Clause is not violated by a "valid and neutral law of general applicability on the ground that the law proscribes conduct that a plaintiff's religion prescribes. *Employment Div., Dep't of Human Res. of Or. v. Smith,*

494 U.S. 872, 879 (1990). A neutral law of general applicability need only be "rationally related to a legitimate government objective" to be upheld. *Combs v. Homer-Ctr. Sch. Dist.,* 540 F.3d 231, 243 (3d Cir. 2008). Courts have held that the Women's Preventive Healthcare Regulations are not specifically targeted at conduct motivated by religious belief. *O'Brien v. U.S Dep't of Health & Human Services,* 2012 WL 4481208, at *8 (E.D. Mo. Sept. 28, 2012). Even though exemptions were made for religious employees, this does not indicate that the regulations seek to burden religion but that the government made efforts to accommodate religious beliefs. *Id.* The purpose of the Women's Preventive Healthcare Regulations is not to target religion, but instead to promote public health and gender equality. *Id.* at *7; *Hobby Lobby,* 870 F.Supp.2d at 1289-90. Since courts have held that the regulations at issue do not offend the Free Exercise Clause, the individual Plaintiff Potter has not carried his burden to show that he will likely succeed on the merits of his Free Exercise Clause claim.

The individual Plaintiff Potter has not shown anything new as to the Court's previous analysis on his Free Exercise claim. For the reasons set forth above in the RFRA analysis and the law cited in this section, individual Potter has not met his burden to show that he will likely succeed on the merits.

C. Irreparable Injury

Because the Court finds Plaintiffs have not carried their burden as to the likelihood of success on the merits factor, this Court need not address the remaining factors. Even if Plaintiffs could meet the likelihood of success factor, Plaintiffs harm is

monetary. As noted above, the Sixth Circuit has found that purely monetary damages do not warrant an injunction. *Autocam,* Case No. 12-2673 at 3. In addition, if the penalties are codified as a tax, which the district court so noted, then taxes cannot be subject to preliminary or permanent enjoinment. *Id.; see Autocam Corp. v. Sebelius,* 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012)(Jonker). It is well settled that a plaintiff's harm is not irreparable if it is fully compensable by money damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992); *Overstreet v. Lexington-Fayette Urban County Government,* 305 F.3d 566, 579 (6th Cir. 2002).

D. Harm to Others and Public Interest

Because Plaintiff is unable to meet the likelihood of success on the merits and irreparable injury factors, the two most important factors, these two other factors need not be addressed. However, based on both parties' briefs and the *amici* brief, these two remaining factors do not weigh in favor of any party. There is public interest in being able to exercise one's religious belief under the RFRA and the First Amendment, but also in providing healthcare options to all.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Motion for Preliminary Injunction **(Doc. No. 10)** is DENIED.

IT IS FURTHER ORDERED that the Motion for Leave to File *Amicus Curiae* Brief **(Doc. No. 13)** is GRANTED.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: May 21, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on May 21, 2013, by electronic and/or ordinary mail.

S/LaShawn R. Saulsberry
Case Manager

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

[Filed March 20, 2013]

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

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.

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COMPLAINT

Now come Plaintiffs Eden Foods, Inc. (hereinafter "Eden Foods") and Michael Potter (collectively "Plaintiffs"), by and through undersigned counsel, and bring this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof state the following upon information and belief:

NATURE OF THE ACTION

1. This is a case about religious freedom. Thomas Jefferson, a Founding Father of our country, principal author of the Declaration of Independence, and our third president, when describing the construct of our Constitution proclaimed, "No provision in our Constitution ought to be dearer to man than *that which protects the rights of conscience* against the enterprises of the civil authority." Letter from Thomas Jefferson, United States Office of the President, to the Soc'y of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809) *cited in People v. Dejonge*, 442 Mich. 266, 278 (1993) (emphasis added).

2. This is a challenge to regulations ostensibly issued under the "Patient Protection and Affordable

Care Act" (Pub. L. 111-148, March 23, 2010, 124 Stat. 119) and the "Health Care and Education Reconciliation Act" (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively known and hereinafter referred to as the "Affordable Care Act") that force individuals to violate their deepest held religious beliefs.

3. The Affordable Care Act, through a Mandate from the United States Department of Health and Human Services, attacks and desecrates a foremost tenet of the Catholic Church, as stated by Pope Paul VI in His 1968 encyclical *Humanae Vitae*, that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception, abortion, and abortifacients—is immoral and unnatural.

4. One of the provisions of the Affordable Care Act mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" and directs the Secretary of the United States Department of Health and Human Services to determine what would constitute "preventative care" under the mandate. 42 U.S.C § 300gg–13(a)(4).

5. Without notice of rulemaking or opportunity for public comment, the United States Department of Health and Human Services, the United States Department of Labor, and the United States Department of Treasury adopted the Institute of

Medicine ("IOM") recommendations in full and promulgated an interim final rule ("the Mandate"), which requires that all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" provide all FDA-approved contraceptive methods and procedures. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

6. The Mandate requires all insurance issuers (e.g. Blue Cross/ Blue Shield of Michigan) to provide contraception, abortion, and abortifacients in all of its insurance plans, group and individual.

7. Health Resources and Services Administration also issued guidelines adopting the IOM recommendations. (http://www.hrsa.gov/womensguidelines).

8. Under the IOM guidelines, the Mandate requires *all* insurance issuers to provide not only contraception, but also abortion, because certain drugs and devices such as the "morning-after pill," "Plan B," and "ella" come within the Mandate's and Health Resources and Services Administration's definition of "Food and Drug Administration-approved contraceptive methods" despite their known abortifacient mechanisms of action.

9. The Mandate forces employers and individuals to violate their religious beliefs because it requires employers and individuals to pay for insurance from insurance issuers which fund and directly provide for drugs, devices, and services which violate their deeply held religious beliefs.

10. Since under the Mandate all insurance issuers must provide what the United States

Department of Health and Human Services has deemed "preventive care," employers and individuals are stripped of any choice between insurance issuers or insurance plans to avoid violating their religious beliefs.

11. The United States Department of Health and Human Services in an unprecedented despoiling of religious rights forces religious employers and individuals, who believe that funding and providing for contraception, abortion, and abortifacients is wrong, to participate in acts that violate their beliefs and their conscience—and are forced out of the health insurance market in its entirety in order to comply with their religious beliefs.

12. Plaintiffs seek a Preliminary Injunction and Permanent Injunction, enjoining Defendants from implementing and enforcing provisions of the regulations promulgated under the Affordable Care Act, specifically the Mandate. The Mandate violates Plaintiffs' rights to the free exercise of religion under the First Amendment to the United States Constitution, the Religious Freedom Restoration Act, and the Administrative Procedure Act.

13. Plaintiffs also seek a Declaratory Judgment that the regulations promulgated under the Affordable Care Act, specifically the Mandate, violate Plaintiffs' rights to the free exercise of religion under the First Amendment to the United States Constitution, the Religious Freedom Restoration Act, and the Administrative Procedure Act.

14. The Affordable Care Act's contraception, abortion, and abortifacient mandate violates the rights of Plaintiffs Eden Foods and Michael Potter.

15. Plaintiff Michael Potter is the Chairman, President, and sole shareholder of Plaintiff Eden Foods.

16. Plaintiffs employ 128 full-time employees, are subject to monetary penalties under the Affordable Care Act, and are forced under the Mandate by penalty of heavy fines to conduct business in a manner that violates their religious faith by providing and funding contraceptives and abortifacients, which violates deeply held religious beliefs.

17. Plaintiffs bring this action to vindicate not only their own rights, but also to protect the rights of all Americans who care about our Constitutional guarantee of free exercise of religion.

JURISDICTION AND VENUE

18. This action in which the United States is a defendant arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1346.

19. Plaintiffs' claims for declaratory and preliminary and permanent injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, by 42 U.S.C. § 2000bb-1, and by the general legal and equitable powers of this Court.

20. Venue is proper under 28 U.S.C. § 1391(e) because this is the judicial district in which Plaintiffs are located.

PLAINTIFFS

21. Plaintiff Eden Foods is incorporated under the laws of the State of Michigan.

22. Plaintiff Eden Foods is registered at 701 Tecumseh Road, Clinton, Michigan 49236.

23. Plaintiff Eden Foods employs 128 full-time employees.

24. Plaintiff Eden Foods is subject to the Mandate.

25. Plaintiff Michael Potter is the Chairman, President, and sole shareholder of Plaintiff Eden Foods. Plaintiff Michael Potter is an individual and a citizen of the State of Michigan and the United States.

26. Plaintiff Michael Potter is an original founder of Plaintiff Eden Foods.

27. Plaintiff Eden Foods is Plaintiff Michael Potter's livelihood and life. Plaintiff Michael Potter has devoted and continues to devote countless hours to Plaintiffs Eden Foods' success and advancement.

28. Plaintiff Michael Potter was instrumental in starting Plaintiff Eden Foods in Ann Arbor, Michigan in the late 1960s.

29. Plaintiff Eden Foods began as Eden co-op.

30. In the late 1960s, natural and organic foods were not common, so members of the co-op actually traveled rural roads, knocking on doors for farmers to grow food using organic methods.

31. The Eden co-op grew into a natural food store offering whole grains, beans, soyfoods, sea vegetables, miso, cereals, vegetable oils, seed and nut butters, and the like. Eden co-op expanded with the addition of a cafeteria, bakery, and books. The expansion became known as the Eden Deli. It was one of very few places in the United States where one could get natural, organic, and macrobiotic food.

32. Soon health food stores called asking to carry Eden's foods, and Plaintiff Eden Foods began to take shape.

33. In 1972, Plaintiff Eden Foods opened its first warehouse, solidifying Plaintiff Eden Foods as an important natural food source for the United States and Canada.

34. Plaintiff Eden Foods is a natural food company which strives to provide only the finest food from known and trusted growers and handlers.

35. Plaintiff Eden Foods is the oldest natural and organic food company in North America and the largest independent manufacturer of dry grocery organic foods.

36. Plaintiff Eden Foods is deeply rooted in Michigan outside of Ann Arbor, and manages grower relations, manufacturing, trucking, quality control, customer and retailer services, marketing, import/export, accounting, databases and websites from that location.

37. Plaintiff Eden Foods is centered on macrobiotics—eating a diet of whole grain and seasonal local plant foods that are not nutrient depleted and *without toxic chemical adulteration*.

38. Plaintiff Eden Foods strives to maintain integrity and transparency in all they do and obtains Superior ratings from AIB International, their highest rating for food safety and sanitation from the most prestigious third-party certifier in North America.

39. Plaintiff Eden Foods' design, construction, and operation of their warehouse reflect their commitment to sustainable growth and follow "LEED" (Leadership in Energy and Environmental Design) principles. Plaintiff Eden Foods in building their most recent warehouse utilized 80% recycled steel forged in the area. Plaintiff Eden Foods uses energy efficient lights and insulation, preserves native flora, and is good-neighbor landscaped.

40. Plaintiff Eden Foods tracks the environmental impact of its food upstream with suppliers, through company operations, and downstream monitoring all its social impacts. Energy consumption and waste are tracked using custom in-house tools.

41. In 2009, Plaintiff Eden Foods was selected as the best food company in the world, and the third best company overall by The Better World Shopping Guide.

42. The Better World Shopping Guide acknowledged Plaintiff Eden Foods' outstanding record in social and environmental responsibility. The company earned an A+ and an A rating in ten food categories.

43. Plaintiff Eden Foods only provides foods that are Non-GMO and third party certified organically grown, handled, and processed. They are locally-grown focused and maintain direct relations with, and

payment directly to, family farms, many of which rival or exceed their commercial counterparts in size and productivity.

44. Plaintiff Eden Foods' products, methods, and accomplishments are described by critics as: tasteful, nutritious, wholesome, principled, unrivaled, nurturing, pure.

45. Plaintiff Eden Foods has won several awards including: *Grocery Headquarters* Trailblazer Award Best of the Best in Wellness, January 2013; *Men's Health* Best Foods for Men Black Bean & Quinoa Chili, Refried Pinto Beans, Chickpeas, November 2012; *Whole Living* Green Giant Visionary Award, October 2012; *Women's Health* Best Food for Women Black Bean & Quinoa Chili, September 2012; *Clean Eating* "Favorite Fiber Booster" Foodie Award Black Beans, July 2012; *Vegetarian Times* Readers' Faves Foodie Award Soba, November 2011; GPI Friend of Glass Packaging Award, November 2011; *Men's Health* Best Foods for Men Black Beans & Spicy Refried Black Beans, November 2011; NASFT Best of the Best Organic Concord Grape Juice, May 2011; *Grocery Headquarters* Trailblazer Award Edensoy, January 2011; *Women's Health* Best Food for Women 100% Whole Grain Udon, November 2010; *Men's Health* Best Foods for Men Beans & Pumpkin Seeds, November 2010; *Vegetarian Times* Readers' Faves Foodie Awards Red Quinoa & Apple Cherry Butter, September 2010; *Men's Health* Best Organic Food Spicy Pumpkin Seeds, April 2010; Responsible Packaging Award, April 2010; Best Practices by a Big Food Brand, April 2010; *Grocery Headquarters* Trailblazer Award Chili, January 2010; Michigan Trucking Association, Fleet Safety Award

1987 to 2009; *Women's Health* Top 125 Best Packaged Foods for Women Quinoa & Wild Berry Mix, September 2009; Vegetarian Times Best Go-To Grain Wild Rice, September 2009; Cornucopia Institute, Organic Score Card Five Bean Rating, June 2009; The Better World Shopping Guide #1 Food Company in the World, February 2009; Nutrition Action Healthletter Thumbs Up, Unseasoned Beans, February 2009; *Grocery Headquarters* Trailblazer Award Red Quinoa, January 2009; San Francisco Chronicle Taster's Choice Hall of Fame Apple Sauce, April 2008; San Francisco Chronicle Taster's Choice Tamari, May 2007; *Men's Health* 125 Best Foods for Men Refried Kidney Beans, June 2006; Michigan Organic Foods & Farm Alliance community Service Award May 2006; Nutrition Action Healthletter Best Bite Refried Beans, September 2004; *Men's Health* 125 Best Foods for Men Refried Kidney Beans, June 2004; Alive Magazine Award of Excellence Apple Juice, November 2002; Khalsa International Industries and Trade, Socially Responsible Business Award, October 2001; Cook's Illustrated Highly Recommended Shoyu, January 2000; Prevention Magazine All Around Best Buy Olive Oil, September 1999.

46. Plaintiff Eden Foods offers certified kosher and pareve foods.

47. The production of Plaintiff Eden Foods' kosher foods are Rabbinically supervised. The Rabbi visits on a regular basis. He inspects the machines prior to production and verifies that every step required by Jewish Law has been observed and fulfilled. Ninety-one percent of all foods produced by

Plaintiff Eden Foods are kosher and marked with a Circle-K on the package.

48. The term "pareve" indicates all ingredients, food contact surfaces, processing, and storage equipment are certified meat and dairy free.

49. Plaintiffs serve their customers with honesty and integrity by providing the best, healthiest, and most natural foods and products available.

50. Plaintiff Michael Potter has also devoted his life to the Catholic faith.

51. Plaintiff Michael Potter is Catholic and follows the teachings of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church.

52. Plaintiff Michael Potter is guided by his religious beliefs.

53. Plaintiff Michael Potter holds religious beliefs that prevent him from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients.

54. Plaintiff Michael Potter strives to follow the tenets of the Catholic faith in his business practices.

55. Plaintiff Michael Potter is responsible for setting policies governing the conduct of all phases of business of Plaintiff Eden Foods.

56. Prior to the issuance of the Mandate, Plaintiffs engineered an insurance policy with Blue Cross/Blue Shield of Michigan which specifically excluded contraception and abortifacients, and exempts

Plaintiffs from providing, paying, contributing, or supporting contraception and abortion for others.

57. Plaintiffs specifically excluded what Blue Cross/Blue Shield of Michigan historically categorized as "Lifestyle Drugs"—a category which encompassed contraceptives and other drugs such as Viagra.

58. Plaintiffs obtained these exclusions due to their deeply held religious beliefs.

59. Plaintiff Eden Foods has never offered insurance which included coverage for contraception and abortifacients.

60. Plaintiffs' employees receive insurance under this engineered insurance policy with Blue Cross/Blue Shield of Michigan which specifically excludes contraception and abortifacients, and exempts Plaintiffs from providing, paying, contributing, or supporting contraception and abortifacients for others.

61. Plaintiff Michael Potter and Plaintiff Eden Foods ensured that their insurance policy contained these exclusions to reflect their deeply held religious beliefs.

62. Based on the teachings of the Catholic Church, and their deeply held religious beliefs, Plaintiffs do not believe that contraception or abortifacients are properly understood to constitute medicine, health care, or a means of providing for the well being of persons. Indeed, Plaintiffs believe these procedures almost always involve immoral and unnatural practices.

DEFENDANTS

63. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing the Mandate.

64. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). In this capacity, she has responsibility for the operation and management of HHS. Defendant Sebelius is sued in her official capacity only.

65. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the regulation which is the subject of this lawsuit.

66. Defendant Seth D. Harris is the Acting Secretary of the United States Department of Labor. In this capacity, he holds responsibility for the operation and management of the United States Department of Labor. Defendant Harris is sued in his official capacity only.

67. Defendant United States Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the regulation which is the subject of this lawsuit.

68. Defendant Jack Lew is the Secretary of the United States Department of the Treasury. In this capacity, he holds responsibility for the operation and management of the United States Department of

Treasury. Defendant Lew is sued in his official capacity only.

69. Defendant United States Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the regulation which is the subject of this lawsuit.

FACTUAL ALLEGATIONS

Plaintiffs' Religious Beliefs

70. Plaintiffs hold and actively profess religious beliefs in accordance with the traditional Christian teachings on the sanctity of life. Plaintiffs believe that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. Plaintiffs therefore believe that abortion ends a human life and is a sin.

71. Plaintiffs' religious beliefs also include traditional Christian teaching on the nature and purpose of human sexuality. In particular, Plaintiffs believe, in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, that human sexuality has two primary purposes: to "most closely unit[e] husband and wife" and "for the generation of new lives." Accordingly, Plaintiffs believe and actively profess, with the Catholic Church, that "[t]o use this divine gift destroying, even if only partially, its meaning and its purpose is to contradict the nature both of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His Will." Therefore, Plaintiffs believe and teach that "any action which either before, at the moment of, or after

sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception, abortifacients, and abortion—is immoral and unnatural.

72. Furthermore, Plaintiffs subscribe to authoritative Catholic teaching about the proper nature and aims of health care and medical treatment. For instance, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life."

73. Several leaders within the Catholic Church have publicly spoken out about how the Mandate is a direct violation of Catholic Faith.

74. Cardinal Timothy Dolan, Archbishop of New York and President of the United States Conference of Catholic Bishops wrote, "Since January 20 [2012], when the final, restrictive HHS Rule was first announced, we have become certain of two things: *religious freedom* is under attack, and we will not cease our struggle to protect it. We recall the words of our Holy Father Benedict XVI to our brother bishops on their recent *ad limina* visit: 'Of particular concern are certain attempts being made to limit that most cherished of American freedoms, the freedom of religion.' . . . We have made it clear in no uncertain terms to the government that we are not at peace with its invasive attempt to curtail the *religious freedom* we cherish as Catholics and Americans." (http://www.usccb.org.,last visited March 2, 2012).

75. Archbishop Charles J. Chaput, the Archbishop of Philadelphia, has expressed that the Affordable Care Act and the Mandate seek "to coerce Catholic employers, private and corporate, to violate their religious convictions . . . [t]he HHS mandate, including its latest variant, is belligerent, unnecessary, and deeply offensive to the content of Catholic belief . . . The HHS mandate needs to be rescinded. In reality, no similarly aggressive attack on religious freedom in our country has occurred in recent memory . . . [t]he HHS mandate is bad law; and not merely bad, but dangerous and insulting. It needs to be withdrawn—now." (http://the american-catholic.com/2012/02/14/archbishop-chaput-hhs-mandate-dangerous-and-insulting/, last visited Feb. 14, 2012).

Plaintiffs Eden Foods and Michael Potter

76. Plaintiff Eden Foods is a for-profit, natural foods company.

77. Plaintiff Michael Potter cannot compartmentalize his conscience or his religious beliefs from his daily work and actions as the Chairman, President, and sole shareholder of Plaintiff Eden Foods. Therefore, Plaintiff Michael Potter and Plaintiff Eden Foods share a common mission of conducting their business operations with integrity and consistent with the teachings, mission, and values of the Catholic Church.

78. Plaintiffs Eden Foods and Michael Potter purchase and provide group insurance through Blue Cross/Blue Shield of Michigan and provide this insurance to their employees.

79. Plaintiffs Eden Foods and Michael Potter strive to provide their employees with employee health coverage superior to coverage generally available in the Michigan market in order to be a competitive employer.

80. Plaintiffs Eden Foods and Michael Potter specifically designed their health insurance plan to exclude contraception and abortifacients in line with the religious beliefs of the Catholic faith.

81. Moreover, as a part of his religious commitment to the authoritative teachings of the Catholic Church, Plaintiff Michael Potter steadfastly avoids practices that subvert the teaching of the Catholic Church such as providing or funding drugs, devices, services or procedures inconsistent with his Catholic faith.

82. Plaintiffs Eden Foods and Michael Potter cannot provide, fund, or participate in health care insurance which covers artificial contraception or abortifacients, or related education and counseling, without violating their deeply held religious beliefs.

83. Plaintiffs Eden Foods and Michael Potter cannot provide information or guidance to their employees regarding artificial contraception, abortifacients or related education and counseling, without violating their deeply held religious beliefs.

84. With full knowledge of these aforementioned beliefs, Defendants issued an administrative rule ("the Mandate") that runs roughshod over Plaintiffs' religious beliefs, and the beliefs of millions of other Americans.

85. The Mandate not only forces Plaintiffs to finance contraception, abortifacients, and related education and counseling as health care, but also subverts the expression of Plaintiffs' religious beliefs, and the beliefs of millions of other Americans, by forcing Plaintiffs to fund, promote, and assist others to acquire services which Plaintiffs believe involve almost always immoral and unnatural practices.

86. The Mandate unconstitutionally coerces Plaintiffs to violate their deeply-held religious beliefs under threat of directly violating their consciences, in addition to any imposed fines and penalties. Having to pay a fine to the taxing authorities or being entirely forced out of the insurance market in order to ensure the privilege of practicing one's religion substantially burdens Plaintiffs' religious liberty under the First Amendment.

87. The Mandate strips the Plaintiffs of any choice to select an insurance plan that does not cover and finance contraception and abortifacients, as the Mandate requires that all insurance issuers provide this coverage.

88. Plaintiffs' plan is not considered "grandfathered" and is subject to the provisions of the Mandate.

89. Due to the Mandate, Plaintiffs are no longer allowed to exclude contraception and abortifacients from their insurance plan—and are forced to provide and pay for these services which violate their religious beliefs.

90. Plaintiffs, since Plaintiff Eden Foods' inception, have excluded objectionable coverage such as

providing contraception and abortifacients from their insurance plan.

91. On February 21, 2013 when presented with a contract by its insurance issuer Blue Cross/Blue Shield of Michigan to change Plaintiffs' group insurance plan to include the objectionable contraception and abortifacients coverage, Plaintiffs objected and refused to sign the contract.

92. Without Plaintiffs' consent or authority, Blue Cross/Blue Shield of Michigan in compliance with the Mandate changed Plaintiffs' plan to include the objectionable contraception and abortifacients coverage.

93. Plaintiffs, as well as the employees and agents of Plaintiff Eden Foods, learned that objectionable contraception and abortifacients coverage had been recently added to Plaintiffs' group insurance plan *without their consent or authority* on March 15, 2013.

94. Plaintiffs wish to conduct their business in a manner that does not violate the principles of their religious faith.

95. Complying with the Mandate requires a direct violation of the Plaintiffs' religious beliefs because it requires Plaintiffs to pay for and assist others in paying for or obtaining not only contraception, but also abortion, because certain drugs and devices such as the "morning-after pill," "Plan B," and "ella" come within the Mandate's and Health Resources and Services Administration's definition of "Food and Drug Administration-approved contraceptive

methods" despite their known abortifacient mechanisms of action.

96. Defendants' refusal to accommodate the conscience of the Plaintiffs, and of other Americans who share the Plaintiffs' religious views, is highly selective. Numerous exemptions exist in the Affordable Care Act which appear arbitrary and were granted to employers who purchase group insurance. This evidences that Defendants do not mandate that all insurance plans need to cover "preventative services" (e.g. the thousands of waivers from the Affordable Care Act issued by Defendants for group insurance based upon the commercial convenience of large corporations, the age of the insurance plan, or the size of the employer).

97. Despite granting waivers upon a seemingly arbitrary basis, no exemption exists for an employer or individual whose religious conscience instructs him that certain mandated services are unethical, immoral, and volatile to one's religious beliefs. Defendants' Mandate fails to give the same level of weight or accommodation to the exercise of one's fundamental First Amendment freedoms that it assigns to the yearly earnings of a corporation.

98. The Defendants' actions violate Plaintiffs' right to freedom of religion, as secured by the First Amendment to the United States Constitution and civil rights statutes, including the Religious Freedom Restoration Act (RFRA).

99. Furthermore, the Mandate is also illegal because it was imposed by Defendants without prior notice or sufficient time for public comment, and

otherwise violates the Administrative Procedure Act, 5 U.S.C. § 553.

100. Had Plaintiffs' religious beliefs, or the beliefs of the millions of other Americans who share Plaintiffs' religious beliefs been obscure or unknown, the Defendants' actions might have been an accident. But because the Defendants acted with full knowledge of those beliefs, and because they arbitrarily exempt some plans for a wide range of reasons other than religious conviction, the Mandate can be interpreted as nothing other than a deliberate attack by the Defendants on the Catholic Church, the religious beliefs held by Plaintiffs and the similar religious beliefs held by millions of other Americans. The Defendants have, in sum, intentionally used government power to force individuals to believe in, support, and endorse the mandated services manifestly contrary to their own religious convictions, and then to act on that coerced belief, support, or endorsement. Plaintiffs seek declaratory and injunctive relief to protect against this attack.

The Affordable Care Act

101. In March 2010, Congress passed, and President Obama signed into law, the "Patient Protection and Affordable Care Act" (Pub. L. 111-148, March 23, 2010, 124 Stat. 119) and the "Health Care and Education Reconciliation Act" (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (referred to in this complaint as the "Affordable Care Act").

102. The Affordable Care Act regulates the national health insurance market by directly

regulating "group health plans" and "health insurance issuers."

103. The Affordable Care Act does not apply equally to all insurers.

104. The Affordable Care Act does not apply equally to all individuals.

105. The Affordable Care Act requires employers with more than 50 full-time employees or full-time employee equivalents to provide federal government-approved health insurance or pay a substantial per-employee fine. (26 U.S.C. § 4980H).

106. Plaintiff Eden Foods employs over 50 full-time employees or full-time equivalents.

107. Plaintiff Eden Foods constitutes a "single employer" for purposes of the Affordable Care Act as defined at 42 U.S.C. § 18024(b)(4)(A).

108. Plaintiff Eden Foods, as well as Plaintiff Michael Potter as the Chairman, President, and sole shareholder of Eden Foods must provide federal government-approved health insurance under the Affordable Care Act or pay substantial per-employee fines.

109. The Affordable Care Act purports to not apply to the failure to offer employer-sponsored insurance to employers with fewer than 50 employees, not counting seasonal workers. 26 U.S.C. § 4980H(c)(2)(A).

110. However, even employees with fewer than 50 employees purchase insurance from health insurance issuers, who are subject to the Affordable Care Act. 42 USC § 300GG-13 (a)(1),(4).

111. Certain provisions of the Affordable Care Act do not apply equally to members of certain religious groups. *See, e.g.*, 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(B)(ii) (individual mandate does not apply to members of "health care sharing ministry" that meets certain criteria).

112. Plaintiffs do not qualify for an individual exemption under 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii) as Plaintiffs do not object to acceptance of public or private insurance funds in their totality and currently enjoy health insurance benefits that exclude contraceptives and abortifacients.

113. The Affordable Care Act's preventive care requirements do not apply to employers who provide so-called "grandfathered" health care plans.

114. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.

115. Plaintiffs' current insurance plans do not qualify as "grandfathered" health care plans, and are considered "non-grandfathered."

116. Furthermore, Plaintiffs do not qualify for the "religious employer" exemption contained in 45 CFR § 147.130 (a)(1)(A) and (B).

117. There have been changes made to Plaintiffs' plan after 2010, and participants have never been notified of a "grandfathered" status.

118. Furthermore, Plaintiffs are not eligible for "grandfathered" status under the Affordable Care Act and will be subject to the requirements of the Affordable Care Act and the Health and Human Services Mandate because: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Plaintiffs do not take the position that its health care plan is a grandfathered plan and thus does not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a) (2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140.

119. Since the Plaintiffs do not qualify for the "religious employer" exemption, they are not permitted to take advantage of the "temporary safe-harbor" as set forth by the Defendants at 77 Fed. Register 8725 (Feb. 15, 2012).

120. Plaintiffs are thus subjected to the Mandate now and are confronted with choosing between complying with its requirements in violation of their religious beliefs or violating federal law.

121. Plaintiffs Eden Foods and Michael Potter must choose between complying with the requirements of the Affordable Care Act in violation of their religious beliefs or paying ruinous fines that would have a crippling impact on their ability to survive economically.

122. Plaintiffs Eden Foods and Michael Potter must provide federal government—approved health insurance under the Affordable Care Act or pay substantial per-employee fines.

123. Under 26 U.S.C. § 4980H since Plaintiffs have over fifty full-time employees, if Plaintiffs do not meet the "minimum essential coverage" requirements (i.e. do not provide contraception, abortion, and abortifacients) Plaintiffs could owe $2,000 per year for each full-time employee excluding the first thirty full-time employees. The tax penalty assessable payment calculation would generally be: (128 employees - 30) x $2,000 per year = $196,000 per year tax penalty.

124. Under the United States Internal Revenue Code, 26 U.S.C. § 4980D(a), there is a tax imposed on any failure of a group plan to meet the requirements of Chapter 100 (relating to group plan requirements). Under 26 U.S.C. § 4980D(b), the amount of the tax is $100 for each day in the non-compliance period with respect to each individual to whom such failure relates. This tax penalty would generally be: 128 employees x 365 days per year x $100 each day = $4,672,000 per year tax.

125. Plaintiffs are collectively confronted with complying with the requirements of the Affordable Care Act in violation of their religious beliefs or removing themselves and employees from the health insurance market in its entirety—endangering the health and economic stability of their employees and forcing Plaintiff Eden Foods to be non-competitive as employers in a market where other, non-Catholic employers will be able to provide insurance to their

employees under the Affordable Care Act without violating their religious beliefs.

126. The Affordable Care Act is not generally applicable because it provides for numerous exemptions from its rules.

127. The Affordable Care Act is not neutral because some groups, both secular and religious, enjoy exemptions from the law, while certain religious groups do not. Some groups, both secular and religious, have received waivers from complying with the provisions of the Affordable Care Act, while others—such as the Plaintiffs—have not.

128. The Affordable Care Act creates a system of individualized exemptions.

129. The United States Department of Health and Human Services has the authority under the Affordable Care Act to grant compliance waivers ("HHS waivers") to employers and other health insurance plan issuers.

130. HHS waivers release employers and other plan issuers from complying with the provisions of the Affordable Care Act.

131. HHS decides whether to grant waivers based on individualized waiver requests from particular employers and other health insurance plan issuers.

132. Upon information and belief, more than a thousand HHS waivers have been granted.

The "Preventive Care" Mandate

133. A provision of the Affordable Care Act mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" and directs the Secretary of United States Department of Health and Human Services to determine what would constitute "preventive care" under the mandate. 42 U.S.C § 300gg–13(a)(4).

134. On July 19, 2010, HHS, along with the United States Department of Treasury and the United States Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010). The interim final rule required providers of group health insurance to cover preventive care for women as provided in guidelines to be published by the Health Resources and Services Administration at a later date. 75 Fed. Reg. 41759 (2010).

135. On February 15, 2012, the United States Department of Health and Human Services promulgated a mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012 (hereafter, "the Mandate"). *See* 45 CFR § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012),

adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

136. The Mandate was enacted pursuant to statutory authority under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (ACA). 77 Fed. Reg. 31,8725 ("Affordable Care Act").

137. In its ruling, HHS included all FDA-approved contraceptives under the banner of preventive services, including contraception, abortion, and abortifacients such as the "morning-after pill," "Plan B," and "ella," a close cousin of the abortion pill RU-486. (http://www.hrsa.gov/womensguidelines).

138. The Mandate's reach seeks to control the decisions of employers, individuals and also the decisions of *all* insurance issuers (i.e. "Blue Cross/Blue Shield of Michigan," etc.). 42 USC § 300gg-13 (a)(1),(4). ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force; . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.").

139. *All* insurance issuers are mandated to include contraception, abortion, and abortifacients such as the "morning-after pill," "Plan B," and "ella" in *all* of its group *and* individual plans, not specifically exempted, beginning as of August 1, 2012 and effective on the anniversary of the employer's plan year.

140. Individuals and employers, regardless of the number of employees they employ, will eventually be forced to select an insurance plan which includes what HHS deemed "preventive care."

141. All individuals and employers will be stripped of their choice not to pay for the "preventive care," regardless of whether paying for such "services" violates one's conscience or deeply held religious beliefs.

142. Health insurance issuers include insurance companies such as Blue Cross/Blue Shield of Michigan, which is the insurance issuer used by Plaintiffs.

143. The Mandate reaches even further than the Affordable Care Act to eliminate all employers and individuals from selecting a health insurance plan in which the insurance issuers do not automatically provide contraception and abortifacients.

144. Prior to promulgating the Mandate, HHS accepted public comments to the 2010 interim final regulations from July 19, 2010 to September 17, 2010. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for certain kinds of services, including contraception and abortifacients.

145. HHS directed a private health policy organization, the Institute of Medicine ("IOM"), to suggest a list of recommended guidelines describing which drugs, procedures, and services should be covered by all health plans as preventative care for women. (http://www.hrsa.gov/womensguidelines, last visited March 6, 2013).

146. In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), John Santelli, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America and Sara Rosenbaum. (http://www.nap.edu/openbook.php?record_id=13181&PAGE=217, last visited March 6, 2013).

147. No religious groups or other groups that oppose government-mandated coverage of contraception, abortifacients, and related education and counseling were among the invited presenters.

148. One year after the first interim final rule was published, on July 19, 2011, the IOM published its recommendations. It recommended that the preventative services include "All Food and Drug Administration approved contraceptive methods." (Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps (July 19, 2011)).

149. Preventative services therefore include FDA-approved contraceptive methods such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the

"morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures.

150. Plan B and "ella" can prevent the implantation of a human embryo in the wall of the uterus and can cause the death of an embryo. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus or to cause the death of an embryo each constitute an "abortion" as that term is used in federal law and Catholic teaching. Consequently, Plan B and "ella" are abortifacients.

151. Thirteen days later, on August 1, 2011, without notice of rulemaking or opportunity for public comment, HHS, the United States Department of Labor, and the United States Department of Treasury adopted the IOM recommendations in full and promulgated an interim final rule ("the Mandate"), which requires that all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" provide all FDA-approved contraceptive methods and procedures. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. Health Resources and Services Administration issued guidelines adopting the IOM recommendations. (http://www.hrsa.gov/womensguidelines, last visited March 6, 2013).

152. The Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity.

153. The Mandate went into effect immediately as an "interim final rule."

154. HHS did not take into account the concerns of religious organizations in the comments submitted before the Mandate was issued.

155. Instead the Mandate was unresponsive to the concerns stated in the comments submitted by religious organizations.

156. When it issued the Mandate, HHS requested comments from the public by September 30th and indicated that comments would be available online.

157. Upon information and belief, over 100,000 comments were submitted against the Mandate.

158. On October 5, 2011, six days after the comment period ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America. She told the assembled crowd that "we are in a war." She did not state whom she and NARAL Pro-Choice America were warring against.

159. During a Congressional hearing on April 26, 2012, Defendant Sebelius admitted that she is totally unfamiliar with the United States Supreme Court religious freedom cases.

160. Defendant Sebelius showed little concern for the constitutional issues involved in promulgating the Mandate. At the aforementioned congressional hearing, she admitted that prior to issuing the Mandate she did not review any written materials or any sort of legal memo from her general counsel discussing the effects of the Mandate on religious freedom.

161. The Mandate fails to take into account the statutory and constitutional conscience rights of

religious business owners and for profit companies that exercise business practices in compliance with certain faith practices, such as Plaintiffs Michael Potter and Eden Foods, a subject of comment.

162. The Mandate requires that Plaintiffs assist, provide, or fund coverage for contraception, abortifacients, and related education and counseling against its conscience in a manner that is contrary to law.

163. The Mandate constitutes government-imposed pressure and coercion on Plaintiffs to change or violate their religious beliefs.

164. The Mandate exposes Plaintiff Eden Foods and Plaintiff Michael Potter, as individuals and as employers or companies with over 50 full-time employees, to substantial fines for refusal to change or violate their religious beliefs.

165. The Mandate imposes a burden on Plaintiffs' employee recruitment efforts by creating uncertainty as to whether Plaintiffs will be able to offer health insurance.

166. The Mandate places Plaintiffs at a competitive disadvantage in their efforts to recruit and retain employees and members.

167. Furthermore as a Christian, his religious beliefs and the principle of stewardship require that Plaintiff Michael Potter care for his employees by providing insurance coverage for them and their families.

168. The Mandate forces Plaintiffs to provide, fund, or approve and assist its employees and members in purchasing contraception and abortifacient drugs in violation of Plaintiffs' religious beliefs that doing so is immoral and unnatural.

169. Plaintiffs have a sincere religious objection to providing coverage for emergency contraceptive drugs such as Plan B and "ella" since they believe those drugs could prevent a human embryo, which they understand to include a fertilized egg before it implants in the uterus, from implanting in the wall of the uterus, causing the death of a person.

170. Plaintiffs consider the prevention by artificial means of the implantation of a human embryo to be an abortion.

171. Plaintiffs believe that Plan B and "ella" can cause the death of the embryo, which is a person.

172. Plan B can prevent the implantation of a human embryo in the wall of the uterus.

173. "Ella" can prevent the implantation of a human embryo in the wall of the uterus.

174. Plan B and "ella" can cause the death of the embryo.

175. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus constitutes an "abortion" as that term is used in federal law.

176. The use of artificial means to cause the death of a human embryo constitutes an "abortion" as that term is used in federal law.

177. The Mandate forces Plaintiffs to provide emergency contraception, including Plan B and "ella," free of charge, regardless of the ability of insured persons to obtain these drugs from other sources.

178. The Mandate forces Plaintiffs to fund education and counseling concerning contraception and abortifacients that directly conflicts with Plaintiffs' religious beliefs and teachings.

179. Plaintiffs could not cease in providing its employees with health insurance coverage without violating their religious duty to provide for the health and well-being of their employees and their families. Additionally, employees would be unable to attain similar coverage in the market as it now exists.

180. The Mandate forces Plaintiffs to choose between violating their religious beliefs, incurring substantial fines, or terminating their employee or individual health insurance coverage.

181. Group health plans and insurance issuers are subject to the Mandate.

182 Without relief and intervention from the Court, Plaintiffs are subject to the Mandate.

183. Plaintiffs have already had to devote significant institutional resources, including both staff time and funds, to determine how to respond to the Mandate. Plaintiffs anticipate continuing to make such expenditures of time and money regarding the Mandate and its effect on Plaintiffs' plan.

The Narrow and Discretionary Religious Exemption

184. The Mandate indicates that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A).

185. The Mandate allows HRSA to grant exemptions for "religious employers" who "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a *nonprofit* organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

186. The Mandate imposes no constraint on HRSA's discretion to grant exemptions to some, all, or none of the organizations meeting the Mandate's definition of "religious employers."

187. HHS stated that it based the exemption on comments on the 2010 interim final rule. 76 Fed. Reg. 46621.

188. There is *no* exemption for a *for-profit* company.

189. Plaintiffs, as confirmed by the unilateral decisions of Plaintiffs' insurance issuer (Blue Cross/Blue Shield of Michigan), are subject to the

Mandate despite the existence of exemptions to the Mandate as none of the exemptions apply to Plaintiffs.

190. On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption. She added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. At the same time, however, Sebelius announced that HHS "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." *See* Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, (http://www.hhs.gov/news/press/2012pres/01/20120120a.html). To date, Defendant HHS has not released any official rule implementing either the one-year extension or the additional forced-speech requirement that applies to either Plaintiff.

191. It is inevitable with the current state of the law that Plaintiffs currently are forced to comply with the Mandate, despite the fact that doing so violates the teachings of the Catholic faith and Plaintiffs' deeply held religious beliefs by directly providing, funding, and/or allowing its members to engage in disseminating information and guidance about where to obtain contraception or abortifacient services.

CLAIMS

COUNT I
Violation of the First Amendment to the United States Constitution Free Exercise Clause

192. Plaintiffs incorporate by reference all preceding paragraphs.

193. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage for contraception, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

194. Neither the Affordable Care Act nor the Mandate is neutral.

195. Neither the Affordable Care Act nor the Mandate is generally applicable.

196. Defendants have created categorical exemptions and individualized exemptions to the Mandate.

197. The Mandate furthers no compelling governmental interest.

198. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

199. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

200. The Mandate chills Plaintiffs' religious exercise.

201. The Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they will no longer be permitted to offer health insurance.

202. The Mandate exposes Plaintiffs to substantial fines for their religious exercise.

203. The Mandate exposes Plaintiffs to monetary and health risks as they will no longer be able to accept health insurance, nor be able to purchase or provide health care insurance without violating their religious beliefs.

204. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

205. The Mandate is not narrowly tailored to any compelling governmental interest.

206. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

207. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT II
Violation of the First Amendment to the United States Constitution
Free Exercise Clause

208. Plaintiffs incorporate by reference all preceding paragraphs.

209. Plaintiffs' sincerely held religious beliefs prohibit them from purchasing or providing coverage

for contraception, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

210. Despite being informed in detail of these beliefs beforehand, Defendants designed the Mandate and the religious exemption to the Mandate in a way that made it impossible for Plaintiffs to comply with their religious beliefs.

211. Defendants promulgated both the Mandate and the religious exemption to the Mandate in order to suppress the religious exercise of Plaintiffs and others.

212. The Mandate and Defendants' threatened enforcement of the Mandate thus violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

213. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT III
Violation of the First Amendment
to the United States Constitution
Free Exercise Clause

214. Plaintiffs incorporate by reference all preceding paragraphs.

215. By design, Defendants imposed the Mandate on some religious organizations or religious individuals but not on others, resulting in discrimination among religions.

216. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

217. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no religious individuals.

218. The Mandate and Defendants' threatened enforcement of the Mandate thus violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment of the united States Constitution.

219. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IV
Violation of the First Amendment
to the United States Constitution
Establishment Clause

220. Plaintiffs incorporate by reference all preceding paragraphs.

221. By design, defendants imposed the Mandate on some religious organizations but not on others, resulting in a selective burden on Plaintiffs.

222. Defendants also imposed the Mandate on some religious individuals and religious organizations but not on others, resulting in a selective burden on Plaintiffs.

223. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to

some, all, or no organizations meeting the definition of "religious employers."

224. The Mandate also vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no individuals.

225. The Mandate and Defendants' threatened enforcement of the Mandate therefore violates Plaintiffs' rights secured to it by the Establishment Clause of the First Amendment to the United States Constitution.

226. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT V
Violation of the First Amendment
to the United States Constitution
Free Exercise Clause

227. Plaintiffs incorporate by reference all preceding paragraphs.

228. By stating that HRSA "may" grant an exemption to certain religious groups, the Mandate vests HRSA with unbridled discretion over which organizations or individuals can have its First Amendment interests accommodated.

229. The Mandate furthermore seems to have completely failed to address the constitutional and statutory implications of the Mandate on for-profit employers such as Plaintiff Eden Foods and Plaintiff Michael Potter. As such, Plaintiff Eden Foods and Plaintiff Michael Potter are subject to the unbridled

discretion of HRSA to determine whether such companies would be exempt or are wholly left without relief from the Mandate.

230. Defendants' actions violate Plaintiffs' right not to be subjected to a system of unbridled discretion when engaging in speech or when engaging in religious exercise, as secured to it by the First Amendment of the United States Constitution.

231. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VI
Violation of the Religious Freedom Restoration Act

232. Plaintiffs incorporate by reference all preceding paragraphs.

233. Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing coverage for contraception, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

234. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

235. The Mandate chills Plaintiffs' religious exercise.

236. The Mandate exposes Plaintiffs to substantial fines for their religious exercise.

237. The Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they will no longer be permitted to offer or purchase health insurance.

238. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

239. The Mandate furthers no compelling governmental interest.

240. The Mandate is not narrowly tailored to any compelling governmental interest.

241. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

242. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to it by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

243. Absent injunctive and declaratory relief against the Defendants, Plaintiffs have been and will continue to be harmed.

COUNT VII
Violation of the Administrative Procedure Act

244. Plaintiffs incorporate by reference all preceding paragraphs.

245. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute "good cause."

246. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by

completing a meaningful "consideration of the relevant matter presented." Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule.

247. Therefore, Defendants have taken agency action not in observance with procedures required by law, and Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

248. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VIII
Violation of the Administrative Procedure Act

249. Plaintiffs incorporate by reference all preceding paragraphs.

250. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the mandate on Plaintiffs and similar organizations, companies, and individuals.

251. Defendants' explanation for its decision not to exempt Plaintiffs and similar companies and religious individuals from the Mandate runs counter to the evidence submitted by religious organizations during the comment period.

252. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rules fail to consider the full extent of their implications and they do not take into consideration the evidence against them.

253. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IX
Violation of the Administrative Procedure Act

254. Plaintiffs incorporate by reference all preceding paragraphs.

255. The Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (September 30, 2008).

256. The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for Defendants United States Department of Labor and United States Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

257. The Mandate requires issuers, employers, and individuals, including Plaintiffs, to provide and purchase coverage of all Federal Drug Administration-approved contraceptives.

258. Some FDA-approved contraceptives cause abortions.

259. As set forth above, the Mandate violates RFRA and the First Amendment.

260. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the Administrative Procedure Act.

261. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT X
Violation of the Administrative Procedure Act

262. Plaintiffs incorporate by reference all preceding paragraphs.

263. The Mandate is contrary to the provisions of the Affordable Care Act.

264. Section 1303(a)(1)(A)(i) of the Affordable Care Act states that "nothing in this title"—i.e., title I of the Act, which includes the provision dealing with "preventive services"— "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."

265. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.

266. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.

267. However, the Mandate requires all issuers, including Plaintiffs and Plaintiffs' insurance issuer Blue Cross/Blue Shield of Michigan, to provide coverage of all Federal Drug Administration-approved contraceptives.

268. Some FDA-approved contraceptives cause abortions.

269. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the Administrative Procedure Act.

270. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that the Court:

a. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the First Amendment to the United States Constitution;

b. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Religious Freedom Restoration Act;

c. Declare that the Mandate was issued in violation of the Administrative Procedure Act;

d. Issue both a preliminary and a permanent injunction prohibiting and enjoining Defendants and insurance issuers from enforcing the Mandate against Plaintiffs and other religious individuals, employers, and companies that object to funding and providing insurance coverage for contraceptives, abortifacients, and related education and counseling;

e. Award Plaintiffs the costs of this action and reasonable attorney's fees; and

f. Award such other and further relief as it deems equitable and just.

Respectfully submitted,

THOMAS MORE LAW CENTER

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

[Filed March 22, 2013]

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

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.

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DECLARATION OF MICHAEL POTTER, Chairman and President of Eden Foods, Inc.

I, Michael Potter, make this declaration pursuant to 28 U.S.C. § 1746 based upon my personal knowledge and, where stated, upon information and belief:

1. I am an adult citizen of the State of Michigan.

2. I am the Chairman and President of Eden Foods, Inc.

3. Eden Foods, Inc. is located at 701 Tecumseh Road, Clinton, Michigan 49236.

Beliefs and History of the Plaintiffs Eden Foods and Michael Potter

4. Plaintiff Eden Foods is a for-profit company.

5. I started Plaintiff Eden Foods in the late 1960s.

6. Plaintiff Eden Foods is a natural food company which strives to provide only the finest food from known and trusted growers and handlers.

7. Plaintiff Eden Foods is the oldest natural and organic food company in North America and the largest independent manufacturer of dry grocery organic foods.

8. Plaintiff Eden Foods is centered on macrobiotics–eating a diet of whole grain and seasonal local plant foods that are not nutrient depleted and *without toxic chemical adulteration*.

9. Plaintiff Eden Foods employs a total of 128 employees.

10. Plaintiff Eden Foods has over 50 full-time employees.

11. I, on behalf of Plaintiff Eden Foods, make every effort to adhere to fair, ethical, and honest business practices with both my employees and my valued customers.

12. Plaintiff Eden Foods and I strive to maintain the highest level of integrity in all they do and obtain Superior ratings from AIB International, their highest rating for food safety and sanitation from the most prestigious third-party certifier in North America.

13. I strive to follow the teachings, mission, and values of the Catholic faith, both in my home life and in my capacity as the Chairman, President, and sole shareholder of Plaintiff Eden Foods. It would be impossible to compartmentalize my conscience.

14. I, as the Chairman, President, and sole shareholder of Plaintiff Eden Foods, am responsible for setting all policies governing the conduct of all phases of business of Plaintiff Eden Foods.

15. I hold religious beliefs which forbid me from providing, participating in, paying for, training others to engage in, or otherwise supporting contraception and abortifacients.

16. Based on the teachings of the Catholic Church, and my deeply held religious beliefs, I do not believe that abortifacients or contraception are properly understood to constitute medicine, health care, or a means of providing for the well being of persons.

17. I believe that these procedures, drugs and chemicals almost always involve immoral and unnatural practices.

18. As a practicing and faithful Catholic, I hold and actively profess religious beliefs in accordance with the traditional Christian teachings on the sanctity of life. I believe that each human being bears the image and likeness of God and that all human life is sacred and precious, from the moment of conception. I therefore believe that abortion ends a human life and is a sin.

19. I engineered an insurance policy with Blue Cross/Blue Shield of Michigan for my company Plaintiff Eden Foods and my employees which specifically excluded contraception and abortifacients, and exempted me from providing, paying, contributing, or supporting contraception or abortifacients for others.

20. I, on behalf of my company Plaintiff Eden Foods, ensured that our insurance policy contained these exclusions to reflect my deeply held religious beliefs.

21. Until March 15, 2013, I believed to have been providing the group insurance plan excluding contraceptives and abortifacients to Plaintiff Eden Foods' full-time employees.

22. I, on behalf of Plaintiff Eden Foods, have tried over the years to provide my employees with employee health coverage superior to coverage generally available in the Michigan market in order to be a competitive employer and for the sake of my employees and their families.

23. As a practicing Catholic, I steadfastly make efforts to avoid practices that subvert the teachings of the Catholic Church such as providing or funding drugs, devices, services or procedures inconsistent with my faith.

24. I, on behalf of Plaintiff Eden Foods, have made great efforts through the years to ensure that my employees' insurance plans do not cover contraception or abortifacients.

25. I, on behalf of Plaintiff Eden Foods, cannot provide, fund, or participate in health care insurance which covers artificial contraception or abortifacients, or related education and counseling, without violating my deeply held religious beliefs.

26. I, on behalf of Plaintiff Eden Foods, cannot provide information or guidance to my employees, nor can Plaintiff Eden Foods, regarding artificial contraception, abortifacients or related education and counseling, without causing a violation of deeply held religious beliefs.

27. On March 15, 2013, Plaintiff Eden Foods was informed that the Affordable Care Act and the Health and Human Services Mandate went into effect against Plaintiffs and is now forcing myself and Plaintiff Eden Foods to provide, pay, fund, contribute, or support artificial contraception, abortifacients or related education and counseling, in violation of our Constitutional rights and deeply held religious beliefs. *This was done without both my and Plaintiff Eden Foods' knowledge, authority, or consent*. *See* 45 CFR § 147.130 (a) (1) (iv), as confirmed at 77. Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

28. I believe that the Health and Human Services Mandate affects all employer group health plans and insurance issuers, including the group plan I engineered with Blue Cross/Blue Shield of Michigan and used by Plaintiff Eden Foods.

29. Due to the size of Plaintiff Eden Foods, I believe that I have to provide federal government-approved health insurance to my employees under the Affordable Care Act or pay substantial per-employee fines and penalties.

30. It is my understanding that these fines and penalties do not apply to employers with fewer than 50 employees who fail to offer employer-sponsored insurance. 26 U.S.C. § 4980H(c)(2)(A).

31. It is also my understanding that the Affordable Care Act does not apply to health insurance plans which are considered to be "grandfathered." However, Plaintiff Eden Foods has made changes to its

health insurance plan after the date of March 2010, so our plan is not eligible for "grandfathered" status.

32. Furthermore, I believe that Plaintiff Eden Foods is not a "religious employer" under the Affordable Care Act, and not eligible to take advantage of any "temporary safe-harbor" provisions. 77 Fed. Register 8725 (Feb. 15, 2012).

33. Plaintiff Eden Foods is a for-profit business. Furthermore in our hiring process, we do not discriminate against any potential hire based upon anyone's personal belief system and we do not base our hiring decisions upon an applicant's religious or personal beliefs.

34. Since Plaintiff Eden Foods does not fall under any sort of exemption, I and Plaintiff Eden Foods are subject to the effects of the Affordable Care Act and the Health and Human Services Mandate.

35. I am confronted with choosing between complying with the requirements of federal law in violation of my deeply held religious beliefs or violating federal law.

36. If I remain faithful to my deeply held religious beliefs, I will be in violation of the Affordable Care Act and the Health and Human Services Mandate, and I am forced to pay per-employee fines that will have a detrimental effect on my company's ability to succeed economically.

37. As of March 15, 2013, Plaintiff Eden Foods and I discovered that we may no longer exclude contraception and abortifacients from our group health insurance plan.

38. I believe that the Health and Human Services Mandate coercively pressures me and Plaintiff Eden Foods to either change or violate our religious beliefs.

39. I believe that the mandate exposes Plaintiff Eden Foods to substantial competitive disadvantages, in that we might not be permitted to offer health insurance, as I would have to exit the health insurance market in order to avoid violation of my religious beliefs.

40. I believe that the mandate exposes myself and employees of Plaintiff Eden Foods to monetary and health risks as we will no longer be able to accept health insurance, nor be able to purchase or provide health care insurance without violating our religious beliefs.

41. I want to continue using the plan I engineered with Blue Cross/Blue Shield of Michigan and providing health insurance to my employees of Plaintiff Eden Foods that comports with my sincere and deeply held religious beliefs— as I have been doing for the last several years.

42. Neither Plaintiffs Eden Foods nor I have done anything by using our engineered plain with Blue Cross/Blue Shield of Michigan to deny access of contraceptives and abortifacients to our employees or their families.

43. My employees and their families are free to exercise their own free will and obtain contraceptives or abortifacients as the law permits. I simply cannot provide or fund the contraceptives or abortifacients for them through Plaintiff Eden Foods' insurance plan in accordance with my sincerely held religious beliefs.

44. Plaintiffs Eden Foods, of which I am the final decision maker, Chairman, President, and sole shareholder, cannot provide contraceptives or abortifacients for my employees and their families in accordance with its sincerely held religious beliefs.

45. I do not condemn those who use contraceptives or abortifacients. I pray that people not condemn me for my sincerely held religious beliefs.

The Mandate's Impact on Plaintiff Eden Foods

46. Because the Plaintiff Eden Foods is not eligible for any exemption, the company and I are subject to enforcement under the mandate, which includes fines, other regulatory penalties, and potential lawsuits.

47. If Plaintiff Eden Foods and I choose to violate the law by ceasing to offer employee health insurance altogether, then we will be penalized with fines of $2,000 per employee per year. The fines are even more insurmountable if we decide to offer insurance without the objectionable coverage.

48. Plaintiff Eden Foods and I need immediately relief from the Mandate. Denial of immediate relief forces Plaintiff Eden Foods and I to choose between our religious beliefs and crippling fines, regulatory penalties, and lawsuits.

49. Plaintiff Eden Foods and I seek to continue using the group insurance health plan we engineered with Blue Cross/Blue Shield which reflects our sincerely held religious beliefs.

I declare under penalty of perjury under the laws of the United States and the State of Michigan that the foregoing is true and correct.

Executed this 21st day of March, 2012, in Ann Arbor, Michigan.

/s/ Michael Potter
Michael Potter

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

[Filed March 22, 2013]

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

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.

THOMAS MORE LAW CENTER
Richard Thompson, Esq. (P21410)
Erin Mersino, Esq. (P70886)
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P.O. Box 393
Ann Arbor, MI 48106
emersino@thomasmore.org
(734) 827-2001

[Civil Rights Action under 42 U.S.C. § 1983]

DECLARATION OF JAMES HUGHES, Chief Accounting Advisor of Eden Foods, Inc.

I, James Hughes, make this declaration pursuant to 28 U.S.C. § 1746 based upon my personal knowledge and, where stated, upon information and belief:

1. I am an adult citizen of the State of Michigan.

2. I am the Chief Accounting Advisor of Eden Foods, Inc.

3. Eden Foods, Inc. is located at 701 Tecumseh Road, Clinton, Michigan 49236.

4. Plaintiff Eden Foods is a for-profit company.

5. Plaintiff Eden Foods is a natural food company which strives to provide only the finest food from known and trusted growers and handlers.

6. Plaintiff Eden Foods is the oldest natural and organic food company in North America and the largest independent manufacturer of dry grocery organic foods.

7. Plaintiff Eden Foods is centered on macrobiotics—eating a diet of whole grain and seasonal local plant foods that are not nutrient depleted and without toxic chemical adulteration.

8. Plaintiff Eden Foods employs a total of 128 employees.

9. Plaintiff Eden Foods has over 50 full-time employees.

10. Plaintiff Eden Foods makes every effort to adhere to fair, ethical, and honest business practices with both its employees and valued customers.

11. Plaintiff Eden Foods strives to maintain the highest level of integrity in all they do and obtain Superior and AIB International's highest rating.

12. Plaintiff Michael Potter is the Chairman, President, and sole shareholder of Plaintiff Eden Foods.

13. Plaintiff Michael Potter, as a practicing Catholic, holds religious beliefs which forbid him from providing, participating in, paying for, training others to engage in, or otherwise supporting contraception and abortifacients.

14. Plaintiff Michael Potter does not believe that abortifacients or contraception are properly understood to constitute medicine, health care, or a means of providing for the well being of persons.

15. For these reasons, Plaintiffs Michael Potter and Eden Foods designed an insurance policy with Blue Cross/Blue Shield of Michigan which specifically excluded contraception and abortifacients.

16. Plaintiff Eden Foods offered this group insurance plan excluding contraceptives and abortifacients for the last several years.

17. On February 5, 2013, I was contacted by Plaintiff Eden Foods' insurance Agent David Huntzicker. It was communicated to me that due to the Health and Human Services Mandate Blue Cross/Blue Shield of Michigan wanted to make changes to Plaintiff Eden Foods' group insurance plan.

18. On February 21, 2013, Plaintiff Eden Foods was presented with a contract from Blue Cross/ Blue Shield of Michigan to add contraceptive and abortifacient coverage. Plaintiff Eden Foods refused to sign the contract due to the religious beliefs of the company, as well as the beliefs of the Chairman, President, and sole shareholder of the company, Plaintiff Michael Potter.

19. On March 15, 2013, I learned that, despite the fact that Plaintiff Eden Foods refused to change their plan and sign the contract with Blue Cross/Blue Shield of Michigan, the group insurance plan was changed without Plaintiff Eden Foods' knowledge, approval, or consent to include contraceptives and abortifacients in compliance with the Health and Human Services Mandate.

20. Plaintiff Eden Foods is now confronted with choosing between complying with the requirements of federal law in violation of their deeply held religious beliefs or violating federal law.

21. Plaintiff Eden Foods seeks to continue using the plan the Plaintiffs engineered with Blue Cross/Blue Shield of Michigan which excludes contraceptives and

abortifacients—as it has been doing for the last several years.

I declare under penalty of perjury under the laws of the United States and the State of Michigan that the foregoing is true and correct.

Executed this 21st day of March, 2013, in Ann Arbor, Michigan.

/s/_____
James Hughes

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

[Filed March 22, 2013]

EDEN FOODS, INC.;
MICHAEL POTTER, Chairman and President of Eden Foods, Inc.,
Plaintiffs,
v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SETH D. HARRIS, Acting Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR JACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants.

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(734) 827-2001

DECLARATION OF DAVID F. HUNTZICKER,
Account Executive for Kapnick Insurance Group

I, David F. Huntzicker, make this declaration pursuant to 28 U.S.C. § 1746 based upon my personal knowledge and, where stated, upon information and belief:

1. I am an adult citizen of the State of Michigan.

2. I am an Account Executive at Kapnick Insurance Group.

3. Kapnick Insurance Group is located at 1201 Briarwood Circle, Ann Arbor, MI 48108.

4. Kapnick Insurance Group is an insurance agent for Plaintiff Eden Foods.

5. Kapnick Insurance Group worked with Plaintiffs Eden Foods and Michael Potter to procure a group health insurance plan which met the stated desire of Plaintiffs to exclude abortifacients and contraception from their group insurance plan.

6. Plaintiff Eden Foods was able to secure a plan through Blue Cross/Blue Shield of Michigan which excluded abortifacients and contraception as requested.

7. Since Plaintiffs Eden Foods' was established with Blue Cross/Blue Shield Michigan in 2010, Plaintiffs Eden Foods had elected not to cover abortifacients and contraceptive drugs.

8. Plaintiff Eden Foods renewed this plan with Blue Cross/Blue Shield of Michigan on September 1, 2012.

9. On February 5, 2013, I discussed Plaintiff Eden Foods' insurance plan with John Jacobs of Blue Cross/Blue Shield of Michigan.

10. Blue Cross/Blue Shield of Michigan communicated that due to the Affordable Care Act and the Health and Human Services Mandate, Blue Cross/Blue Shield of Michigan will no longer be allowed to lawfully exclude contraception and abortifacients from its group health insurance plans, including the plan used by Plaintiff Eden Foods.

11. On February 21, 2013, Plaintiff Eden Foods was presented with a contract from Blue Cross/Blue Shield of Michigan to change the plan to include group insurance coverage for abortifacients and contraception.

12. Plaintiff Eden Foods, including its employees and agents, did not sign a contract to change their existing plan.

13. On March 15, 2013, I communicated to Plaintiff Eden Foods that their group insurance plan

had been changed to include abortifacients and contraceptive coverage.

14. Plaintiff Eden Foods employs over 50 full time employees.

15. It is my belief that the current medical plan offered by Plaintiff Eden Foods does not meet the requirements to be considered a "grandfathered" plan under the Affordable Care Act. There have been changes made to Plaintiff Eden Foods' group health insurance through Blue Cross/Blue Shield of Michigan after the date of March 2010. Furthermore in 2011, Plaintiff Eden Foods' plan underwent an increase in its percentage cost-sharing requirement.

I declare under penalty of perjury under the laws of United States and the State of Michigan that the foregoing is true and correct.

Executed this 21st day of March, 2012, in Ann Arbor, Michigan.

/s/_____
David F. Huntzicker