IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.* Plaintiffs, v. KATHLEEN SEBELIUS, *et al.* Defendants.	Case No. 1:12-cv-01096-RJJ

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Relying largely on claims this Court has already deemed unlikely to succeed, plaintiffs – two manufacturing companies and their shareholders – seek to strike down regulations that are intended to ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts have deemed necessary for women's health and well-being. Plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation established to engage in manufacturing can claim to exercise a religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, the Supreme Court and this Court have recognized that, "'[w]hen 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.'" *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012) ("*Opinion Denying Prelim. Inj.*") (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)), *motion for injunction pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2012), *reconsideration denied*, No. 12-2673 (6th Cir. Dec. 31, 2012). Nor can such a company's owners or officers eliminate the legal separation provided by the corporate form to impose their personal religious beliefs on the corporation's employees. To hold otherwise, this Court has emphasized, would permit for-profit, secular companies and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general

application. *Id.* This Court, therefore, should once again reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

Indeed, all of plaintiffs' claims are subject to dismissal for failure to state a claim upon which relief may be granted. With respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, none of the plaintiffs can show, as each must, that the preventive services coverage regulations impose a substantial burden on their religious exercise. This Court has already articulated the reasons why. *Id.* at *6-8. Autocam is a for-profit, secular employer, and a secular entity - by definition – does not exercise religion within the meaning of the Free Exercise Clause or RFRA. Indeed, this Court expressed grave doubts about Autocam's claim, *id.* at *4, and the only courts to address the question in this context have held that "secular, for-profit corporations[] do not have free exercise rights," *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. Nov. 19, 2012), *motion for injunction pending appeal denied*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) ("*Hobby Lobby Tenth Circuit Order*"), *application for injunction pending appellate review denied*, 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J., in chambers); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013) (same), *motion for stay pending appeal denied*, No. 13-1144 (3d Cir. Feb. 7, 2013) ("*Conestoga Third Circuit Order*") (Ex. 1). The Kennedys' allegations of a substantial burden on their own personal religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to certain group health plans and health insurance issuers. The Kennedys are neither. It is well established that a corporation and its shareholders and officers are wholly separate entities, and the Court should not permit the Kennedys to eliminate that legal separation to impose their personal religious beliefs on the corporate entity's group health plan or its employees. Autocam's owners and shareholders

cannot use the corporate form alternatively as a shield and a sword, depending on what suits them in any given circumstance.

Furthermore, even if a secular entity could exercise religion, the regulations still do not substantially burden the company's or its owners' exercise of religion for an independent reason: Any burden caused by the regulations is simply too attenuated to qualify as a substantial burden. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. Just as employees of Autocam have always retained the ability to choose whether to procure contraceptive services by using the salaries the company pays them or by using some combination of their salaries and other benefits provided by Autocam, under the current regulations those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences. Autocam and its shareholders remain free to advocate against employees' use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not Autocam's or Autocam's shareholders. Finally, even if the preventive services coverage regulations were deemed to impose a substantial burden on either plaintiff's religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who choose to do so can be a part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable, even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). As this Court correctly concluded, the preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously-motivated

conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with a religious affiliation. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4-5. Nor do the regulations violate the Establishment Clause by selectively burdening plaintiffs. Plaintiffs did not rely on this claim in seeking preliminary injunctive relief, and it is meritless. Furthermore, the regulations do not violate plaintiffs' free speech rights. This Court has already held that the regulations compel conduct, not speech, and that conduct is not inherently expressive so as to warrant First Amendment protection. *Id.* at *8.

For these reasons, and those set out below, the Court should grant defendants' motion to dismiss this case in its entirety.

BACKGROUND

Defendants have already set out, and the Court is well aware of, the statutory, regulatory, and factual background related to this case. *See* Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Inj. 4-7, Nov. 9, 2012, ECF No. 17 ("Defs.' PI Opp'n"); *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, *1-4. Defendants will not repeat it here, except to summarize the proceedings thus far.[1]

Plaintiffs brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage Autocam makes available to its employees to cover certain recommended contraceptive services. Plaintiffs filed suit on October 8, 2012. *See* Compl., ECF No. 1. They moved for a preliminary injunction on October 10, 2012, relying on their RFRA, Free Exercise Clause, and Free Speech Clause claims. *See* Pls.' Br. Supporting Mot. for Prelim. Inj. 3-4, Oct. 10, 2012, ECF No. 9.

This Court denied plaintiffs' motion for a preliminary injunction. The Court held, in relevant part, that plaintiffs were unlikely to succeed on the merits of their RFRA, Free Exercise,

[1] Defendants generally will refer to the two company plaintiffs as a single entity, "Autocam," and to the individual plaintiffs collectively as "the Kennedys."

and Free Speech claims. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *4-9. Plaintiffs have appealed the Court's ruling as to their RFRA claim.[2] They also moved the Sixth Circuit Court of Appeals for an injunction pending appeal, which the Sixth Circuit denied. *Autocam Corp. v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 28, 2012) ("*Autocam Sixth Circuit Order*").[3] Shortly thereafter, plaintiffs moved for reconsideration of the Sixth Circuit's denial of an injunction pending appeal, which was also denied. *Autocam Corp. v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 31, 2012).

On February 5, 2013, plaintiffs dismissed their First Amendment Expressive Association claim (Count VI) and all their Administrative Procedure Act claims (Counts IX through XII). Notice of Dismissal of Pls.' Counts VI and IX – XII, ECF No. 48. In their remaining claims, plaintiffs contend that the preventive services coverage regulations violate RFRA and the First Amendment's Free Exercise, Establishment, and Free Speech Clauses.

STANDARD OF REVIEW

Defendants move to dismiss the Complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under this Rule, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Bell*

[2] Plaintiffs' opening brief before the Sixth Circuit appears to address this Court's denial of preliminary relief as to RFRA only. *See* Appellants' Principal Br., Feb. 11, 2013, *Autocam Corp. v. Sebelius*, No. 12-2673.

[3] The Sixth Circuit did, however, grant expedition of the appeal. *See Sixth Circuit Order*.

Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); *U.S. Citizens Ass'n v. Sebelius*, -- F.3d --, Nos. 11-3327 & 11-3798, 2013 WL 380342, *5 (6th Cir. Feb. 1, 2013).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT CLAIM

A. The Preventive Services Coverage Regulations Do Not Substantially Burden Any Exercise Of Religion By For-Profit, Secular Companies And Their Owners

This Court has already held that plaintiffs are unlikely to establish a substantial burden on any exercise of religion. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4, 6-8. A Sixth Circuit motions panel agreed, citing this Court's "reasoned opinion" as well as the Supreme Court's denial of an injunction pending appeal in *Hobby Lobby Stores, Inc.*, 133 S. Ct. 641. *Sixth Circuit Order* at 2. This Court's reasons for denying preliminary injunctive relief warrant dismissal of plaintiffs' RFRA claim.

i. There is no substantial burden on Autocam because secular, for-profit corporations do not exercise rights under RFRA

Under RFRA, the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Here, as this Court has recognized, plaintiffs have not shown that the regulations substantially burden any religious exercise. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4, 6-8; *see also* Defs.' PI Opp'n at 9-18. Any suggestion that Autocam "exercise[s] . . . religion" with the meaning of RFRA cannot be reconciled with Autocam's self-described status

as a "for-profit, secular employer[]." Compl. ¶ 155. The terms "religious" and "secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *See* Merriam-Webster's Collegiate Dictionary 1123 (11th ed. 2003). Thus, by definition, a secular company does not engage in any "exercise of religion," 42 U.S.C. § 2000bb-1(a), as required by RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he practice[] at issue must be of a religious nature."); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd on other grounds*, 333 F.3d 156 (rejecting an organization's RFRA claim because "nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, [Plaintiff] defines itself as a 'non-profit charitable corporation,' without any reference to its religious character or purpose.").

Because Autocam is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added); *see also, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that the Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (citations and quotation marks omitted) (emphasis added).

RFRA was intended only to reinstate the pre-*Smith* compelling interest test, 42 U.S.C. § 2000bb-1(b), *not* to *expand* the scope of that test. The Sixth Circuit has explained, in the parallel RLUIPA context:

> The U.S. Supreme Court has not yet defined "substantial burden" as it applies to RLUIPA. Neither does the statute itself contain any definition of the term. The statute's legislative history, however, indicates that the "term 'substantial burden' as used in this Act is *not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise*." 146 Cong. Rec. S7774–01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. App'x 729, 733-34 (6th Cir. 2007) (emphasis added). In other words, Supreme Court precedent should guide judicial interpretation of the phrase "exercise of religion" contained in RLUIPA and RFRA.[4] *Id.*; *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) ("Congress defined the term 'exercise of religion' only as meaning 'the exercise of religion under the First Amendment to the Constitution.'"). There is no authority – much less from the Supreme Court – to support plaintiffs' assertion "that a secular, for-profit corporation has a First Amendment right of free exercise of religion." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4; *see also, e.g.*, *Anselmo v. Cnty. of Shasta*, 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a non-religious organization such as Seven Hills."). This is powerful evidence that Congress did not intend that a secular, for-profit corporation could engage in any "exercise of religion" under RFRA. Accordingly, the two other district courts and one other circuit court motions panel to have reached the issue in cases like

[4] RFRA expressly incorporates the definition of "exercise of religion" contained in RLUIPA. 42 U.S.C. § 2000bb-2(4) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."); *id.* § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

this one have rejected claims nearly identical to Autocam's. *See Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1291-92; *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013); *Conestoga Third Circuit Order*, Ex. 1 at 3. This Court should continue to do the same.

Furthermore, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies cannot permissibly discriminate on the basis of religion in hiring or firing their employees or otherwise establishing the terms and conditions of their employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id.* § 2000e-1(a). It is clear that Autocam does not qualify as a "religious corporation"; it is for-profit, it engages in manufacturing, and it alleges no religious purpose or affiliation. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007).

It would be extraordinary to conclude that Autocam is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" under RFRA, *id.* § 2000bb-1(b).[5] Such a conclusion would allow a secular company to impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and

[5] Indeed, such a conclusion would not only expand the scope of RFRA in an unprecedented way, but would also undermine Congress's decision to limit the exemption in Title VII to religious organizations. Any company that does not qualify for Title VII's exemption could simply sue under RFRA to obtain an exemption from Title VII's prohibition against discrimination in employment. *See, e.g.*, *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[E]ven where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute.") (citation omitted).

well-being (including Title VII). A host of laws and regulations would be subject to attack. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. Moreover, any secular company would have the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences underscore why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.

It is significant that Autocam elected to organize itself as a secular, for-profit entity and to enter commercial activity. "'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.'" *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7 (quoting *Lee*, 455 U.S. at 261); *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share, or even know of, the owners' beliefs). In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). Any burden is therefore caused by the company's "choice to enter into a

commercial activity." *Id.*; *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring in part and concurring in judgment).[6]

ii. The regulations do not substantially burden the Kennedys' religious exercise because the regulations apply only to Autocam, a separate legal entity

The preventive services coverage regulations also do not substantially burden the Kennedys' religious exercise, for reasons this Court recognized in its prior ruling. By their terms, the regulations apply to group health plans and health insurance issuers. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The Kennedys are neither. The Kennedys nonetheless claim that the regulations substantially burden their religious exercise because the regulations require the group health plans sponsored by their for-profit secular companies to provide health insurance that includes contraceptive coverage.

But a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for

[6] A for-profit, secular employer like Autocam therefore stands in a fundamentally different position from a church or a religiously-affiliated non-profit organization. *Cf. Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation . . . . but that [its] activities themselves are infused with a religious purpose.").

governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring); *see also Living Water Church of God*, 258 Fed. App'x at *734 ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high . . . ."). Here, any burden on the Kennedys' religious exercise results from obligations that the regulations impose on a legally separate, secular entity.[7]

The Kennedys' theory boils down to the claim that what's done to the company (or group health plans sponsored by the company) is also done to its owners. But, as a legal matter, that is simply not so, as the very purpose of incorporation "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." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). "Standing between the Kennedy Plaintiffs and the decisions some Autocam employees make to procure contraceptive services are not only the independent decisions of an employee and the employee's health care provider, but also the corporate form itself." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. The Kennedys should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on Autocam's group health plans or its large number of employees. *Id.* ("The law protects th[e] separation between the corporation and its owners for many worthwhile purposes. Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own.").

Although the preventive services coverage regulations do not require the Kennedys to provide contraceptive services directly, their complaint appears to be that, through *Autocam*'s

[7] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d). And, as explained below, Autocam is a legally separate entity from the Kennedys.

group health plans and the benefits *Autocam* provides to employees, the Kennedys will facilitate conduct (the use of contraceptives) that they find objectionable. But this complaint has no limits, and its necessary implications are "troubling." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. A company provides numerous benefits to its employees, including a salary, and by doing so in some sense facilitates whatever use its employees make of those benefits. But the Kennedys have no right to control the choices of their company's employees, many of whom (having been hired, presumably, without regard to their religious views) may not share the Kennedys' religious beliefs, when making use of their benefits. These employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations. More generally, if an owner's or shareholder's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization[]" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in hiring or firing its employees or otherwise establishing the terms and conditions of their employment, 42 U.S.C. § 2000e-1(a).

iii. Alternatively, any burden imposed by the regulations is too attenuated to constitute a substantial burden

Even assuming that Autocam exercises religion within the meaning of RFRA and that the legal separation created by the corporate form can be pierced when the corporation or its owners want it to be, the regulations still do not substantially burden plaintiffs' religious exercise. For reasons this Court has recognized, any burden imposed by the regulations is too attenuated to satisfy RFRA's substantial burden requirement. Indeed,

> [T]he [regulatory] requirement differs little in substance from Autocam's current practice of providing undesignated cash that employees are free to apply to uncovered health expenses – including contraception – of their choosing. In particular, the Autocam Plaintiffs already give each employee up to $1500 for a health savings account . . . .
>
> Implementing the challenged [regulations] will keep the locus of decision-making in exactly the same place: namely, with each employee, and not the Autocam plaintiffs. It will also involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and money originating from the Autocam Plaintiffs will pay for it . . . . [I]n both situations, the Autocam Plaintiffs are responsible to pay wages or benefits that their employees earn; and in neither situation do the wages and benefits earned pay – directly or indirectly – for contraception products and services unless an employee makes an entirely independent decision to purchase them.

Opinion Denying Prelim. Inj., 2012 WL 6845677, at *6; *see also, e.g.*, *Hobby Lobby Tenth Circuit Order*, 2012 WL 6930302, at *3 (deeming it unlikely that the Tenth Circuit "will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship"); *Conestoga Third Circuit Order*, Ex. 1 at 3 (agreeing with the district court that any burden on the corporation's owners' religious exercise would be "indirect" and "too attenuated" to be considered "substantial").

The Sixth Circuit has emphasized that "a 'substantial burden' is a difficult threshold to cross." *Living Water Church of God*, 258 Fed. App'x at 736, and this Court soundly concluded that "[p]laintiffs are unlikely to cross it," *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *6. Because the regulations do not substantially burden any religious exercise by plaintiffs, the regulations do not violate RFRA, and Count VIII should be dismissed.

B. Even If There Were A Substantial Burden, The Preventive Services Coverage Regulations Serve Compelling Governmental Interests And Are The Least Restrictive Means To Achieve Those Interests

i. The regulations significantly advance compelling governmental interests in public health and gender equality

Even if plaintiffs could demonstrate a substantial burden on their religious exercise, they

would not prevail because the regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. *See also* Defs.' PI Opp'n at 18-29. First, "the Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (concluding that "public health is a compelling government interest"); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995) ("The State . . . has a compelling interest in the health of expectant mothers and the safe delivery of newborn babies.") (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)).

There can be no question that this compelling interest in the promotion of public health is furthered by the regulations at issue here. As explained in the interim final regulations, the primary predicted benefit of the regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103. Contraceptive coverage also

helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations. As the Supreme Court explained in *Roberts,* there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." 468 U.S. at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress intended to equalize health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services,

with the resulting benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

ii. The regulations are the least restrictive means of advancing the government's compelling interests

The regulations, moreover, are the least restrictive means of furthering the government's dual interests. When determining whether a particular regulatory scheme is "least restrictive," the appropriate inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme – or whether the scheme can otherwise be modified – without undermining the government's compelling interest. *See S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1206 (6th Cir. 1990) (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (same); *see also, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.).

Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31, exempting Autocam and similarly-situated companies from the obligation to make available to its employees a health plan that covers contraceptive services would remove these employees from the very protections that were intended to further the compelling interests recognized by the government. *See, e.g., Graham v. Comm'r of Internal Revenue Serv.*, 822 F.2d 844, 853 (9th Cir. 1987) ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance."). Each woman who wishes to

use contraceptives and who works for Autocam or a similarly-situated employer (and each woman who is a covered spouse or dependent of an employee) – or, for that matter, any woman in such a position in the future – is significantly disadvantaged when her employer chooses to provide a plan that fails to cover such services. As revealed by the IOM Report, those female employees (and covered spouses and dependents) would be, as a whole, less likely to use contraceptive services in light of the financial barriers to obtaining them and would then be at risk of unhealthier outcomes, both for the women themselves and their potential newborn children. IOM REP. at 102-03. They also would have unequal access to preventive care and would be at a competitive disadvantage in the workforce due to their inability to decide for themselves if and when to bear children.[8] These harms would befall female employees (and covered spouses and dependents) who do not share their employer's religious beliefs and might not have been aware of those beliefs when they joined the ostensibly secular company. Autocam's desire not to make available a health plan that permits such individuals to exercise their own choice as to contraceptive use must yield to the Government's compelling interest in avoiding the adverse and unfair consequences that would be suffered by such individuals as a result of the company's decision. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees"); *S. Ridge Baptist Church*, 911 F.2d at 1209, 1211 n.6.

[8] Plaintiffs' allegations regarding the pre- and postnatal care available to Autocam employees, *see* Compl. ¶ 38, do not advance plaintiffs' RFRA claim. As explained in the IOM Report, unwanted or unplanned pregnancies are associated with adverse health outcomes for a variety of reasons unrelated to a lack of access to pre- and post-natal care. IOM REP. at 103. Thus, access to such care, while certainly desirable, does not fully address the compelling interest in women's and infants' health underlying the preventive services coverage regulations. And access to pre- and postnatal care does little to advance the government's compelling interest in gender equality. Nor does the care available to Autocam's employees reveal anything about care provided for employees of similarly-situated employers.

Should plaintiffs be permitted to extend the protections of RFRA to any employer whose owners or shareholders object to the operation of the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. Providing for voluntary participation among for-profit, secular employers would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. Indeed, women who receive their health coverage through corporations like Autocam would be subject to negative health and employment outcomes because they had obtained employment with a company that imposes its owners' religious beliefs on their health care needs. *See* 77 Fed. Reg. at 8728.

Thus, even if there were a substantial burden, the regulations serve compelling governmental interests and are the least restrictive means of achieving those interests, and Count VIII should accordingly be dismissed.

II. THE COURT SHOULD DISMISS PLAINTIFFS' FIRST AMENDMENT CLAIMS

A. The Regulations Do Not Violate The Free Exercise Clause

As explained above, a for-profit, secular employer like Autocam does not engage in any exercise of religion protected by the First Amendment. But even if it did, the preventive services

coverage regulations do not violate the Free Exercise Clause because – as this Court and numerous others have held – the regulations are neutral laws of general applicability. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5; *see also* Defs.' PI Opp'n at 29-32.

A neutral and generally applicable law does not violate the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *Smith*, 494 U.S. at 879; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The challenged regulations are neutral and generally applicable because they "do[] not target a particular religion or religious practice or have as [their] objective the interference with a particular religion or religious practice." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5. Rather, the regulations "appl[y] to all non-exempt, non-grandfathered plans," and, to the extent the regulations burden on plaintiffs' religious exercise, they do so only "incidentally." *Id.*

The Complaint suggests two ways in which the regulations are not neutral and generally applicable, neither of which has merit. First, plaintiffs aver that the regulations contain "categorical exemptions." Compl. ¶ 111. But as this Court and numerous others have recognized, the existence of categorical exemptions "does not mean that the law does not apply generally." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5 (citing *United States v. Lee*, 455 U.S. 252, 261 (1982)); *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). The regulations "appl[y] to all non-grandfathered, non-exempt plans, regardless of employers' religious persuasions, and this is enough to create a neutral law of general application." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5.

Second, plaintiffs claim that defendants have created a system of individualized exemptions. Compl. ¶ 111. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none. Plaintiffs incorrectly suggest that HHS' purported authority to grant "waivers," Compl. ¶ 57, 101, permits individualized exemptions from the challenged regulations. Plaintiffs appear to reference the annual limits waiver program. *See* 42 U.S.C. § 300gg-11; 45 C.F.R. § 147.126. The ACA's annual limits provision restricts annual dollar limits on essential health benefits provided by health insurance issuers and group health plans. *See id.* The Secretary of HHS had the authority to waive these restrictions for plans if compliance "would result in a significant decrease in access to benefits under the plan or health insurance coverage or would significantly increase premiums for the plan or health insurance coverage." 45 C.F.R. § 147.126(d)(3). These waivers are *not* related to the challenged regulations, however, and those non-exempt, non-grandfathered plans that received such a waiver must provide the required preventive services coverage.

Virtually every court to consider similar claims has agreed with this Court's conclusions. *See Conestoga Third Circuit Order*, Ex. 1 at 3; *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476 (CEJ), 2012 WL 4481208, *7-9 (E.D. Mo. Sept. 28, 2012), *stay pending appeal granted on other grounds*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *6-9, *18; *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, *7-8 (S.D. Ind. Dec. 27, 2012), *injunction pending appeal granted on other grounds*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Hobby Lobby*

Stores, Inc., 870 F. Supp. 2d at 1287-91; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006); *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 81-87 (Cal. 2004); Defs.' PI Opp'n at 29-32.

Because the regulations are neutral and generally applicable, and therefore do not violate the Free Exercise Clause, Counts I, II, III, and VII should be dismissed.

B. The Regulations Do Not Violate The Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id*. at 246 (quotations omitted); *see also Olsen v. DEA*, 878 F.2d 1458, 1461 (D.C. Cir. 1989). Although plaintiffs' theory is difficult to discern, they appear to claim that the preventive services coverage regulations violate the Establishment Clause by allegedly imposing a "selective burden on Plaintiffs" and "vest[ing] HRSA with unbridled discretion" as regards the "religious employer" exemption. Compl. ¶¶ 135-37. These contentions lack merit.

Plaintiffs' allegation that they are selectively burdened by the regulations mirrors their Free Exercise argument that the regulations are not generally applicable. *See Lukumi*, 508 U.S. at 543 (explaining that a generally applicable law does not "in a selective manner impose burdens only on conduct motivated by religious belief"); *see, e.g.*, *O'Brien*, 2012 WL 4481208, at *8. That argument fails, for reasons explained already. *See supra* at 19-22; *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5.

Likewise, plaintiffs miss the mark with their conclusory assertions about HRSA and the "religious employer" exemption. Indeed, plaintiffs misunderstand the regulations when they

assert – throughout the Complaint – that the regulations provide HRSA "unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of 'religious employers'" or to individuals. Compl. ¶¶ 93, 125, 130-31, 136-37, 154-55. That is incorrect. The plan of any employer that meets the criteria for the "religious employer" exemption is not required to cover contraceptive services. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Feb. 6, 2013); *see, e.g.*, *Grote*, 2012 WL 6725905, at *8. To be sure, secular, for-profit corporations such as Autocam do not meet these criteria, and therefore do not benefit from the "religious employer" exemption, Compl. ¶ 53, but that is not itself a violation of the Establishment Clause:

> Accommodations of religion are possible because the legislative line-drawing to which the plaintiffs object, between the religious and the secular, is constitutionally permissible. The religious employer exemption, by necessity, distinguishes between religious and secular employers, and HHS has selected a logical bright line between the two . . . . If the Constitution required Congress to provide exemptions for such employers whenever an exemption was also allowed for churches organized specifically for the purpose of promoting a religion, the accommodation would swallow the rule.

O'Brien, 2012 WL 4481208, at *10; *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *15 ("A statute does not violate the Establishment Clause merely because it distinguishes between secular and religious organizations."); *see also Catholic Charities of Diocese of Albany*, 859 N.E.2d at 459; *Catholic Charities of Sacramento*, 85 P.3d at 67.[9]

Because plaintiffs fail to state a plausible claim under the Establishment Clause, Count VI of the Complaint should be dismissed.

[9] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra* at 14-19.

C. The Regulations Do Not Violate The Free Speech Clause

The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights* ("FAIR"), 547 U.S. 47, 61 (2006). Plaintiffs have already advanced their Free Speech theory in this case; this Court soundly rejected it as "not persuasive." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *8; *see also* Defs.' PI Opp'n at 35-37. Every court to rule on similar claims has agreed. *See O'Brien*, 2012 WL 4481208, at *11-13 (dismissing identical Free Speech claim); *Conestoga Third Circuit Order*, Ex. 1 at 3 (agreeing with the district court's finding that plaintiffs' Free Speech claim had "little likelihood of success" because the regulations affect conduct, not speech); *Grote*, 2012 WL 6725905, at *8-10 (same).

The preventive services coverage regulations do not require plaintiffs – or any other person, employer, or other entity – to say anything. Like the statute at issue in *FAIR*, "the contraceptive coverage requirement 'regulates conduct, not speech. It affects what [employers] must *do* . . . not what they may or may not say.'" *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *8 (quoting *FAIR*, 547 U.S. at 60). And, as in *FAIR*, "the contraceptive coverage requirement differs from cases concerning compelled-speech violations, in which the violations 'resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate.'" *Id.* (quoting *FAIR*, 547, U.S. at 63). The conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *Id.*; *see FAIR*, 547 U.S. at 66; *see also O'Brien*, 2012 WL 4481208, at *12; *Conestoga Third Circuit Order*, Ex. 1 at 3-4. Thus, plaintiffs' Free Speech clause claim fails, and Counts VI and VII of the Complaint should be dismissed.[10]

[10] To the extent Count VII invokes the Free Exercise Clause, it fails for reasons explained earlier. *Supra* at 19-22.

CONCLUSION

For the forgoing reasons, this Court should grant defendants' motion to dismiss this case in its entirety.

Respectfully submitted this 15th day of February, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Jacek Pruski
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