Preliminary Injunctions in the Obamacare Religious-Objection Lawsuits II: An Amicus Brief for Mersino v. Sebelius

Eric Rasmusen

August 26, 2013

Abstract

 Various corporations, profit and nonprofit, have sued to be exempted from abortion-related mandates of Obamacare because of religious objections. They have also asked for preliminary injunctions against government enforcement of the offending provisions until the merits are decided. This paper is an amicus brief on the preliminary injunction issue for one of those cases, *Mersino v. Sebelius*. I argue for 4 points.

1. The government’s loss from a wrong injunction are limited by the dollar expenditure it would require for the government to pay for the disputed contraceptives for Mersino’s employees until the merits are decided, and it could recover even that from Mersino later.

2. In determining Mersino’s loss from a wrong injunction, the court should keep in mind that Sebelius is protected by qualified immunity from liability for a new kind of legal dispute, and so even if Mersino’s losses can be quantified, they are irreparable.

3. Other Sixth Circuit opinions involving preliminary injunctions have overlooked the fact that the 2002 6th Circuit *Overstreet* test has been superseded by the 2007 Supreme Court *Winter* test, and that the 2009 Supreme Court *Nken* test is for stays, in explicit contrast to preliminary injunctions.

4. The court should use the r sliding-scale rule for balancing the equities. This makes a case like the present one far easier to decide.

Email: erasmuse@indiana.edu

Website: http://rasmusen.org

This paper at SSRN: http://ssrn.com/abstract=2311834.

Phone: (812) 345-8573

 I hope to write an article on preliminary injunctions generally. The document here raw material for such an article. It is a reformatted motion and brief for an out-of-time amicus brief in support of plaintiff’s motion for a preliminary injunction. Comments are welcomed.

**No. 13-1944**

**August 17, 2013**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**United States Court of Appeals**

**for the**

**Sixth Circuit**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Mersino Management Company, Karen A. Mersino, and Rodney A. Mersino,**

*Plaintiffs-Appellants,*

**v.**

**Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; United States Department of Health and Human Services; Seth D. Harris, in his official capacity as Acting Secretary of the Department of Labor; United States Department of Labor; Jack Lew, in his official capacity as Secretary of Treasury, United States Department of the Treasury**,

*Defendants-Appellees.*

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

HONORABLE PAUL D. BORMAN

Civil Case No. 2:13-cv-11296

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**AMICUS MOTION AND OUT-OF-TIME BRIEF IN SUPPORT OF THE PLAINTIFF’S motion for injunction pending appeal**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 Eric Rasmusen

 Kelley School of Business

 Indiana University

 1309 E. Tenth St.

 Bloomington, Indiana 47401

 (812) 345-8573

 ERASMUSE@INDIANA.EDU

*Pro se*

 **TABLE OF CONTENTS**

TABLE OF AUTHORITIES xx

MOTION OF ERIC RASMUSEN TO FILE AN OUT-OF-TIME BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION xx

STATEMENT OF THE ISSUE xx

SUMMARY OF THE ARGUMENT xx

THE ARGUMENT xx

I. The harm to the Mersino family is large, and irreparable because of the qualified immunity of the United States. xx

II. Damages to the United States are limited to the cost of providing the excluded

contraceptive services to the Mersino employees, a small dollar cost, and are not

irreparable. .................. xx

III. Previous 6th Circuit Obamacare cases have not followed the Supreme Court’s 2008

*Winter* rule for preliminary injunctions. xx

IV. Under *Winter*, the greater the plaintiff’s irreparable harm compared to the defendant’s, the lower can be the plaintiff’s likelihood of success if a preliminary injunction is to be issued. xx

V. Minor Points. . xx

A. Supreme Court Justice Sotomayor’s denial of Hobby Lobby’s request

 for a preliminary injunction is

 irrelevant. .....................................................................................................................xx

B. Hobby Lobby did get its preliminary injunction after remand to the trial court. xx

C. Mersino’s late filing of its suit and motion might justify the denial of a preliminary

injunction. ...... xx

VI. CONCLUSION xx

CERTIFICATE OF STYLISTIC COMPLIANCE, AUTHORSHIP AND FUNDING x

CERTIFICATE OF SERVICE. xx

**TABLE OF AUTHORITIES**

## Cases Page

A*merican Hospital Supply. v. Hospital. Products*, 780 F.2d 589 (7th Cir. 1986). xx

*Amoco Production* v. *Gambell*, 480 U. S. 531 (1987) xx

*Autocam v. Sebelius*, No. 12-2673, order (6th Cir. Dec. 28, 2012) *passim*

*Baker v. Adams County./Ohio Valley Sch. Bd.*, 310 F.3d 927 (2002) xx

*Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012). xx

*eBay v. MercExchange,* 547 U.S. 388 (2006) xx

*Eden Foods v. Sebelius*, No. 13-1677 slip op. (6th Cir. June 28, 2013). *passim*

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

*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,

546 U.S. 418 (2006) xx

*Grutter v. Bollinger*,

Motion of Steelcase, Inc...., No. 97-cv-75928 (E.D. Michigan, Oct. 16,

2000). <http://www.vpcomm.umich.edu/admissions/legal/gratz/amici.html> xx

*Grutter v. Bollinger,*

Order Granting Motion..., No. 97-cv-75928 (E.D. Michigan, Oct.

24, 2000). <https://ecf.mied.uscourts.gov/doc1/0971378393>. 5

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) 13

*Hobby Lobby v. Sebelius*,

No. 12A644, 2012 WL 6698888 (Dec. 26, 2012). 25

*Hobby Lobby v. Sebelius*,

No. 12-6294 slip op. (10th Cir. en banc, June 27, 2013) 26

*Hobby Lobby v. Sebelius,*

No. CIV-12-1000-HE, slip op. (W.D of Oklahoma, July 19, 2013) 26

*Mersino v. Sebelius [Mersino I],*

No. 13-cv-11296, slip op. (E.D of Michigan, July 11, 2013) *passim*

*Nken v. Holder*, 556 U.S. 418 (2009) *passim*

*Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*,

305 F.3d 566 (6th Cir. 2002) *passim*

*Russell v. Farley*, 105 U.S. 433, 438 (1881) 24

*Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) *passim*

*Wisconsin Right to Life v. Federal Election Comm’n*, 542 U.S. 1305 (2004) 25

**Other Works Cited**

*All Writs Act,* 28 USC. §1651(a).

Richard R.W. Brooks & Warren F. Schwartz, Legal Uncertainty, Economic Efficiency,

and the Preliminary Injunction Doctrine, 58 STAN. L. REV. 381 (2005) 19

Federal Rule of Appellate Procedure 28, Briefs 7

Federal Rule of Appellate Procedure 29, Brief of an Amicus Curiae 5,6

Mark P. Gergen, John M. Golden & Henry E. Smith*,* The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions, 112 COLUMBIA L. REV. 202 (2012). 17

Max Kennerly, Sanctions for Failing to Disclose Adverse Precedent

under the Duty of Candor, *Litigation*

*and Trial*, <http://www.litigationandtrial.com/2012/08/articles/the-law/sanctions-precedent-duty-of-candor/> (August 23, 2012) 7

John Leubsdorf, Preliminary Injunctions: In Defense of the Merits, 76 FORDHAM L.

 REV. 33 (2007) 19

*USA vs. Mersino*, No. 13-1944, Opposition to Plaintiff’s Motion for Injunction Pending

Appeal, brief (July 31, 2013) 5

*USA vs. Mersino*, No. 13-1944, Reply Motion for Injunction Pending Appeal,

 brief (Aug. 7, 2013) 5

Rachel A. Weisshaar, Hazy Shades of Winter:? Resolving the Circuit Split over

Preliminary Injunctions, 65 VANDERBILT L. REV. 1011 (2013) 19

# **MOTION OF ERIC RASMUSEN TO FILE AN OUT-OF TIME BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION**

# I am an economics professor who has written numerous articles for law reviews and economics journals, co-authoring with Judges Wiley and Posner and with various law professors. I am a former Director of the American Law and Economics Association and have been a visiting scholar at Yale and Harvard Law Schools. I have several times been chosen by the Law and Economics Center (now at George Mason University) to teach economics to federal judges.

#  Since my point of view is that of a law-and-economics scholar rather than an attorney, I hope that I may have something new and useful for the court in my discussion of the law. I have tried not to repeat arguments made in the appellants’ brief or in the *Autocam* and *Eden* opinions offered by the appellee.[[1]](#footnote-1) The focus in those three documents is the size of the likelihood of success on the merits and on whether a corporation has standing. I will discuss only balancing the equities and irreparable harm in this brief,

 I have no material stake in the outcome of this case. I believe an economic approach can help courts organize their thoughts more simply on the topic of preliminary injunctions and can also help with consideration of damages.

###  This brief is to be accepted only at the Court’s discretion, for two reasons: it is late, and the defendant does not consent to it.

###  I only heard about the case on August 14, one week after plaintiff’s August 7 reply brief and thus after the deadline for amicus filing had passed. I had written an amicus for the *Hobby Lobby* case which involved the same issues but in the context of Fifth Circuit caselaw. On seeing my brief, the plaintiff in the present case asked if I might be interested in modifying it for the Sixth Circuit. FRAP. 29(e) says that a court may grant leave for late filing (“A court may grant leave for later filing, specifying the time within which an opposing party may answer”), and Sixth Circuit courts have granted out-of-time motions to amici in the past, e.g. in *Grutter v. Bollinger*.[[2]](#footnote-2)

 Counsel for the defendant has told me she does not consent to my filing an out-of-time amicus brief. That is understandable, given that it will create extra work for her office, and that the defendant’s existing reply brief in this case is very short, saying that (a) the case is so similar to *Autocam* and *Eden* that it does not need new briefing and (b) *Autocam* will be decided soon on the merits anyway.[[3]](#footnote-3) Just as the court may grant leave for an out-of-time amicus brief, however, so may it grant leave for an amicus brief lacking consent of all the parties (F.R.A.P. 29(a): “Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing”).

 The attached amicus brief has more to offer than just new arguments (or the useless repetition of old arguments so often found). The briefs of plaintiff and defendant, and the opinions in *Autocam*, *Mersino I*, and *Eden*, overlook important case and statutory law. *Autocam* and *Mersino I* use the old 6th Circuit *Overstreet* preliminary injunction test (from 2002).[[4]](#footnote-4) In 2007, the U.S. Supreme Court issued the *Winter* decision to try to resolve the circuit split on preliminary injunction tests.[[5]](#footnote-5) *Winter* has a different test than *Overstreet,* superseding it. *Eden* uses a test from the Supreme Court’s 2009 *Nken* decision.[[6]](#footnote-6) That decision is recent, but the *Nken* test there is for a stay, not for a preliminary injunction, and the opinion explicitly states that the two tests are different, though overlapping in many respects. A third problem is that these decisions are based on the harm to plaintiff not being irreparable because it is monetary, and monetary damages can be recovered later by suit at law if the plaintiff succeeds on the merits. The oversight there is that if the defendant is the U.S. government and the law was undecided at the time of the injury, the defendant is protected by qualified immunity and so need not pay damages. The damages are monetary, but they are irreparable nonetheless.

 All of these things---the use of the superseded *Overstreet* decision, the use of the *Nken* test for stays instead of the *Winter* test for preliminary injunctions, and overlooking the defendant’s qualified immunity---would, I think, justify, or even require, the submission of a supplementary filing by counsel if they were discovered late.[[7]](#footnote-7) If that is so, then the Court should grant leave for this amicus brief, or reject it but instruct counsel to address the issues anyway.[[8]](#footnote-8)

 If I am correct about these deficiencies in *Autocam* and *Eden*, that opens up the question of how the 6th Circuit should interpret the Supreme Court’s *Winter* test for preliminary injunctions, something on which the circuits are split. This brief also tries to help with that.

**Conclusion**

 For the foregoing reasons, I respectfully ask that the Court grant me leave to file the attached brief *amicus curiae*.

Respectfully submitted,

 ERIC RASMUSEN, *pro se*

Kelley School of Business,

Indiana University

1309 East 10 Street

Bloomington, Indiana 47405

Email: erasmuse@indiana.edu

Phone: (812) 855-9219

**STATEMENT OF THE ISSUE**

Should the Mersino family be granted its request for a preliminary injunction to compel the United States to refrain from imposing fines? (I will refer to the plaintiffs as “the Mersino family” and the defendants as “the United States”.)

 In particular, how can the Court balance the equities between wrongful denial of a preliminary injunction to the Mersino family and a wrongful injunction imposed on the United States?

 This brief will not treat of whether the Mersino family will succeed on the merits. It will argue that for a broad range of views of how likely they are to succeed, a preliminary injunction should be granted, so close examination of the merits is unnecessary as well as premature.

# **SUMMARY OF THE ARGUMENT**

 The United States wishes the Mersino family to provide health insurance to their employees that includes coverage of what I will call “the excluded contraception.” The Mersino family says that this offends their religious beliefs and so they are exempt from that requirement. (Whether a corporation differs in this from an individual is a question of law I will not treat in this brief.) They are asking for a preliminary injunction to prevent the imposition of fines for not providing the excluded contraception. I will argue that because the irreparable harm to the Mersino family is so large compared to that of the United States, the preliminary injunction should be granted.

**THE ARGUMENT**

In 2008 the Supreme Court said:

 "A plaintiff seeking a preliminary injunction **must establish that he is likely to succeed on the merits**, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest....

 In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Production Co.*, 480 U. S., at 542.”

 [*Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20, 24 (2008)]

 Courts have split on the likelihood of success on the merits in cases like the present one. See *Mersino v. Sebelius [Mersino I],* No. 13-cv-11296, slip op. (E.D of Michigan, July 11, 2013). For purposes of this brief, let us suppose that there is some likelihood of success---perhaps 30%---but not a strong likelihood. This brief will argue that the Mersino family should nonetheless be granted their preliminary injunction under current Supreme Court precedent, because even if their likelihood of success is less than that of the defendant, their irreparable harm is much larger.

I. The harm to the Mersino family is large, and irreparable because of the qualified immunity of the United States.

 It is commonly held that deprivation of civil rights is irreparable harm. See *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) (deprivation of First Amendment rights is irreparable harm). The Mersino family has a number of options, however. (1) They could provide the excluded contraceptives, violating their religious beliefs.

(2) They could drop health insurance altogether and pay relatively small fines (or perhaps no fines at all, if the employer mandate is not enforced, as is current Administration policy).

(3) They could offer health insurance without the excluded contraceptives and incur gigantic fines.

(4) They could dissolve their corporation and go out of business.

 The *Eden* court said of similar plaintiffs, “To the extent that they may be fined if they refuse to comply with the contraception mandate, purely monetary damages do not warrant an injunction.” *Eden Foods v. Sebelius*, No. 13-1677, slip op. (6th Cir. June 28, 2013), p. 3. In the same line of thought, the Mersino family could drop employee health insurance altogether, or simply go out of business, thus perhaps avoiding non-monetary violation of their civil rights. The *Eden* court did not think monetary damages through, however. What legal process can the plaintiffs follow to recover their monetary damages?. There may well be a process for recovering fines they paid, but the court did not say what it was, and I do not myself know it. Even if fines can be recovered, however, that would not be the extent of the monetary damage. If the plaintiffs choose option (2) and drop health insurance benefits altogether, they will have offended employees and will have to pay higher cash salaries to retain them or make new hires. If the plaintiffs take option (3) and pay massive fines, they may go bankrupt, or, at the very least, they will have to obtain financing for the cash outlay and forgo other investments they might have made. Just being repaid the fines would not undo the damage. Option (4), voluntarily going out of business, is also costly: closing and then re-opening a business are both difficult operations.

 We thus have to think about what happens when the plaintiff’s harm cannot be undone simply by repayment of fines. In a lawsuit between two private parties, if the plaintiff wins he can recover money damages for harm that occurred between the filing of the suit and its conclusion. If the party causing unlawful harm is the United States, the plaintiff can still recover money damages for civil rights violations, via a Section 1983 or Bivens suit. Not so here, however. In a case like this, the United States (or more precisely, the officer of the United States), has qualified immunity, because he is not expected to know what will happen in an uncertain legal environment:

 “We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

 [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in the context of a

 *Bivens* suit]

 The point is crucial. Even if the damage to the Mersino family were completely objective dollars and cents, they would not be able to recover monetary damages. Even if they could show that the entire value of their company was wiped out by bankruptcy due to intentional acts of a government in violation of their First Amendment rights, they would not get a cent back. All they would get is a permanent injunction commanding the government not to ruin their business a second time, should they choose to start life over. Thus, the harm is irreparable.

II. Damages to the United States are limited to the cost of providing the excluded contraceptive services to the Mersino employees, a small dollar cost, and are not irreparable.

 The United States, can achieve its objective of having inexpensive access to the excluded contraception by paying for it itself during the period of the preliminary injunction. If that period is two years, and 50 employees would spend $500 each on this kind of special contraception (surely an overestimate), then the amount is $50,000. The harm to the United States from an ex-post-mistaken preliminary injunction is therefore small. It is also not irreparable; monetary damages suffice for the $50,000, and the court could even require the Mersino family to post a bond for the amount. It is harder to measure the irreparable harm to the Mersino family from denial of a preliminary injunction, but surely it would be much greater---we might guess $1 million compared the government’s $50,000, though this would be a matter for the district court to determine on remand.

 The district court might also advise the Parties to agree to a bond for liquidated damages. Liquidated damages would avoid later court proceedings and would also prevent the Mersino family from having to violate its beliefs by paying for the period’s excluded birth control if they later lost on the merits. Instead, they would be paying damages only loosely related to the expenditures. If the United States prefers, it could perhaps waive qualified immunity and post its own bond for an estimate of the monetary cost to the Mersino family.

III. Previous 6th Circuit Obamacare cases have not followed the Supreme Court’s 2008 *Winter* rule for preliminary injunctions.

 Section I of this brief argued that 6th Circuit courts in similar cases have concluded that the plaintiffs’ damages were not irreparable only because the courts did not take the difficulty or impossibility of legally recovering money damages from official with qualified immunity. Section III will argue that Courts have acted on mistaken beliefs about the required likelihood of the plaintiffs’ success on the merits.

 The Supreme Court ruled in 2008 that (boldfaced added):

 "A plaintiff seeking a preliminary injunction **must establish that he is likely to succeed on the merits**, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest....

 In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Production Co.*, 480 U. S., at 542.”

 [*Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20, 24 (2008)]

 Obamacare preliminary injunctions have been denied in three 6th Circuit cases: *Mersino I* at the district court level, and *Autocam* and *Eden* at the circuit court level. None of them applied *Winter* on likelihood. All of them cited other cases which seemed to require a stronger likelihood of success on the merits.

First, look at *Autocam v. Sebelius*, No. 12-2673, order, p. 1 (6th Cir. Dec. 28, 2012). It says (boldface added):

 “The relevant factors are: “(1) **whether the movant has shown a strong likelihood of success** on the merits;...*Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002); *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (2002).”

*Mersino I* said, following *Autocam*’s example (boldface added):

 ...*Overstreet v. Lexington-Fayette Urban County Gov’t,* 305 F.3d 566, 573 (6th Cir. 2002). When considering a motion for injunctive relief, the Court must balance the following factors: (1) **whether the movant has a strong likelihood of success** on the merits, (2) whether the movant would suffer irreparable injury absent preliminary injunctive relief, (3) whether granting the preliminary injunctive relief would cause substantial harm to others, and (4) whether the public interest would be served by granting the preliminary injunctive relief. “These factors are not prerequisites, but are factors that are to be balanced against each other.” *Id.*

 In 2007 the Supreme Court said in *Winter* that the plaintiff must establish that **“he is likely to succeed.”** Not **“he is strongly likely succeed.”** *Autocam* and *Mersino I* seem to be relying on a 2002 6th Circuit precedent that *Winter* superseded.

 The other 6th Circuit case, *Eden Foods v. Sebelius*, No. 13-1677 slip op. (6th Cir. June 28, 2013)*,* did not rely on *Overstreet*. Itsays on p. 2 (boldface added):

“Four factors are weighed: (1) **whether the movant has made a “strong showing that he is likely to succeed** on the merits”; *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012)....”

 *Eden* quotes from *Nken*, a 2009 Supreme Court case. *Nken v. Holder*, 556 U.S. 418 (2009). Notice the position of the word “strong” in **“strong showing that he is likely to succeed”**. It’s not **“showing that he has a strong likelihood of succeeding,”** which would amount to a reversal of *Winter* after two years.The natural reading of the phrase in *Nken* is that the plaintiff must present compelling evidence that he has *some* chance of winning, rather than making a baseless claim.[[9]](#footnote-9)

 There is, however, a good reason to skip *Nken* altogether. *Nken* is talking about the test for stays, not preliminary injuntions, and for stays *as distinguished from* preliminary injunctions. The issue in the case was whether a court could stop Nken from being deported. Congress had passed a statute with the specific language and intent to block courts from granting “injunctive relief” to someone being deported. *Nken,* at 424. The question was whether courts could block deportation using a “stay”, even though they could not using a “preliminary injunction”. Justice Roberts says at 434 (boldface added) that the legal principles governing issuance of a stay,

 “have been distilled into consideration of four factors: "**(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;** (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton*, ***supra***, at 776. **There is substantial overlap between these and the factors governing preliminary injunctions, see *Winter*** v. *Natural Resources Defense Council, Inc.*, 555 U. S. \_\_\_, \_\_\_ (2008) (slip op., at 14); **not because the two are one and the same,** **but because similar concerns arise** whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.”

Justice Roberts takes care to distinguish between the factors for stays and those which Winter listed for preliminary injunctions. “There is substantial overlap between these”, “because similar concerns arise”, but a stay and a preliminary injunction are not “one and the same”. Indeed, his entire opinion hinges on a stay being so different from a preliminary injunction that it cannot even be classified as “injunctive relief”. When *Eden* cites the stay factors instead of the preliminary injunction factors, it is therefore in error.

IV. Under *Winter*, the greater the plaintiff’s irreparable harm compared to the defendant’s, the lower can be the plaintiff’s likelihood of success if a preliminary injunction is to be issued.

 A circuit split and lack of controlling 6th Circuit clarification of the *Winter* rule leave open the question of how exactly to balance the equities in deciding whether to grant a preliminary injunction.[[10]](#footnote-10)

 Let us start with the split. Rachel Weisshaar describes the post-*Winter* situation thus:[[11]](#footnote-11)

 “The Fourth Circuit has held that *Winter* mandates a sequential preliminary injunction test and that therefore its longstanding threshold test is invalid. In contrast, the Seventh and Second Circuits have held that certain types of sliding-scale tests are compatible with *Winter*. The Ninth Circuit has split, with some panels holding that *Winter* requires a sequential test and others holding that a modified sliding-scale test is still viable. The Tenth and D.C. Circuits have refrained from deciding this question. The remaining circuits have not yet addressed it.”

 The main question is whether the required degree of likelihood of a plaintiff succeeding on the merits is fixed, or whether it depends on the balance of irreparable harms. Under a sequential test, if a plaintiff fails to show above a certain fixed likelihood of success the court can stop there and not examine the degree of his irreparable injury. Under a sliding-scale test, a plaintiff can win the injunction with a lower likelihood of success on the merits if he can show that his irreparable harm is greater than the defendant’s.

 I will repeat the *Winter* rule yet again (boldfaced added):

 "A plaintiff seeking a preliminary injunction **must establish that he is likely to succeed on the merits**, that he is likely to suffer irreparable harm in the absence of preliminary relief, **that the balance of equities tips in his favor**, and that an injunction is in the public interest....

 In each case, **courts “must balance the competing claims of injury and must consider the effect on each party** of the granting or withholding of the requested relief.” *Amoco Production Co.*, 480 U. S., at 542.”

 [*Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20, 24 (2008)]

So far courts have not found a clear answer to whether the test should be sequential or sliding-scale. Note, however that the second paragraph quoted would be superfluous if the test were sequential. If the test is sequential, the court should stop after finding that the likelihood of success on the merits fails to reach the fixed threshold, because it doesn’t matter if the plaintiff’s irreparable harm from wrongly injunction denial is a million times greater than the defendant’s harm from an injunction.

The Court has some freedom to consider what is good policy, in light of the Supreme Court’s ambiguity. If the Court’s goal is to minimize the cost of inadvertent injustice, the sliding-scale test is clearly the best, since the sequential test completely ignores the costs unless the critical likelihood percentage is passed. Is administrative convenience a reason for a sequential test? If quick estimates of the merits of the case were easy and quick estimates of irreparable harms were hard, the sequential test would be the easier to use. If, however, a quick view of the harms clearly shows that this factor weighs overwhelmingly in the plaintiff’s favor then the court doesn’t have to estimate either the harm or the likelihood of success precisely. The present case is a good example. If one accepts that the plaintiff has at least a 10% chance of winning, that the irreparable harm to the plaintiff is large (because of defendant’s qualified immunity) and that the defendant’s harm is not irreparable, then granting the preliminary injunction is an easy decision, even given that the remedy is an discretionary one which does create administrative and litigation costs.

 Would a neutral observer be willing to bet $100 to win $900 if the Mersino family ultimately succeeds on the merits I think so, even if he wouldn’t accept even odds, and this is one way to think of the likelihood of success being at least 10%. In that case, most of the brief and opinion pages written on these cases are unnecessary, since they are used to discuss whether success on the merits is “likely” or “unlikely”, with a vague yet crucial dividing probability between those words. Using a sliding-scale test, courts would not have to spend their time writing about the merits at this early stage. Some of them might never have to, since the Supreme Court might address the merits first.

 The sliding-scale test fits with pre-*Winter* 6th Circuit thinking, which is relevant when it addresses details that *Winter* leaves obscure. “These factors are not prerequisites, but are factors that are to be balanced against each other.” *Overstreet v. Lexington-Fayette Urban County Gov’t,* 305 F.3d 566, 573 (6th Cir. 2002). “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 Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000). *Overstreet* and *Gonzalez* suggest that the 6th Circuit has no fixed likelihood threshold (except the threshold of zero) that if passed might either guarantee a preliminary injunction or rule one out. Note, however, that a very small likelihood of success will rarely lead to an injunction being granted under even the sliding-scale test, because the scale only slides to the extent that irreparable harm becomes large.

 A sliding-scale test does not have to be any more precise than what I have just described---the acceptance of lower success likelihood if the irreparable harm is bigger, This is really the very idea of “balancing the equities”. One may go further, though, and use a simple equation to describe the thought process.

 Judge Posner said in a well-known case that if *P* is the plaintiff’s probability of success, *Hp* is his irreparable harm from denial of an injunction, and *Hd* is the defendant’s harm from an injunction, then:

 “Grant the preliminary injunction if but only if *P × Hp > (1 - P) × Hd*, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.” [A*m. Hosp. Supply v. Hosp. Prods*., 780 F.2d 589, 594 (7th Cir. 1986)]

Put in word form, grant the injunction if:

*(Probability plaintiff wins)\*(Irreparable harm to plaintiff from a mistake)*

 *is greater than*

*(Probability defendant wins)\*(Irreparable harm to defendant from a mistake)*

or, in the case before us, grant the injunction if

*(Probability Mersino wins)\*(Irreparable harm to Mersino from a denial)*

 *is greater than*

*(Probability US wins)\*(Irreparable harm to US from an injunction),*

or, using the particular numbers I gave earlier (for concreteness only; the district court would fill in the numbers):

 *30% ($1,000,000) > 70% ($50,000)*

which says to grant the injunction if

*$300,000 > $35,000*

which is true under the given numbers.

 These numbers may seem unrealistically precise, but they are just making obvious the difficulty of the judge’s task under any reasonable rule. The Court cannot get away from estimating the probability of success, hard though that is. As so often in the courts, the judge must do the best he can. The framework helps to organize his thoughts if he wishes to use the common-sense principle that he should grant the injunction if the probability of the injunction-seeker’s eventual success is high and the cost to the injunction-seeker of not getting the injunction is high relative to the cost to the injunction-opposer of having to comply with the injunction. It is not even necessary that the Court disclose its exact calculations if it follows this method, since all the court is doing is checking that the plaintiff’s side of the equation comes out with a bigger number and trying to make the quantities more exact is wasted effort once that practical aim is achieved. Indeed, if the precise numbers matter too much, a court ought to be excused if it says the balance of equities is not clear enough to justify a preliminary injunction. As the U.S. Supreme Court said in *Russell v. Farley*, 105 U.S. 433, 438 (1881) (boldface added),

 It is a settled rule of the court of chancery, in acting on applications for injunctions,to **regard the comparative injury which would be sustained by the defendant, if an injunction were granted and by the complainant if it were refused.** Kerr on Injunctions, 209, 210. And **if the legal right is doubtful either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party**, for the damage arising from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court as a court of equity, and has been exercised from time immemorial.

V. Minor Points.

A. Supreme Court Justice Sotomayor’s denial of Hobby Lobby’s request for a preliminary injunction is irrelevant.

 Supreme Court Justice Sotomayor’s December 26, 2012 denial of an injunction in *Hobby Lobby* is not important. Her denial is based on the *All Writs Act,* 28 USC. §1651(a). The *Autocam* opinion does cite the denial, but only as weak support for the proposition that success on the merits was unlikely:

 “The Supreme Court has never considered similar RFRA or free-exercise claims. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Dec. 26, 2012). But, applying amore demanding standard, it denied an injunction pending appeal in a case involving similar issues. *Id.”*

 *[Autocam v. Sebelius*, *p.2.]*

 The “more demanding standard” is that “the legal rights at issue are indisputably clear.” *Wisconsin Right to Life v. Federal Election Comm’n*, 542 U.S. 1305, 1306 (2004). Justice Sotomayor should have turned the Mersino family down even if she thought them quite likely to succeed on the merits---just not “indisputably” likely. Thus, her denial does not mean she thinks them unlikely to win on the merits.

B. Hobby Lobby did get its preliminary injunction after remand to the trial court.

 The plaintiff’s reply briefdiscusses theJune 2013 6th Circuit en banc decision in favor of granting a preliminary injunction to Hobby Lobby in a similar case.*Hobby Lobby v. Sebelius*, No. 12-6294 slip op. (10th Cir. en banc, June 27, 2013) More precisely, the decision remanded the case to the trial court for a final decision in light of its reversal on the likelihood of success on the merits and on irreparable harm. I would like simply to add that the trial court *did* grant the preliminary injunction. *Hobby Lobby v. Sebelius,* No. CIV-12-1000-HE, slip op. (W.D of Oklahoma, July 19, 2013).

C. Mersino’s late filing of its suit might justify the denial of a preliminary injunction.

 A preliminary injunction is an equitable remedy, and the essence of equity is its flexibility compared to “law”.  *Mersino I*, p. 1., says:

 “The Court notes as an initial matter Plaintiffs’ lack of urgency in filing this action over a year and a half after the contraceptive coverage regulations were issued and further waiting more than two months after filing the Complaint in this action to seek injunctive relief.”

The Mersino I court suggests that this indicates lack of urgency and that the preliminary injunction should therefore be denied. Lack of urgency is not part of the *Winter* test. It is related to irreparable harm, but in this case, the effect of delay was not to create immediate harm to the plaintiffs, because the contraceptive regulations had not yet come into effect. On the other hand, if the plaintiffs had filed earlier, that would have saved the Court and defendants considerable effort. Thus, perhaps some kind of unclean hands argument applies. I do not know enough to comment further on this, except to note that this may be a consideration that falls outside the four-factor tests.

VI. Conclusion.

 The Court ought to balance the equities using a sliding-scale test in interpreting *Winter*, and taking into account that the USA’s harm is not irreparable but the Mersino’s family is, because of Secretary Sebelius’s qualified immunity. This will likely lead to the granting of the preliminary injunction, though that will depend on determinations of the district court on remand.

 Respectfully submitted,

 ERIC RASMUSEN, *pro se*

Kelley School of Business,

Indiana University

1309 East 10 Street

Bloomington, Indiana 47405

Email: erasmuse@indiana.edu

Phone: (812) 855-9219

**CERTIFICATE OF STYLISTIC COMPLIANCE**, **AUTHORSHIP AND FUNDING**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32. It contains 6,924 words and 30 pages as measured in MS-Word, even including pages excluded from the limitation.

2. This brief complies with the typeface requirements of FRAP 32 and the type-style requirements of FRAP 32. It is written in a proportionally spaced typeface using MS-Word in 14-point Times New Roman font (with 12pt for indented quotations, the table of contents, and the table of authorities).

3. Since the party filing is *pro se*, unrepresented, the green cover requirement does not apply (FRAP 32(a)(2): “Except for filings by unrepresented parties, the cover of the appellant’s brief must be blue...”). In view of FRAP 32(c)(2)(C), this motion-plus-brief is filed with no cover, just a white first page containing the necessary information (“A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used,it must be white.”)

4. This brief is offered by Amicus as an individual. His institutional affiliation is for identity purposes only. No party's counsel authored this brief in whole or in part, and no party or other person contributed money to the preparation or submission of this brief.

/s/ Eric Rasmusen

**CERTIFICATE OF SERVICE**

 On August 17, 2013, copies of this brief were sent by email to the counsel for each party below, with a message asking if they would like two paper copies in addition.

***Attorneys for the United States***

Michelle Renee Bennett, michelle.bennett@usdoj.gov

Alisa B. Klein alisa.klein@usdoj.gov,

Mark B. Stern mark.stern@usdoj.gov.

***Attorneys for the Mersino family***

S. Kyle Duncan

Luke W. Goodrich

Mark L. Rienzi

Eric S. Baxter

Lori H. Windham

Adèle Auxier Keim

THE BECKET FUND FOR RELIGIOUS LIBERTY

3000 K Street, N.W., Suite 220

Washington, D.C. 20007

(202) 349-7209

kduncan@becketfund.org

Erin Mersino

emersino@thomasmore.org

/s/ Eric Rasmusen

1. *Autocam v. Sebelius*, No. 12-2673, order (6th Cir. Dec. 28, 2012). *Eden Foods v. Sebelius*, No. 13-1677 slip op. (6th Cir. June 28, 2013). [↑](#footnote-ref-1)
2. *Grutter v. Bollinger*, Motion of Steelcase, Inc...., No. 97-cv-75928 (E.D. Michigan, Oct. 16, 2000). <http://www.vpcomm.umich.edu/admissions/legal/gratz/amici.html>; *Grutter v. Bollinger,* Order Granting Motion..., No. 97-cv-75928 (E.D. Michigan, Oct. 24, 2000). <https://ecf.mied.uscourts.gov/doc1/0971378393>. [↑](#footnote-ref-2)
3. *USA v. Mersino*, No. 13-1944, Opposition to Plaintiff’s Motion for Injunction Pending Appeal, brief (July 31, 2013). [↑](#footnote-ref-3)
4. *Mersino v. Sebelius [Mersino I],* No. 13-cv-11296, slip op. (E.D of Michigan, July 11, 2013). *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566 (6th Cir. 2002). I did not send the defendant’s counsel a copy of the attached brief, and she was kind enough to reply to me very promptly, so I am not in any way accusing her of violating the duty of candor mentioned later in this motion. [↑](#footnote-ref-4)
5. *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). [↑](#footnote-ref-5)
6. *Nken v. Holder*, 556 U.S. 418 (2009). [↑](#footnote-ref-6)
7. For a good short survey of legal authorities on the rule of candor in the rules of professional conduct and court rules, see Max Kennerly, Sanctions for Failing to Disclose Adverse Precedent under the Duty of Candor, *Litigation and Trial*, <http://www.litigationandtrial.com/2012/08/articles/the-law/sanctions-precedent-duty-of-candor/> (August 23, 2012). But see also F.R.A.P. 28(j) (“If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citation.”) [↑](#footnote-ref-7)
8. *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566 (6th Cir. 2002) is used instead of *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) in *Autocam v. Sebelius*, No. 12-2673, order (6th Cir. Dec. 28, 2012) and *Mersino v. Sebelius [Mersino I],* No. 13-cv-11296, slip op. (E.D of Michigan, July 11, 2013). [↑](#footnote-ref-8)
9. The Supreme Court seems to have some difficulty in getting its injunction jurisprudence straight. In *eBay v. MercExchange,* 547 U.S. 388, 391 (2006), a unanimous but confused Court made the assertion that the standard four-factor test for preliminary injunctions is a standard test for permanent injunctions, also getting one factor absurdly wrong as “(1) it has suffered an irreparable injury” rather than “it will suffer an irreparable injury”. See Mark P. Gergen, John M. Golden & Henry E. Smith*,“*The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions.” 112 COLUMBIA L. REV. 202 (2012). Thus, it is not clear that *Winter* is the last word on when preliminary injunctions should be granted. [↑](#footnote-ref-9)
10. For academic proposals to change preliminary injunction doctrine, see: Richard R.W. Brooks & Warren F. Schwartz, Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine, 58 STAN. L. REV. 381 (2005); and John Leubsdorf, Preliminary Injunctions: In Defense of the Merits, 76 FORDHAM L. REV. 33 (2007). [↑](#footnote-ref-10)
11. Rachel A. Weisshaar, Hazy Shades of Winter:? Resolving the Circuit Split over Preliminary Injunctions, 65 VANDERBILT L. REV. 1011, 1032 (2013). [↑](#footnote-ref-11)