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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

When individuals establish a for-profit, secular company, that entity becomes subject to a host of general laws and regulations that, like the regulations at issue here, are designed to protect employees. The government is not aware of any Supreme Court case—and plaintiffs cite none—in which a for-profit, secular company like IAI obtained an exemption from such general laws under either the Religious Freedom Restoration Act ("RFRA") or the First Amendment. And for good reason: Granting such exemptions would have "troubling" implications—it would not only "paralyze the normal process of governing," *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *mot. for inj. pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2012), *recons. denied*, No. 12-2673 (6th Cir. Dec. 31, 2012), but also limit the protections employees of a secular company receive to only those that are consistent with the personal religious beliefs of the company's owner(s). Because plaintiffs cannot show that the law requires such an exemption for IAI, plaintiffs' RFRA and Free Exercise Clause claims should be dismissed. Plaintiffs' remaining APA claim should also be dismissed because defendants complied with the applicable regulatory process requirements.[1]

ARGUMENT

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

A. Plaintiffs Have Not Sufficiently Alleged A "Substantial Burden" On Their Religious Exercise

As defendants' opening brief discusses, numerous courts, including this Court, have concluded that secular, for-profit corporations and their owners are unlikely to succeed on the merits of their RFRA challenges to the preventive services coverage regulations—challenges that are nearly indistinguishable from this one. Defs.' Mem. in Supp. at 2 ("Defs.' Mem."), ECF No. 14. Before attempting to respond to the substance of defendants' arguments, plaintiffs make much of the fact that many of those courts rendered their decisions in the context of motions for

[1] Plaintiffs have "agreed to dismiss" their Free Speech claim and their other APA claims. Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss at 2 n.2 ("Pls.' Opp'n"), ECF No. 17.

preliminary injunctions rather than motions to dismiss.[2] *See* Pls.' Opp'n at 1, 3-4. But plaintiffs fail to show why that distinction should make any difference here—where purely legal questions govern the case and have been fully briefed, and where this Court, like others, engaged in a thoughtful analysis of those legal questions.[3] The difference in posture alone is no reason for this Court to change course from the reasoning it employed to deny preliminary injunctive relief in *Autocam*. As defendants' opening brief showed, that reasoning necessitates dismissal here.

First, plaintiffs' argument that secular corporations can exercise religion under RFRA is rooted in fundamental misunderstandings of the law. Quoting from the Religious Land Use and Institutionalized Persons Act (RLUIPA), plaintiffs observe that the statute uses the word "entity" without confining it to religious entities, but ignore the fact that Congress otherwise made clear that the entirety of RLUIPA and RFRA were "not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 733-34 (6th Cir. 2007) (quoting 146 Cong. Rec. S7774–01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy)); *see Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003). Because the rights RFRA protects sweep only as far as the Supreme

[2] While many rulings have been made in the preliminary injunction context, one court has ruled in defendants' favor on a motion to dismiss. *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *motion for injunction pending appeal granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). In any event, the same is true for all but one of the courts to have *accepted* arguments like plaintiffs'. *See* Pls.' Opp'n at 1 n.1 (citing cases). *But see Geneva College v. Sebelius*, No. 12-cv-00207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013).

[3] When the Sixth Circuit motions panel said in its order in *Autocam* that the divergence of holdings on these issues in the district courts established a "possibility of success," it did so in the context of *denying* the plaintiffs preliminary injunctive relief. *See Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012) (previously docketed at ECF No. 14-1). Nothing in that statement suggested any directive to this Court to reconsider its reasoning. Moreover, the panel was simply stating the obvious proposition that *it* (or some other panel of the Court) might reach a different conclusion once it had the benefit of full briefing and argument. Simply because some court somewhere might, in the future, agree with some legal argument is not enough to survive a motion to dismiss in this context. Plaintiffs cite no authority to support such a standard—a standard that would make it nearly impossible for a court to ever grant a motion to dismiss in a case presenting purely legal issues. *Twombly* is of no help to plaintiffs, since that case, as plaintiffs note, held only that a case may not be dismissed "based on a district court's assessment that the plaintiff will fail to find *evidentiary* support for his allegations or prove his claim to the satisfaction of the *factfinder*." Pls.' Opp'n at 3 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007)) (emphasis added). Neither defendants' nor plaintiffs' arguments are about evidence or facts, and no factual development is necessary to evaluate plaintiffs' case. The parties' arguments are about law, and so long as *this Court* is convinced that defendants' legal arguments—arguments that govern the case—are correct, it should dismiss plaintiffs' case. *See Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where a complaint presents only legal arguments, "the sufficiency of the complaint is the question on the merits").

Court's articulation of the Free Exercise Clause, which protects only "religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012); Defs.' Mem. at 7-8, secular, for-profit corporations do not exercise religion within the meaning of RFRA.[4]

Second, the regulations also do not substantially burden the owners' religious exercise because, as this Court has noted, the regulations apply only to the group health plan sponsored by IAI, a legally separate entity. *Autocam*, 2012 WL 6845677, at *7. Mr. Cretens and Mr. Trierweiler created a corporate entity and, having done so, "enjoy the protections and benefits of the corporate form." *Id.* at *7. But they cannot have it both ways. "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." *Id.* Having availed themselves of the protections of the corporate form, the owners cannot insist that the corporation is nothing more than their "alter-ego" only insofar as it suits them. Pls. Opp'n at 8; *see Autocam*, 2012 WL 6845677, at *7 ("[A]t a minimum . . . the corporation is not the alter ego of its owners for purposes of religious belief and exercise.").[5]

[4] Plaintiffs contend that "the First Amendment" protects corporations, Pls.' Opp'n at 6-7 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010)), but this overbroad conclusion is not supported by the cases plaintiffs cite—all of which are free speech cases. Perhaps recognizing the leap their claim requires, plaintiffs insist that free speech doctrine should be "indistinguishable" from free exercise doctrine, Pls.' Opp'n at 7 n.7, but they offer no authority to support such a leap, and defendants, like this Court, *Autocam*, 2012 WL 6845677, at *4, are aware of none. Instead, plaintiffs assert that it would be "illogical" to permit corporations to espouse political views but not religious ones. Pls. Opp'n at 7. But accepting that a secular, for-profit corporation can exercise religion would do far more than permit it to speak out about its religious views in the same way it may speak out about its political views. Nothing prevents IAI from advocating certain religious beliefs, just like it may advocate certain political beliefs, and nothing prevents IAI from donating corporate funds to religious causes, just like it may donate corporate funds to political causes. But if a secular, for-profit corporation could exercise religion under RFRA, any secular company would have the same right as a house of worship 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). As this Court has recognized, a whole host of general laws and regulations designed to protect employees' health and well-being would be subject to attack. *Autocam*, 2012 WL 6845677, at *7.

[5] Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), or *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), *see* Pls.' Opp'n at 7-8, which declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119. Those cases also addressed the question of whether a particular corporation had standing to raise the rights of its owners (who were not parties). But, "[g]enerally, if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim," and this "shareholder standing rule applies even if the plaintiff is the sole shareholder of the corporation." *Potthoff v. Morin*, 245 F.3d 710, 716-17 (8th Cir. 2001) (citing cases); *see also Bartel v. Kemmerer City*, 482 Fed. App'x 323, 326 (10th Cir. 2012) (unpublished).

Finally, even assuming that IAI exercises religion within the meaning of RFRA or that the legal separation created by the corporate form can be selectively pierced when the corporation or its owners want it to be, the regulations still do not substantially burden plaintiffs' religious exercise. As this Court and others have recognized, any burden imposed by the regulations is too attenuated to satisfy RFRA's substantial burden requirement.[6]

Plaintiffs rely heavily on *Sherbert v. Verner* and *Wisconsin v. Yoder*, but these cases "involved situations where the restraint in question operated with some level of directness on the individual." *Hobby Lobby*, 870 F. Supp. 2d at 1295. The plaintiff in *Sherbert* "was forced to 'choose between following the precepts of her religion [by resting, and not working, on her Sabbath] and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other.'" *Id.* (quoting *Sherbert*, 374 U.S. 398, 404 (1963)). Similarly, in *Yoder*, the state compulsory-attendance law "affirmatively compel[led] [plaintiffs], under threat of criminal sanction to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. 205, 218 (1972); *see Conestoga*, 2013 WL 140110, at *14; *Grote*, 2012 WL 6725905, at *5; *O'Brien*, 894 F. Supp. 2d at 1159.[7]

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[6] *Autocam*, 2012 WL 6845677, at *6; *see, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012), *motion for injunction pending appeal denied*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *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 *12-14 (E.D. Pa. Jan. 11, 2013), *motion for stay pending appeal denied*, No. 13-1144 (3d Cir. Feb. 7, 2013) (Ex. 3); *Briscoe v. Sebelius*, Civil Action No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *5-6 (D. Colo. Feb. 27, 2013); *see also Grote Indus., LLC v. Sebelius*, No. 4:12-cv-134, 2012 WL 6725905, at *5-7 (S.D. Ind. Dec. 27, 2012), *motion for reconsideration denied*, 2013 WL 53736 (S.D. Ind. Jan. 3, 2013), *motion for injunction pending appeal granted sub nom. Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Grote*, 708 F.3d at 860-61, 865-67 (Rovner, J., dissenting); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072, 2012 WL 6553996, at *10 (S.D. Ill. Dec. 14, 2012), *motion for injunction pending appeal granted*, No. 12-3841 (7th Cir. Dec. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-5 (D. Minn. Jan. 8, 2013), *motion for injunction pending appeal granted*, No. 13-1118 (8th Cir. Feb. 1, 2013); *O'Brien*, 894 F. Supp. 2d at 1158-60; *Gilardi v. Sebelius*, Civil Action No. 13-104(EGS), 2013 WL 781150, at *9 (D.D.C. March 3, 2013), *motion for injunction pending appeal granted*, No. 13-5069 (D.C. Cir. Mar. 29, 2013).

[7] For the same reason, plaintiff's reliance on *Thomas v. Review Board*, 450 U.S. 707, 717 (1981), is misplaced. As the court in *Conestoga* explained, "[w]hile a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*," *Conestoga*, 2013 WL 140110, at *14 n.15, that is not so where the burden itself is indirect, as it is here. *See also Hobby Lobby*, 870 F. Supp. 2d at 1295 (noting that *Thomas*, like *Sherbert* and *Yoder* involved a degree of directness not present in this case).

In contrast to the direct and substantial burdens imposed in those cases, the preventive services coverage regulations result in only an indirect and non-substantial impact on the plaintiffs because "the particular 'burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion.'" *Hobby Lobby*, 870 F. Supp. 2d at 1294 (quoting *O'Brien*, 894 F. Supp. 2d at 1159). Such an indirect and attenuated relationship does not establish the necessary substantial burden. *Id.*; *see also Autocam*, 2012 WL 6845677, at *6-*7; *Conestoga*, 2013 WL 140110, at *14; *Korte*, 2012 WL 6553996, at *10-11; *Grote Indus.*, 2012 WL 6725905, at *5-*6; *Grote*, 708 F.3d at 860-61, 865-67 (Rovner, J., dissenting).[8] After all, the regulations no more impact an entity's religious beliefs than the entity's payment of salaries to its employees, which those employees can also use to purchase contraceptives.[9] *Autocam*, 2012 WL 6845677, at *6; *Conestoga*, 2013 WL 140110, at *13; *O'Brien*, 894 F. Supp. 2d at 1160; *Grote*, 708 F.3d at 861 (Rovner, J., dissenting).

Plaintiffs attempt to avoid any real inquiry into the substantiality of their claimed burden, but while this Court must accept as true plaintiffs' well-pled factual allegations, it need not accept "the legal conclusion, cast as a factual allegation, that [plaintiffs'] religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, if the Court were bound to simply accept plaintiffs' line-drawing as a definition of substantiality, *see* Pls.' Opp'n at 14, RFRA's substantial burden inquiry would drop out and any plaintiff able to articulate some religious objection to some law would be able to subject that law to strict scrutiny. *Autocam*, 2012 WL 6845677, at *7; *see*

[8] Plaintiffs' attempt to undermine *Autocam*, Pls.' Opp'n at 11, is unavailing. Though this Court noted the low cost of compliance, that was only the beginning of a lengthy analysis of burden. 2012 WL 6845677, at *6-7.

[9] Plaintiffs contend there is a "moral" distinction between, on one hand, providing a service to an employee or contracting with an insurer to provide a service to an employee, and on the other, paying an employee a wage with which the employee can purchase that service. Pls.' Opp'n at 13. But whether plaintiffs make such a moral distinction is immaterial to the legal question before the Court. To elevate that moral distinction to a cognizable claim of substantial burden, without any role for the Court in assessing whether RFRA's substantial burden requirement is satisfied, would be to subject the legality of every law to an individual's own moral compass. As this Court has recognized, the outcome would be "a recipe for chaos." *Autocam*, 2012 WL 6485677, at *7.

Conestoga, 2013 WL 140110, at *12-13. Such an outcome would be irreconcilable with the Sixth Circuit's admonition that "a 'substantial burden' is a difficult threshold to cross." *Living Water Church of God*, 258 Fed. App'x at 736. As this Court explained in *Autocam*, a court must examine "whether the claimed burden – no matter how sincerely felt – . . . amounts to a substantial burden on a person's exercise of religion." 2012 WL 6845677, at *6. Because the regulations do not impose any substantial burden on any plaintiff's exercise of religion, plaintiffs' RFRA claim should be dismissed.

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

Although the Court need not reach the issue, given the lack of a substantial burden on any religious exercise, defendants have demonstrated why the regulations are narrowly tailored to advance compelling governmental interests in public health and gender equality. Plaintiffs agree these are compelling interests. Pls.' Opp'n at 15. Plaintiffs therefore focus on the so-called "broad exceptions" they claim already exist in the regulations to argue that exempting plaintiffs would not further undermine the government's interests. *Id.* at 16.

But this is not a case where under-inclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling.[10] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). Many of the "exceptions" referred to by plaintiffs are not exceptions from the preventive services coverage regulations at all. For example, 26 U.S.C. § 4980H(c)(2) is a provision of the ACA that operates to exclude small employers from the possibility of penalty under the employer responsibility provision. It does not, as plaintiffs assert, exempt small employers from the challenged regulations. Small businesses that elect to offer non-grandfathered health coverage to their employees are required

[10] Plaintiffs note that defendants consented to a preliminary injunction in *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013). Pls.' Opp'n at 18. But defendants' consent was nothing more than an effort to conserve judicial and governmental resources. *Sioux Chief* is in the Eighth Circuit, and it was filed after Eighth Circuit panels had preliminary enjoined the regulations pending appeal in two similar cases—*O'Brien* and *Annex Medical*. Here, by contrast, the Sixth Circuit *denied* the plaintiffs' motion for injunction pending appeal in *Autocam*.

to provide coverage for recommended preventive health services without cost sharing. *See* 42 U.S.C. § 300gg-13. And small employers have business incentives to offer health coverage to their employees; an otherwise eligible small employer would lose eligibility for certain tax benefits if it did not do so. *See* 26 U.S.C. § 45R. Similarly, the ACA's grandfathering provision, 42 U.S.C. § 18011, is not an "exception"—it is transitional, and it is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010).[11] This provision is thus "a reasonable plan for instituting an incredibly complex health care law while balancing competing interests." *Legatus v. Sebelius*, Case No. 12-12061, 2012 WL 5359630, *9 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013); *see United States v. Lee*, 455 U.S. 252, 259 (1982) ("The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions.").

The only true exemption from the regulations is the exemption for certain non-profit religious organizations that qualify as "religious employers." Pls.' Opp'n at 16. Clearly, the government can exempt non-profit, religious institutions such as churches and their integrated auxiliaries, *see* 45 C.F.R. § 147.130(a)(1)(iv)(B), and address religious objections raised by additional non-profit, religious organizations through an accommodation, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013), without also extending such measures to for-profit, secular corporations. *See, e.g.*, *Lee*, 455 U.S. at 260 (noting that "Congress granted an exemption" from social security taxes, "on religious grounds, to self-employed Amish and others"). "Religious accommodations

[11] Plaintiffs grossly overstate the number of individuals in grandfathered plans. Pls.' Opp'n at 16 (citing *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012)). The "over 190 million" figure appears to stem from estimates concerning the *total* number of health plans existing at the start of 2010, ignoring the fact that the number of grandfathered plans is significantly and steadily declining. *See* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://ehbs.kff.org/pdf/2012/8345.pdf (last visited April 29, 2013) (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011); *see also* 75 Fed. Reg. at 34,553 (noting that, by 2012, the government's mid-range estimate is that 38 percent of employer plans will have lost grandfathered status, and that by the end of 2013, this mid-range estimate increases to 51 percent); *Korte*, 2012 WL 6553996, at *7 n.12.

in related areas of federal law, such as the exemption for religious organizations under Title VII . . . are available to nonprofit religious organizations but not to for-profit secular organizations." 78 Fed. Reg. at 8462. The religious employer exemption is consistent with this longstanding federal law. *Id*. And unlike the exemption plaintiffs would seek for all employers with religious objections, the religious employer exemption does not significantly undermine the government's interests. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1208-09 (6th Cir. 1990); 78 Fed. Reg. at 8461-62 (explaining that employees of "religious employers," i.e. houses of worship, are likely to share their employer's beliefs).

Turning to least restrictive means, defendants have demonstrated why exempting IAI and similarly-situated companies from the regulatory requirements plaintiffs challenge "would impede the state's objectives," *S. Ridge Baptist Church*, 911 F.2d at 1206, by removing their employees (and their employees' covered spouses and dependents) from the very protections that were intended to further the government's compelling interests. Defs.' Mem. at 17-18. Plaintiffs assert that the government should "provide tax credits to employers or employees to encourage use of the objectionable drugs and services," "create a contraception insurance plan with free enrollment," or "directly compensate contraception and sterilization providers." Pls.' Opp'n at 18. These proposals—which turn the existing employer-based system upside-down to accommodate the owners of secular, for-profit companies at enormous administrative and financial cost to the government—reflect a fundamental misunderstanding of RFRA and the "least restrictive means" test it incorporates. That test has never been interpreted to require the government to, in effect, "subsidize private religious practices." *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance policies cover prescription contraceptives).[12]

[12] In addition, plaintiffs' challenge is to regulations promulgated by defendants, not to the ACA itself. But it is the ACA that requires that recommended preventive services be covered without cost-sharing through the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, the statute would prevent them from doing so.

II. THE COURT SHOULD DISMISS PLAINTIFFS' FREE EXERCISE CLAIM

Defendants have already demonstrated that the preventive services coverage regulations are generally applicable because they do not selectively "impose burdens *only* on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543 (emphasis added); Defs.' Mem. at 19-20. Plaintiffs' contrary view confuses general applicability for universality, a view this Court and others have rejected already. *See Autocam*, 2012 WL 6845677, at *5; Defs.' Mem. at 20 (citing cases). In any event, the categorical exceptions alluded to by plaintiffs, Pls.' Opp'n at 20-21, do not show that the challenged regulations selectively burden only religious conduct because those exceptions do not themselves disfavor religion. *O'Brien*, 894 F. Supp. 2d at 1162; *compare Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (finding that a police department's policy accepted secular exemptions but *rejected* religious ones). Both the transitional relief afforded by grandfathering and the exemption of small employers from the possibility of penalty under the employer responsibility provision are based on secular criteria and are equally available to secular and religious entities alike. To be sure, the "religious employer" exemption excludes certain non-profit religious organizations from the contraceptive-coverage requirement, but the existence of that exemption cuts *against* plaintiffs' claim that the regulations selectively burden only religiously-motivated conduct. "It is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536).

As for neutrality, plaintiffs identify nothing in the regulations' text or effect to suggest that their "object . . . is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533, 535. Nor could plaintiffs do so. "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 894 F. Supp. 2d at 1161 (dismissing similar claim).

III. THE COURT SHOULD DISMISS PLAINTIFFS' APA CLAIM

Plaintiffs attempt to defend their inadequate pleadings on the basis that defendants nonetheless understand plaintiffs' claims, Pls.' Opp'n at 22, but their reliance on a notice pleading standard is inconsistent with the current doctrine's requirement of "more than labels and conclusions" and more than a "recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. Plaintiffs' Complaint fails to meet this threshold.

Even if plaintiffs overcame this hurdle, their claim is baseless. Defendants issued an interim final rule in August of 2011, pursuant to express statutory authority granting defendants the discretion to promulgate regulations relating to health coverage on an interim final basis without engaging in prior notice and comment.[13] 76 Fed. Reg. 46,621, 46,624 (Aug. 3, 2011); *see* 29 U.S.C. § 1191c; 26 U.S.C. 9833; 42 U.S.C. § 300gg-92. When Congress sets forth its "clear intent that APA notice and comment procedures need not be followed," as in statutes like these, an agency may lawfully dispense with those requirements and issue an interim final rule. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994).

In any event, defendants requested comments for a period of sixty days on both the interim final rule and a subsequent amendment to the interim final rule that authorized the religious employer exemption. 76 Fed. Reg. at 46,621. After receiving and carefully considering over 200,000 comments, defendants adopted in final form in February 2012 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 objections to providing contraception coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). Plaintiffs' suggestion that defendants failed to consider comments is not only speculative but incoherent: their only "proof" that comments were ignored is the initiation of further rulemaking—evidence of responsive action.[14]

[13] Defendants also made a determination, in the alternative, that defendants had "good cause" to dispense with the APA's notice-and-comment requirements. 76 Fed. Reg. at 46,624.

[14] Similarly, the fact that the regulations are inconsistent with the preferences of plaintiffs or any commenters is not evidence that comments were ignored.

Respectfully submitted this 29th day of April, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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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