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

INFRASTRUCTURE ALTERNATIVES, INC., *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 1:13-cv-00031-RJJ

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Advancing claims that are indistinguishable from those that this Court and the Sixth Circuit, as well as the Tenth and Third Circuits, have already reviewed and preliminarily deemed unlikely to succeed in similar litigation, plaintiffs—a for-profit contractor and two of its owners—challenge 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 Infrastructure Alternatives, Inc. ("IAI"), a for-profit, secular corporation, can claim to exercise 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) (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) ("*Autocam Sixth Circuit Order*") (Ex. 1), *and 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 "subject virtually every government action to a potential private veto," "paralyze the normal process of governing, and threaten to replace a generally uniform pattern of economic and social regulation with a patchwork array of theocratic fiefdoms." *Id.* Such a system would not only be a "recipe for chaos," it would also cripple the government's ability to solve national problems through

laws of general application. *Id.* This Court should 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 any religious exercise. IAI is a for-profit, secular employer, and a secular entity—by definition—cannot exercise religion within the meaning of the Free Exercise Clause or RFRA. Indeed, 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. 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 (2012) (Sotomayor, J., in chambers); *Conestoga Wood Specialties Corp. v. Sebelius*, Civil Action No. 12-6744, 2013 WL 140110, at *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. 2); *Briscoe v. Sebelius*, Civil Action No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *5 (D. Colo. Feb. 27, 2013) (same); *see Gilardi v. Sebelius*, Civil Action No. 13-104(EGS), 2013 WL 781150, at *5-8 (D.D.C. March 3, 2013) (holding that the secular, for-profit corporation in that case does not exercise religion). Mr. Cretens's and Mr. Trierweiler's (the "owners") 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 owners are neither. As this Court explained, "[n]either the law nor equity can ignore the separation [between a corporation and its owners]

when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Autocam*, 2012 WL 6845677, at *7. IAI's owners cannot use the corporate form as both a shield and a sword, depending on what suits them in any given circumstance, especially when the owners before the Court only own approximately 87 percent of the corporate entity.

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 too attenuated to be a substantial burden. Indeed, this Court relied on this rationale to deny preliminary injunctive relief in *Autocam*—a case that is indistinguishable from this one—explaining that "[i]mplementing the challenged mandate will keep the locus of decision-making in exactly the same place: namely, with each employee, and not the . . . 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 [corporation] will pay for it." *Id.* at *6. IAI and its owners remain free to advocate against employees' use of contraceptive services (or any other services), but ultimately, an employee's health care choices remain those of the employee, not IAI's and not IAI's owners'. Finally, even if the preventive services coverage regulations were deemed to impose a substantial burden on any 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 explained in denying preliminary injunctive relief in *Autocam*, the preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously-motivated conduct. "The law applies to all non-grandfathered, non-exempt plans, regardless of employers' religious persuasions, and this is enough to create a neutral law of general application." *Autocam*, 2012 WL 6845677, at *5. Nor do the regulations violate plaintiffs' free speech rights. "Including contraceptive coverage in a health care plan is not inherently expressive conduct, particularly when the coverage is included to comply with a neutral, generally applicable law." *Id.* at *8.

Finally, plaintiffs' Administrative Procedure Act (APA) claims fail as a matter of law, both because they consist of conclusory legal assertions which do not suffice to state a claim, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and because defendants complied with the APA's procedural requirements and the regulations are not arbitrary, capricious, or contrary to law.

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

BACKGROUND

The Court is well aware of the statutory and regulatory background related to this case. *See Autocam*, 2012 WL 6845677, at *1-4. Defendants will not repeat it here, and simply summarize the relevant factual background for this particular case.

Plaintiffs brought this action on January 10, 2013 to challenge the lawfulness of the preventive services coverage regulations to the extent those regulations require that the health coverage IAI makes available to its employees covers recommended contraceptive services. *See* Compl., Jan. 10, 2013, ECF No. 1. Plaintiffs are a for-profit corporation (IAI) and two of IAI's

owner-officers (Mr. Cretens and Mr. Trierweiler) who, together, own approximately 87 percent of IAI's outstanding stock and a controlling interest in IAI. *Id.* ¶¶ 14-17. The owners are personally "adherents of the Catholic faith." *Id.* ¶ 25. IAI provides group health insurance coverage to its employees through Blue Cross/Blue Shield of Michigan, and that health plan has covered and continues to cover contraceptive services. *Id.* ¶¶ 27, 30-31. Plaintiffs allege now that offering such coverage was in error and that continuing to offer it would be inconsistent with the owners' personal religious beliefs. *Id.* ¶¶ 25, 30-31.

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." *Iqbal*, 556 U.S. at 678. "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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 597 (6th Cir. 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 in nearly identical litigation that entities and individuals like the plaintiffs here are unlikely to establish a substantial burden on any exercise of religion. *See Autocam*, 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. *Autocam Sixth Circuit Order*, Ex. 1, at 2. This Court's reasons for denying preliminary injunctive relief in *Autocam* warrant dismissal of plaintiffs' RFRA claim here.

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

Plaintiffs' suggestion that IAI "exercise[s] . . . religion" within the meaning of RFRA cannot be reconciled with IAI's status as a secular, for-profit corporation. And IAI is plainly secular. Its corporate activities are not religious; it contracts in the fields of environmental dredging, contaminated sediment remediation, geotextile tube instillation, and water treatment operations. *See* Infrastructure Alternatives, http://www.infralt.com (last visited Mar. 18, 2013). Its Articles of Incorporation make no reference at all to any religious purpose. *See* Infrastructure Alternatives, Inc., Articles of Incorporation (April 27, 2000) (Ex. 3). The company does not claim to be affiliated or managed by any formally religious entity, nor does it assert that it employs persons of a particular faith. Because IAI is a secular corporation, it—by definition—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 (D.C. Cir. 2003) (rejecting an organization's RFRA claim where it did not contend it was a "religious organization"). After all, 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).

Because IAI is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA, which incorporates Free Exercise jurisprudence. *Holy Land Found.*, 333 F.3d

at 167. 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). Indeed, the government is aware of no authority to support the notion "that a secular, for-profit corporation has a First Amendment right of free exercise of religion." *Autocam*, 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.").[1] Accordingly, the other district courts and the

[1] The profound lack of authority, from the Supreme Court or anywhere else, for the proposition that a secular, for-profit corporation has free exercise rights provides powerful evidence that Congress did not intend that a secular, for-profit corporation could engage in any "exercise of religion" under RFRA either. After all, RFRA was intended only to reintstate the pre-*Smith* compelling interest test, 42 U.S.C. § 2000bb-1(b), *not* to *expand* the scope of that test. As the Sixth Circuit 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*

other circuit court motions panel to have reached the issue in cases like this one have rejected claims nearly identical to IAI's. *See Hobby Lobby*, 870 F. Supp. 2d at 1288, 1291-92; *Briscoe*, 2013 WL 755413, at *5; *Gilardi*, 2013 WL 781150, at *5-8; *Conestoga*, 2013 WL 140110, at *7-8, 10; *Conestoga Third Circuit Order*, Ex. 2, at 3. This Court should 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 like IAI 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 IAI does not qualify as a "religious corporation"; it is for-profit, it engages in contracting, and it alleges no institutional 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 IAI is not a "religious corporation" under Title VII (and it clearly is not) and that it 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),

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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). Because RFRA expressly incorporates the definition of "exercise of religion" contained in RLUIPA, *see* 42 U.S.C. § 2000bb-2(4); *id.* § 2000cc-5(7)(A), the Sixth Circuit's observation is equally apt in the RFRA context.

but that it nonetheless "exercise[s] . . . religion" under RFRA, *id.* § 2000bb-1(b).[2] 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 well-being (including Title VII). A host of laws and regulations would be subject to attack. *Autocam*, 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 IAI 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.'" *Autocam*, 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."); *Gilardi*, 2013 WL 781150, at *4-5. Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not

[2] 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).

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).[3]

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

The preventive services coverage regulations also do not substantially burden the owners' religious exercise, for reasons this Court recognized in its preliminary injunction ruling in *Autocam*. 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 owners are neither.

The owners 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

[3] A for-profit, secular employer like IAI 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.").

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 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 owners' religious exercise results from obligations that the regulations impose on a legally separate, secular entity.[4]

The owners' theory boils down to the claim that what is 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 [owners] and the decisions some [IAI] 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." *Autocam*, 2012 WL 6845677, at *7. The owners should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on IAI'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

[4] 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 above, IAI is a legally separate entity from the owners.

when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own."); *Conestoga*, 2013 WL 140110, at *8 (same); *Briscoe*, 2013 WL 755413, at *6 (same); *Gilardi*, 2013 WL 781150, at *4-5 (same).

Although the preventive services coverage regulations do not require the owners to provide contraceptive services directly, their complaint appears to be that, through IAI's group health plans and the benefits IAI provides to employees, the owners will facilitate conduct (the use of contraceptives) that they find objectionable. But this complaint has no limits, and its necessary implications are indeed "troubling." *Autocam*, 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. In fact, plaintiffs here expressly recognize as much, correctly referring to employee health insurance as just "[l]ike other non-cash employee benefits." Compl. ¶ 29. But, just as with all employee benefits, the owners have no right to control the choices their company's employees make when availing themselves of those benefits, particularly where many of those employees (having been hired, presumably, without regard to their religious views) may not share the owners' religious beliefs. 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 (or with one or more, but not all, religious owners or shareholders[5]) 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

[5] Indeed, here, all of the owners of IAI are not before the Court, and it is not clear that all of the owners share the religious beliefs of Mr. Cretens and Mr. Trierweiler.

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 if IAI could be said to exercise religion within the meaning of RFRA and even if the legal separation created by the corporate form could be pierced when the corporation or its owners want it to be (while leaving it intact for all other purposes), the regulations still do not substantially burden any plaintiff's religious exercise. For the same reasons this Court recognized in *Autocam*, any burden imposed by the regulations is too attenuated to satisfy RFRA's substantial burden requirement. Indeed, the regulations leave "the locus of decision-making" with the individual employee, not IAI and not the owners. *Autocam*, 2012 WL 6845677, at *6. "[E]mployees will earn a wage or benefit with their labor, and money originating from the [corporation] will pay for it," but "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." *Id.*; *see also 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. 2, 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"); *Briscoe*, 2013 WL 755413, at *5; *Gilardi*, 2013 WL 781150, at *9.

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 entities and individuals indistinguishable from plaintiffs "are unlikely to cross it," *Autocam*, 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 I 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. 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. 41,726, 41,733 (July 19, 2010); *see also* 77 Fed. Reg. 8725, 8728 (Feb. 15, 2011). 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 the Institute of Medicine ("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." INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 20, 103 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Mar. 18, 2013) ("IOM REP."). 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," *Gonazales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006), exempting IAI 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 IAI 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 is laid out in 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. 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. IAI'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.

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 IAI 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 any exercise of religion were substantially burdened, the regulations serve compelling governmental interests and are the least restrictive means of achieving those interests. Count I 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 IAI 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. *Autocam*, 2012 WL 6845677 at *5.

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." *Autocam*, 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 the regulations are not neutral and generally applicable because the regulations contain exemptions and because some groups qualify for those exemptions and others do not. Compl. ¶ 41. But as this Court and numerous others have recognized, the existence of categorical exemptions "does not mean that the law does not apply generally."

Autocam, 2012 WL 6845677 at *5 (citing *Lee*, 455 U.S. at 261); *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). And indeed, the regulations and the exemptions are categorical and are neutral with respect to religion. To warrant strict scrutiny, a system of exemptions must be so individualized so as to enable the government to engage in subjective, case-by-case inquiries, and the government must utilize that system to grant exemptions only for secular reasons and 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. Rather, 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." *Autocam*, 2012 WL 6845677 at *5.

Virtually every court to consider similar claims has so held. *See Conestoga Third Circuit Order*, Ex. 2, at 3; *O'Brien v. U.S. Dep't of Health & Human Servs.*, Case 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*, 2013 WL 140110, at *6-9, *18; *Briscoe*, 2013 WL 755413, at *7; *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*, 85 P.3d at 81-87.

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

B. 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). The regulations do no such thing. 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.'" *Autocam*, 2012 WL 6845677, at *8 (quoting *FAIR*, 547 U.S. at 60); *see O'Brien*, 2012 WL 4481208, at *12 (noting that the regulations "do not require funding of one defined viewpoint"). Indeed, plaintiffs remain free under the regulations to express any views they may have about contraceptive services (or any other health care services) as well as their views about the regulations themselves. *See Autocam*, 2012 WL 6845677, at *8 ("[T]he 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.'" (quoting *FAIR*, 547 U.S. at 63)).

Moreover, the conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services, because it is required by law to do so is not engaged in the sort of conduct the Supreme Court has recognized as inherently expressive. *Compare FAIR*, 547 U.S. at 65-66 (making space for military recruiters is not conduct that indicates colleges' support for recruiters' message), *with Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning is expressive conduct); *see also Catholic Charities of Sacramento*, 85 P.3d at 89 ("a law regulating health care benefits is not speech"); *Diocese of Albany*, 859 N.E.2d at 465. Because the regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause. *See Autocam*, 2012

WL 6845677, at *8; *O'Brien*, 2012 WL 4481208, at *11-13; *Conestoga Third Circuit Order*, Ex. 2, at 3-4; *Briscoe*, 2013 WL 755413, at *8. Count III should therefore be dismissed.

III. THE COURT SHOULD DISMISS PLAINTIFFS' APA CLAIMS

Plaintiffs' claim that defendants failed to follow the procedures required by the APA in issuing the preventive services coverage regulations, Compl. ¶ 80, is both baseless and not supported by a single allegation in the Complaint. It is therefore nothing more than a conclusory legal assertion, which does not suffice to state a claim. *Iqbal*, 556 U.S. at 678. Further, defendants complied with the APA's rulemaking provisions, which generally require that agencies provide notice of a proposed rule, invite and consider public comments, and adopt a final rule that includes a statement of basis and purpose. *See* 5 U.S.C. § 553(b), (c). On August 1, 2011, Defendants issued an amendment to the interim final regulations authorizing HRSA to exempt group health plans sponsored by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621. That amendment was issued pursuant to express statutory authority granting defendants discretion to promulgate regulations relating to health coverage on an interim final basis.[6] *Id*. at 46,624. Defendants requested comments for a period of 60 days on the amendment to the regulations and specifically on the definition of "religious employer" contained in the exemption authorized by the amendment. *Id*. at 46,621. After receiving and carefully considering thousands of comments, defendants adopted the definition of "religious employer" contained in the amended interim final regulations, and created a temporary enforcement safe harbor period during which time defendants would consider additional amendments to the regulations to further accommodate religious organizations' religious

[6] Defendants also made a determination, in the alternative, that issuance of the regulations in interim final form was in the public interest, and, thus, defendants had "good cause" to dispense with the APA's notice-and-comment requirements. 76 Fed. Reg. at 46,624.

objections to providing contraception coverage. 77 Fed. Reg. at 8,726-27. Because defendants provided notice and an opportunity to comment on the amendment to the interim final regulations, they satisfied the APA's procedural requirements.

Plaintiffs' bare assertion that the regulations are arbitrary and capricious, Compl. ¶ 80, is similarly groundless and insufficient to state a claim under *Iqbal*. Moreover, as this Court's discussion of defendants' policymaking path reveals, *see Autocam*, 2012 WL 6845677, at *2, the regulations are in fact neither arbitrary nor capricious. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action must be upheld, so long as "the agency's path may reasonably be discerned"); *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 281 (D.C. Cir. 1989) ("The APA has never been construed to grant to this or any other court the power to review the wisdom of policy decisions of the President.")

Finally, plaintiffs contend that the preventive services regulations violate the APA because they conflict with federal law and constitutional rights. Compl. ¶¶ 76-78. For the reasons discussed above, the regulations do not violate RFRA or the First Amendment. Nor do the regulations conflict with § 1303(b)(1) of the Affordable Care Act, which provides that "nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of [abortion services]." 42 U.S.C. § 18023(b)(1)(A)(i).

Plaintiffs' claim that the regulations conflict with § 1303(b)(1) should be dismissed at the outset because plaintiffs lack prudential standing to assert it. The doctrine of prudential standing requires that a plaintiff's claim fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). But the necessary link between plaintiffs and this section—which protects health insurance issuers that offer qualified health plans, 42 U.S.C. §

18023(b)(1)—is missing here because plaintiffs do not allege they are either health insurance issuers or purchasers of qualified health plans. Nor could they reasonably do so. Because § 1303(b)(1) is inapplicable to the health plan that IAI offers to its employees, the Court should dismiss this claim for lack of prudential standing. *See Dialysis Ctrs., Ltd. v. Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981); *O'Brien*, 2012 WL 4481208, at *14 (holding that similar plaintiff lacked prudential standing to raise identical claim).

Even if the Court were to reach the merits of plaintiffs' claim that the regulations violate § 1303(b)(1), the Court should dismiss it because it is based on a misunderstanding of the scope of the preventive services coverage regulations. The regulations do not mandate that any health plan cover abortion as a preventive service or that it cover abortion at all. Rather, they require only that non-grandfathered group health plans cover all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Mar. 18, 2013). In fact, the government has made clear that the preventive services for which coverage must be provided without cost-sharing under the regulations "do not include abortifacient drugs."[7]

In recommending what contraceptive services should be covered by health plans without cost-sharing, the IOM Report identified the contraceptives that have been approved by the FDA as safe and effective. *See* IOM Rep. at 10. And the list of FDA-approved contraceptives includes emergency contraceptives such as Plan B. *See* FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited Mar. 18,

[7] HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at* http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html (last visited Mar. 18, 2013); *see also* IOM Rep. at 22 (recognizing that abortion services are outside the scope of permissible recommendations).

2013). The basis for the inclusion of such drugs as safe and effective means of contraception dates back to 1997, when the FDA first explained why Plan B and similar drugs act as contraceptives rather than abortifacients. *See* Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) (noting that "emergency contraceptive pills are not effective if the woman is pregnant" and that there is "no evidence that [emergency contraception] will have an adverse effect on an established pregnancy"). In light of FDA's conclusion, HHS over 15 years ago informed Title X grantees, which are required to offer a range of acceptable and effective family planning methods and may not offer abortion, that they "should consider the availability of emergency contraception the same as any other method which has been established as safe and effective." Office of Population Affairs, Memorandum (Apr. 23, 1997), http://www.hhs.gov/opa/pdfs/opa-97-02.pdf (last visited Mar. 18, 2013); *see also* 42 U.S.C. §§ 300, 300a-6.

Simply put, the regulations adopted a settled understanding of FDA-approved emergency contraceptives that is in accordance with existing federal laws prohibiting federal funding for certain abortions. Such an approach cannot be deemed arbitrary or capricious or contrary to law when it is consistent with over a decade of regulatory policy and practice. *See Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 815 (D.C. Cir. 2011) (giving particular deference to an agency's longstanding interpretation) (citing *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)).

Plaintiffs' APA claims thus fail, and Count IV should be dismissed.

CONCLUSION

The Court should grant defendants' motion to dismiss this case in its entirety.

Respectfully submitted this 18th day of March, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 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.

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