No. 12-2673

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY; PAUL KENNEDY; JOHN KENNEDY, IV; MARGARET KENNEDY; THOMAS KENNEDY
Plaintiffs – Appellants

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, names as Hilda Solis; Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department
Defendants – Appellees

On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:12-CV-1096
Hon. Robert J. Jonker

APPELLANTS' SUPPLEMENTAL BRIEF

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SUMMARY OF SUPPLEMENTAL ARGUMENT

This Court asked for supplemental briefing on questions relating to standing and the Anti-Injunction Act. The Plaintiffs-Appellants have standing. Autocam Corporation and Autocam Medical, LLC (collectively "Autocam") is owned and operated by John Kennedy, Paul Kennedy, John Kennedy IV, Margaret Kennedy, and Thomas Kennedy (the "Kennedy Family," collectively with Autocam, the "Plaintiffs"). The Kennedy Family is being coerced to take actions inconsistent with their religious beliefs, which supports standing under the Religious Freedom Restoration Act ("RFRA"). Autocam itself is directly subject to an injury for exercising the religious faith of its owners and operators—the faith that it operates under and expresses through its work in the world. These Plaintiffs are experiencing injury in this case. Whether this rises to the level of a *substantial* burden under the RFRA—and thus whether they will ultimately succeed—is a different question from standing and is addressed in the prior briefing.

The Anti-Injunction Act ("AIA") is not implicated in this case. The Plaintiffs are challenging regulations issued by the Department of Health and Human Services—the "HHS Mandate"—and are not seeking to stop collection of a tax. The multi-million penalty at issue is just that, a penalty, and not a tax subject to the AIA. Furthermore, the RFRA provides a specific remedy and controls over the AIA's general provisions. And even if the AIA applies, the Plaintiffs can move forward under an exception to the statute.

ARGUMENT

I. The Kennedy Family has Article III standing to bring RFRA claims because they face coercion to violate their faith, the RFRA grants them standing, and the injury to their company provides a concrete injury.

Standing concerns whether "[a] litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "Article III standing requires a litigant to have suffered an injury-in-fact, fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief." *NRA v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). When evaluating standing at this stage, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Coyne ex Rrel. Ohio v. American Tobacco* Co, 183 F.3d 488, 492 (6th Cir. 1999). The Kennedy Family's allegations easily demonstrate their standing to challenge the Mandate under the RFRA.

The Kennedy Family alleges that: (1) they fund, control, and operate a group health plan for their employees, (Verif. Comp., R. 1 at ¶¶ 17-18, 36-40, Page ID # 5, 7-8); (2) the plan is not exempt from the Mandate, (*Id.* at ¶ 42, Page ID # 9); (3) they have a sincere religious objection to covering the mandated drugs and services

(*Id.* at ¶¶ 38-39, Page ID # 8); (3) they exercise their religion through how they operate Autocam, (*Id.* at ¶¶ 31-39, Page ID # 7-8); and (4) the HHS Mandate threatens them with penalties if they do not comply (*Id.* at ¶ 41, Page ID # 9). The Kennedy Family has thus alleged that the HHS mandate coerces them to act contrary to their religious beliefs. See, e.g., *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, *3 (7th Cir. Dec. 28, 2012) (explaining that "the religious-liberty violation at issue here inheres in the *coerced coverage*"); see also *McGlone v. Bell*, 681 F.3d 718, 729 (2012) (In First Amendment context, a plaintiff has standing if she intends to engage in a course of protected conduct that is proscribed by statute backed with a credible threat.) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). These undisputed allegations establish Article III standing. The coercion on their faith exceeds the requirements for constitutional standing. See *Lujan*, 504 U.S. 561-62.

The statutory text of the RFRA also shows that the Kennedy Family has standing. The RFRA affords them the right to "assert that violation as a claim or defense in a judicial proceeding." 42 U.S.C. § 2000bb-1(c). And they allege that the HHS Mandate is violating their religious freedom. "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *ACLU v. NSA*, 493 F.3d 644, 720, n.19 (6th Cir. 2007) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3, 93 S. Ct.

1146, 35 L. Ed. 2d 536 (1973)); see also *Warth*, 422 U.S. 500 (explaining that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief").

The jurisdictional question of the Kennedy Family's standing under RFRA is distinct from the merits question of whether the HHS Mandate's burden is "substantial" or whether the Kennedy's will ultimately succeed. Unless Congress "clearly states" that "a statutory limitation on coverage [is] jurisdictional, courts should treat the restriction as non-jurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). It is immaterial to standing that the HHS Mandate applies to Autocam's health plan and not to the Kennedy Family personally. The HHS Mandate governs "a group health plan," 42 U.S.C. § 300gg-13, but the Kennedy Family controls that plan and operates it in accordance with their religious values. See, e.g., *Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."). Coercing Autocam and its plan thus coerces the Kennedy Family to operate the plan in a particular way that violates their right to freely exercise their faith. See, e.g., *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir.1988) (a family corporation bringing a free exercise challenge "present[ed] no rights of its own different from or greater than its owners' rights"); *Stormans, Inc. v.*

Selecky, 586 F.3d 1109, 1121 (9th Cir. 2009) (concluding "we will consider the rights of the owners as the basis for the Free Exercise claim").

More broadly, characterizing the HHS Mandate's impact as "indirect" cannot defeat the Kennedy Family's standing: "[t]he fact that the harm . . . may have resulted indirectly does not in itself preclude standing." *Warth*, 422 U.S. at 504-05. If a regulation "imposed on one party causes specific harm to a third party, . . . the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Id*. (citation omitted). In *Stormans*, for example, although the rule required the *pharmacy* to deliver medications, the pharmacy would "generally depend upon their pharmacists" to comply. 586 F.3d at 1121. Thus, pharmacists with a religious objection to delivering those medications could challenge the rule. *Id*. at 1121-22 ("It is difficult to imagine a more appropriate group of plaintiffs to challenge new rules governing the conduct of pharmacies and pharmacists than a pharmacy and two pharmacists."). The Kennedy Family can similarly challenge a regulation of their business that would make them violate their faith.

Finally, the Kennedy Family as shareholders also have Article III standing to challenge action that threatens their property interests in their companies. See, e.g., *Franchise Tax Bd. of Cal. v. Alcan Alum. Ltd.*, 493 U.S. 331, 336 (1990) ("quite right" that owners "have Article III standing to challenge the taxes that their [businesses] are required to pay"). The Kennedy Family faces the prospect of complete destruction of their business if they do not comply; this is an injury that triggers standing.[1] See, e.g., *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006) (shareholders have Article III standing when corporation "incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings").[2] For all of these reasons, the Kennedy Family has standing.

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[1] It is disingenuous for the Defendants to argue that Plaintiffs cannot show injury-in-fact based on the fines they must pay if they fail to provide the benefits to which they object for religious reasons. It is true that the Plaintiffs objection to the HHS Mandate is about the moral—as opposed to monetary—cost of providing the mandated coverage. But it is also true that the punitive fines the Plaintiffs must pay if they fail to provide the objectionable benefits will destroy their business and by any realistic measure those fines are a real financial injury that provides standing. See, e.g., *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) ("A civil fine is a pecuniary injury, and pecuniary injury is clearly a sufficient basis for standing.") (quotation omitted*); Danvers Motor Co. v. Ford Motor Co*., 432 F.3d 286, 289 (3d Cir. 2005) ("Monetary harm is a classic form of injury.").

[2] Furthermore, no distinct prudential standing rules apply to the RFRA. The statute provides that standing "shall be governed by the general rules of standing under Article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Where "Congress intended standing . . . to extend to the full limits of Art[icle] III," courts "lack the authority to create prudential barriers to standing." *Havens Realty Corp*., 455 U.S. at 372. Moreover, the Kennedy Family is asserting their own rights to exercise their own religious beliefs, which are being trampled on by the HHS Mandate.

II. Autocam has standing independent of the rights of their corporate shareholders, to assert the RFRA claim alleged in the complaint because Autocam is injured by the HHS Mandate.

A. *Autocam itself is directly subject to the HHS Mandate.*

It is undisputed that Autocam is subject to the HHS Mandate and has a non-grandfathered plan. When "the plaintiff is [itself] an object of the action" there is "ordinarily little question" that the action "has caused it injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. 561-62. As the Government recognizes, Autocam is itself the target here. It faces a direct injury, and it unquestionably has standing to proceed.

B. *Whether Autocam can exercise religion is distinct from whether it has standing.*

The Government's principal argument that Autocam cannot exercise religion is irreverent to whether it has standing to invoke this Court's jurisdiction. First, as discussed at length in the Plaintiffs' earlier briefing, Autocam is and has a right to exercise religion. The undisputed factual record attests that Autocam, through the actions of its owners and operators, has been exercising religion. (Verif. Comp., R.1 ¶¶ 31-40 Page ID # 7-8.) Imposing a massive penalty on Autocam for exercising religion must suffice to establish a concrete injury for article III standing purposes.

Second, even if Autocam itself were to fail on the merits of its RFRA claim, this would not preclude standing. Courts must treat statutory elements as non-jurisdictional, unless Congress "clearly states" they are jurisdictional. *Arbaugh*, 546 U.S. at 515. Congress did no such thing in RFRA, and instead provided that standing depends only on "the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Furthermore, had Congress intended to exclude for-profit corporations, it would not have used the term "person," which includes corporations as a matter of statutory and constitutional construction. See 1 U.S.C. § 1 (providing that, generally, the word "'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Nothing in the RFRA precludes a business like Autocam that faces massive penalties for exercising religion from invoking this Court's jurisdiction.

III. Autocam has standing to assert the free exercise rights of its owners and operators.

The Court's Briefing Order also asks whether Autocam has standing to assert the Kennedy Family's rights. The Court need not answer this question because the Kennedys are parties, and the "presence of one party with standing is sufficient to satisfy article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 53 n. 2 (2006); see also *ACLU v. Grayson County, Ky*, 591 F.3d 837, 843 (6th Cir. 2010) (same) (citing

Rumsfeld). If the Court reaches this question, however, the answer is yes: third-party standing principles would allow Autocam to assert its owners' rights.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958), the Supreme Court held that the NAACP had standing to assert its members' rights. Because members' rights could not otherwise "be effectively vindicated" and because the NAACP had a "nexus . . . sufficient to permit that it act as their representative," the Court granted third-party standing to the organization. *Id*. Relying on *NAACP*, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n. 26 (1985), held that an organization had standing to bring free exercise claims on behalf of its members. The Ninth Circuit has twice relied upon *Tony and Susan Alamo* to hold that for-profit corporations have third-party standing to represent their owners' free exercise rights. *Townley*, 859 F.2d at 620 n. 15 (corporation had standing to challenge Title VII on alleged ground that it violated owner's free exercise); *Stormans*, 586 F.3d at 1121 (corporation had standing to challenge state regulation on ground that it required owners to violate their consciences); *see also Tyndale House Pub., Inc. v. Sebelius*, No. 12-cv-1635, 2012 WL 5817323, *9 (D.D.C. Nov. 16, 2012) ("Viewing the rights of Tyndale's owners . . . as the basis for its RFRA claim, the Court finds that Tyndale has made a satisfactory showing of article III standing.").

Second, the Government's theory in this and other HHS lawsuits shows how the Kennedy Family's ability to protect their own rights could be hindered. The Government's argument is that the fine imposed by the HHS Mandate is imposed on the company, and not its owners. To embrace that, argument while denying third-party standing would create a catch-22 where both company and owners are harmed by the HHS Mandate but neither could challenge it. The Constitution should not be interpreted to allow the Government to impose the HHS Mandate, while stripping federal courts of jurisdiction to consider challenges to it.

IV. The Anti-Injunction Act, 26 U.S.C. § 7421(a), has no impact on the Court's jurisdiction.

The Anti-Injunction Act ("AIA") does not apply to this matter for several reasons. Section 4980D is a penalty, rather than a tax, for AIA purposes. Congress labeled Section 4980D as a "penalty," structured it based on fault, and made the penalty so substantial that forcing compliance with the regulation rather than revenue to the government is the only possible goal. Under *Natl'l Fed'n of Indep. Businesses v. Sebelius*, __U.S.__, 132 S.Ct. 2566 (2012), a clearly expressed congressional intent to treat a statute as a penalty, rather than a revenue-raising tax, would prevent the application of the AIA, but the indicia of legislative intent show Section 4980D is a penalty. Furthermore, the Plaintiffs are challenging the HHS Mandate itself, and not just the monetary penalty imposed by 26 U.S.C. § 4980D. To the extent Section 4980D is subject to the AIA at all, the

RFRA controls over the AIA as the specific statute governing this type of injunction. And even if the AIA is controlling, the judicially-created exception bases on irreparable harm and success on the merits permits the Court to issue an injunction.

As a preliminary matter, it is worth noting that the Government has taken the position that the AIA does not apply here. This position is entitled to deference. *See Seven-Sky v. Holder*, 661 F.3d 1, 12 (D.C. Cir. 2011) (observing that "the Government's determination that the Anti-Injunction Act should not be interpreted to bar appellants' suit is entitled to deference"), abrogated on other grounds by *Sebelius*, 132 S.Ct. 2566. Whether or not the Court defers to the Government on this matter, the AIA does not apply to bar the Plaintiffs' challenge.

A. *The AIA does not apply to Section 4980D's penalty.*

1. Because Congress created the AIA to protect tax collection, its application is limited to statutes that manifest a congressional intent to raise tax revenue rather than regulate and penalize conduct.

The AIA, 26 U.S.C. § 7421(a), is a procedural statute with a single purpose: protecting tax collection from judicial meddling. "The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.* 370 U.S. 1, 7 (1962); *see also NFIB v. Sebelius*, 132 S.Ct. 2566, 2583 (2012)

("This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes."). The AIA is to be read literally and applies to "truly revenue-raising tax statutes." *Bob Jones Univ. v. Simo*n, 416 U.S. 725, 736-43 (1974).

The Supreme Court recently analyzed in the AIA in *Sebelius*. 132 S.Ct. at 2583. The Supreme Court determined that the AIA did not apply to the individual mandate because Congress had characterized the "individual responsibility payment" levied on taxpayers for failure to purchase insurance as a "penalty." *Id.* at 2583-93. *Sebelius* thus found that congressional intent could show that a statute was outside the reach of the AIA. Although *Sebelius* does not hold that a label alone controls, in that case, the Court did defer to Congress where it had plainly indicated an intent that the payment be treated as a penalty not a tax for the purpose of the AIA.

Sebelius did not make new law on this point. Courts have always looked to whether the statutory language reveals a legislative intent to regulate or a legislative intent to raise revenue when determining whether a measure was properly characterized as a tax within the meaning of the AIA. In doing so, courts have recognized that the AIA does not apply simply because Congress has used the label "tax" in a statute when the effect of the statute (and thus its intent) was to regulate rather than raise revenue. For example, the Seventh Circuit found that the

"Marijuana Transfer Tax" was "penal in nature, and not enacted as a revenue-raising statute." *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978). This is so even though Congress gave it the title "tax." *Id.;* see also *Tovar v. Jarecki*, 173 F.2d 449, 451 (7th Cir. 1949) (marijuana). Similarly, the AIA did not bar a suit to enjoin enforcement of a "tax" for violating the Prohibition Act, which was really a penalty and not a tax. *Lipke v. Lederer*, 259 U.S. 557, 562 (1922).

Precedent concerning the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, features this same focus on whether the statutory language reveals a legislative intent to regulate or to raise revenue.[3] Under the TIA, "the label given by a state for an assessment or charge is not dispositive of its character." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 762 (10th Cir. 2010). The "touchstone" of a court's "inquiry is the purpose of the assessment." *Id.* 761. This includes an examination of "the incentive structure created by a levy." *Id.* For TIA purposes, "an assessment is a tax when its purpose is to raise revenue, while levies assessed for regulatory or punitive purposes, even though they may also raise revenues, are generally not 'taxes.'" *Id.* (quotation omitted). Thus, a "regulatory penalty" is "not a tax, because its purpose is to regulate behavior rather

[3] The TIA prohibits federal injunctions against state taxes, and courts often look to AIA precedent when interpreting the TIA, and vice-versa. See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 104 (2004) ("Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints.").

than to raise revenue." *Id.* 763. *Edmondson* involved a challenge to an Oklahoma statute that created "an incentive structure that, on pain of financial assessment, encourages employers to verify the employment authorization of their independent contractors" to prevent the hiring of illegal immigrants. *Id.* Although characterized as an assessment or tax, "the expressed primary goal of the Oklahoma Act is to regulate behavior." It was not a tax for TIA purposes, and it could be enjoined. *Id*.; see also *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc*., 651 F.3d 722, 728 (7th Cir. 2011) (en banc) (Posner, J.) (noting that the "distinction is between exactions designed to generate revenue . . . and exactions designed either to punish (fines, in a broad sense) rather than to generate revenue (the hope being that the punishment will deter, though deterrence is never perfect and therefore fines generate some state revenues)"). The text, structure, and purpose of the HHS Mandate enforcement mechanisms show that Section 4980D is a regulatory penalty and not a tax.

2. <u>The Preventative Care Mandate is a penalty not a tax.</u>

In 2010, Congress enacted the Affordable Care Act, including 42 U.S.C. § 300gg-13. This statute contains the Preventative Care Mandate and requires certain health plans to provide coverage without cost sharing, which ultimately included the HHS Mandate. Congress located the statute within Title 42 of the

U.S. Code, covering public health and welfare. It is enforced in a variety of ways by the Secretary of Labor, private litigants, and the penalty in Section 4980D.

For example, the Affordable Care Act incorporated the requirements of the HHS Mandate into the Employee Retirement Income Security Act ("ERISA"), 29 USC § 1185d(a). ERISA permits plan beneficiaries or the Secretary of Labor to sue for the benefits included in the HHS Mandate. 29 USC § 1132(a).[4] The goal of these remedies is to secure compliance with the legal requirements governing benefit plans.

Along with changes to Title 42 (the underlying mandate) and Title 29 (allowing enforcement), the Affordable Care Act also made the changes to the Internal Revenue Code relevant here. Congress added 26 U.S.C. § 9815 to the Internal Revenue Code, titled "Additional market forms," which also incorporated the requirements of the HHS Mandate into the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191. Of particular importance to this case is HIPAA Section 402, codified as 26 U.S.C. § 4980D, which imposes massive penalties for failure to comply with group health care requirements. The actual language used by Congress shows that Section 4980D was intended as a penalty:

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[4] In some circumstances, ERISA can also impose criminal penalties. See 29 USC § 1132. It is not immediately clear whether these penalties could ever be used to enforce issues related to the HHS Mandate.

> SEC. 402. **PENALTY** ON FAILURE TO MEET CERTAIN GROUP HEALTH PLAN REQUIREMENTS.
>
> (a) In General.--Chapter 43 of the Internal Revenue Code of 1986 (relating to qualified pension, etc., plans) is amended by adding after section 4980C the following new section: [then providing the language of Section 4980D]

P.L. 104-191 (emphasis added); see also H.R. CONF. REP. 104-736, *155 (same). Thus, the actual act passed by Congress applied the label "penalty" to describe the enforcement mechanism of Section 4980D.

The features and function of Section 4890D also show it is a penalty. By its terms, Section 4980D is a "tax" on "noncompliance" that only applies to the period of noncompliance. The penalties are fault-based, and can be limited or waived if the employer "did not know, and exercising reasonable diligence would not have known" that it failed to comply or if the failure to comply was "due to reasonable cause and not to willful neglect." 26 U.S.C. § 4980D(c)(1) and (c)(4). The amount of the fine is calculated with reference to employees denied benefits, not income. Any revenue provided is incidental to noncompliance. And the amount of the fine is so draconian ($19,000,000 for the Plaintiffs' here) and out of proportion to any cost of benefits ($100,000 here) that it is plainly penal in nature. In all these ways, Section 4980D creates an incentive structure to force compliance and punish noncompliance. Put another way, Section 4980D is a penalty not a tax. When Section 4980D is seen as a provision designed to coerce compliance it parallels and complements the other remedies that Congress provided under Title 29, which governs employees benefits and authorizes a plan participant, beneficiary, or the Secretary of Labor to bring an action to require compliance with benefits law. See 29 U.S.C. §1132.

The lesson of *Sebelius* is that if Congress intended the statutory section to serve as a penalty, as opposed to a revenue-raising tax, the AIA does not apply. In passing HIPAA, Congress explicitly labeled Section 4980D as a penalty, it functions as a penalty for noncompliance, and as a mechanism designed to ensure compliance it shares the thrust of other remedies available for noncompliance. For all these reasons, it is plain that Congress labeled Section 4980D as a penalty because it called the section and penalty and understood the section to be a penalty, not a revenue raising measure.

B. *The Plaintiffs are challenging the HHS Mandate itself, not just the Section 4980D penalty.*

To the extent that the Court believes Section 4980D is a tax and not a penalty, the AIA would still not apply because the Plaintiffs are challenging a mandate issued by the Department of Health and Human Services, not a tax to be collected by the IRS.[5] This lawsuit concerns a challenge to the HHS Preventative

[5] The Plaintiffs have also named the Treasury Department and the Treasury Secretary in their Complaint. JA 19a. But that is because the Treasury Department (in addition to the Labor Department) has issued regulations incorporating the HHS Mandate by reference. See 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012); 29

Care Mandate, and 45 C.F.R. § 147.130—the "HHS Mandate." As noted above, the HHS Mandate itself is a direct requirement that the Plaintiffs provide drugs and services, which is enforced through multiple mechanisms. Because the Court can enjoin the application of this Mandate without enjoining the penalty of Section 4980D, the AIA does not apply. Simply put, this is an HHS regulation, not an IRS regulation.

Plaintiffs are unaware of any case in which the AIA has been found to bar a suit challenging action by an agency other than the IRS or challenging a law outside the Internal Revenue Code. Indeed, courts reviewing non-tax regulations like the HHS Mandate have not applied the AIA's bar, even where the challenged regulations are enforceable by a separate tax expressly subject to the AIA. In *National Petrochemical & Refiners Association v. EPA*, for example, the D.C. Circuit considered a procedural challenge to the EPA's Highway Diesel Fuel Sulfur Control Requirements ("Diesel Requirements"), which established emission standards for diesel fuel. 287 F.3d 1130, 1134 (D.C. Cir. 2002). By separate statute, the Diesel Requirements are enforceable by IRS penalty. See 26 U.S.C. § 6720A (imposing $10,000 penalty for each transfer of fuel not in compliance with the Diesel Requirements). Another statute expressly provides that the

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C.F.R. § 2590.715-2713. A change in the HHS Mandate would remove the threat posed by the Treasury and Labor regulations as well.

penalties are taxes for AIA purposes. 26 U.S.C. § 6671(a); see also *NFIB*, 132 S. Ct. at 2583 (noting that "[p]enalties in subchapter 68B [including fuel penalties] are thus treated as taxes under Title 26, which includes the Anti–Injunction Act"). Yet no federal court has ever held that the AIA barred an action challenging the Diesel Requirements themselves. Similarly, in over thirty-five years of challenges to the EPA's Clean Air Act fuel registration requirements, the D.C. Circuit has never once applied the AIA—even though the Internal Revenue Code relies on these Clean Air Act requirements to determine who must pay certain taxes and penalties. *Compare Lubrizol Corp. v. EPA*, 562 F.2d 807, 809 (D.C. Cir. 1977), *and Ethyl Corp. v. Browner*, 67 F.3d 941, 942 (D.C. Cir. 1995), *with* 26 U.S.C. § 4101; 26 U.S.C. § 4081; 26 U.S.C. § 6719; 26 U.S.C. § 40A (tax and penalty provisions incorporating Clean Air Act definitions and requirements). Thus, there is no basis to expand the reach of the AIA to cover non-tax regulations like the HHS Mandate.

The suit here is not brought "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a), but instead seeks to protect religious freedom by enjoining a regulation that was not promulgated by the IRS and is not located in the Tax Code. To the extent possible future IRS enforcement is incidentally implicated, that does not trigger the AIA. See *Cohen*, 650 F.3d at 726-27 (the AIA "does not . . . reach all disputes tangentially related to taxes").

C. *The RFRA permits the relief sought by the Plaintiffs and controls over the AIA.*

To the extent the AIA applies at all, the RFRA controls over the AIA. The RFRA provides this Court with jurisdiction over the Plaintiffs' claims. See 42 U.S.C. § 2000bb-1(c) (creating right of action). Congress took pains to specify that the term "government" as used in the statute "includes a branch, department, agency, instrumentality, and official…of the United States…." 42 U.S.C. §200bb-2(1). Congress expressly crafted the RFRA to apply to all federal statutes, including those adopted before and after the RFRA, unless the statute explicitly controls over the RFRA. 42 U.S.C. § 2000bb-3. The AIA contains no language excluding it from the reach of the RFRA. See 26 U.S.C. § 7421.

Moreover, to the extent there is a conflict between the RFRA's attempt to provide a private right of action and the AIA's attempt to restrict it, the canons of statutory construction indicate that the RFRA wins out for two reasons. First, the RFRA was passed after the AIA. "A specific policy embodied in a later federal statute should control our construction of the earlier statute, even though it has not been expressly amended." *Detroit Receiving Hosp. and University Health Center v. Sebelius*, 575 F.3d 609, 614 (6th Cir. 2009) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). The RFRA embodies a specific policy of allowing those burdened by a federal government action to enjoin that action in court. Second, the RFRA is the more specific statute (covering taxes that burden religion) as opposed to the AIA's more general provision (covering only certain taxes). "There is an additional canon of statutory construction which dictates that the specific statute controls over the more general provision." *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998). As the specific statute, the RFRA controls.

Congressional intent to make RFRA comprehensive in its reach is emphatic. Consequently, RFRA applies to the AIA and prohibits an application of the AIA that results in a substantial burden on religion. Since there is no question that using the AIA to bar Plaintiffs' request for relief would subject the Plaintiffs to the vicious bind arising from the HHS mandate and noncompliance penalty, there is no question that RFRA permits the Plaintiffs to secure the relief they seek in this case.

D. *To the extent the AIA applies to this case, the Plaintiffs can claim the benefit of the judicially created exception for irreparable harm.*

Even if the Court finds that Section 4980D is a tax subject to the AIA, *and* that the HHS Mandate cannot be blocked without enjoining Section 4980D, *and* that the AIA controls over the RFRA, the Plaintiffs are still entitled to an injunction. Where a plaintiff shows that the Government cannot ultimately prevail, a tax may be enjoined if the other equitable requirements (e.g. irreparable harm) are shown. *Enochs v. Williams Packing & Nav. Co*., 370 U.S. 1, 7 (1962); see also *Everett v. United States*, 10 F. App'x. 336, 337 (6th Cir. 2001) ("the statute is not applicable if the taxpayer was certain to succeed on the merits and could demonstrate that the collection would cause him irreparable harm"); *Vonderheide v. United States*, 178 F.3d 1297, 1999 WL 220134, *1 (6th Cir. 1999) (AIA does not apply where government will not prevail and irreparable harm will occur because no other legal remedy exists); *Hezel v. United States*, 165 F.3d 27, 1998 WL 702311, *1 (6th Cir. 1998) ("the statute is not applicable if the taxpayer was certain to succeed on the merits and could demonstrate that the collection would cause him irreparable harm.").[6]

The Plaintiffs requested relief under the more relaxed preliminary injunction standard requiring a mere likelihood of success on the merits. And they have met that burden. But even if required to show certain—or actual—success on the merits, they have done so. For the reasons set forth in the earlier briefing, the HHS Mandate is unconstitutional and unlawful.

CONCLUSION

For these reasons, the district court's decision denying a preliminary injunction should be reversed and the case remanded with instructions to issue a preliminary injunction.

Respectfully submitted,

Dated: May 17, 2013

/s/ Patrick T. Gillen */s/ Jason C. Miller*

[6] This also shows that the AIA is not actually jurisdictional, which means that the Government can waive it, which it has done.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013 I served a true and correct copy of the foregoing on all counsel appearing in this case.

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order for supplemental briefing, which required it to be no longer than 30 pages in a 14-point font.