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

INFRASTRUCTURE ALTERNATIVES, INC. et al.,

Plaintiffs,

v

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al.,

Defendants.
_____/

Case No. 1:13-cv-00031-RJJ

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

INTRODUCTION

After reading Defendants' memorandum in support of their motion to dismiss, one would think that Plaintiffs' claims are completely baseless and that every court to have considered similar claims has found no likelihood of success on the merits. Remarkably, Defendants fail to mention a single case where a court favorably discussed similar claims, which would lead one to believe that no such case exists. Contrary to this suggestion, however, numerous other courts have considered claims like those advanced here, and many courts have ruled favorably for the plaintiffs and against these Defendants in such cases.[1] Defendants' failure to even mention the other cases where they were parties to the action hardly appears to be an inadvertent oversight.

Further, with one exception known to Plaintiffs, every court considering similar claims has applied a different standard of review than is applicable here, because those courts were considering motions for a temporary restraining order or preliminary injunction. Plaintiffs, however, are not seeking a temporary restraining order or preliminary injunction, and a much different standard of review applies to Defendants' motion to dismiss.

As far as Plaintiffs are aware, the *only* court to consider the sufficiency of pleadings as to these claims — therefore applying the same standard of review that must be applied here — largely denied a similar motion to dismiss brought by these Defendants. *Geneva College v. Sebelius*, No. 12-207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013). Specifically, the court in *Geneva College* denied Defendants' motion to dismiss *practically indistinguishable claims* with respect to RFRA, the

[1] *E.g.*, *Annex Medical, Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Geneva College v. Sebelius*, No. 12-207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *but see Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *stay pending appeal denied sub nom. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 2013 WL 1277419 (3d Cir. Feb. 8, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), *injunction pending appeal denied*, ___ U.S. ___, 133 S. Ct. 641 (2012). Unless otherwise noted, unpublished decisions are attached as **Exhibit A**.

Free Exercise Clause, and the APA (regarding violation of notice and comment requirements), rejecting arguments nearly identical to those made here by Defendants. *See id.* As such, the most applicable case law, *Geneva College*, strongly supports a ruling in favor of Plaintiffs on this motion.

BACKGROUND

This action presents constitutional and statutory challenges to administrative regulations promulgated and implemented under the Affordable Care Act ("ACA"), specifically those regulations mandating that Plaintiff IAI include in its employee benefit plan coverage of drugs and services that violate Plaintiffs' religious beliefs and values.[2] Compl. ¶ 1. In particular, Plaintiffs object to regulations that require them to provide — under threat of ruinous fines — employee health coverage of drugs and services, *particularly abortifacients*, which violate their sincerely held religious beliefs (the "Mandate").[3] Compl. ¶¶ 4-9.

This case is not about Plaintiffs imposing their religious beliefs on others. And this case is not about the choice of an individual to use any drugs or services. Rather, this case concerns whether Defendants can, under the guise of advancing public health and the equality of women, impose on Plaintiffs a regulation that compels them to forsake the fundamental tenets of their religion by providing and paying for employee health coverage of objectionable drugs and services.

[2] Based on the well-reasoned opinion in *Geneva College v. Sebelius*, No. 12-207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013), which was issued subsequent to this action, Plaintiffs agree to dismiss Count III (free speech) and Count IV (APA), except that portion of Count IV alleging the Mandate is unlawful because it was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). *See* Compl. ¶ 4 (citing a lack of "meaningful notice of rulemaking or opportunity for public comment"), ¶ 79 (citing a failure to consider constitutional and statutory implications of the Mandate), and ¶ 80 (alleging that the Mandate is "not in accordance with . . . required procedure").

[3] The "mandate," as that term is often used in connection with the ACA regulations, applies to many forms of preventive health care, the vast majority of which are not subject to any objection by Plaintiffs. As used in this brief, the "Mandate" refers *only* to that small portion of drugs and services described in the Complaint that violate Plaintiffs' sincerely held religious beliefs.

Such regulation runs afoul of well-established jurisprudence and violates fundamental rights of Plaintiffs under the First Amendment to the Constitution and other federal law.

STANDARD OF REVIEW

In evaluating a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), the court "must construe the allegations of the complaint in the light most favorable to plaintiffs, accept all well-pled factual allegations as true, and decide whether the complaint contains sufficient facts to state a claim for relief that is plausible on its face." *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 597 (6th Cir. 2013). The purpose of such a motion is to test the formal sufficiency of the pleadings. It is not a procedure for resolving the substantive merits of a claim. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995).

The Supreme Court has recognized the "unobjectionable proposition that, when a complaint adequately states a claim, it 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." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). In other words,

> [w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984).

Therefore, the dispositive question for purposes of Defendants' motion is not whether Plaintiffs are *likely or unlikely to succeed* on the merits of their claims. *Cf.* Mem. in Supp. of Defs.' Mot. to Dismiss, at 5-6, relying this Court's prior "likelihood of success" ruling on a preliminary injunction in *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012). The proper question here is whether Plaintiffs have satisfied the liberal pleading requirements necessary to state a *plausible claim* for relief. There can be no serious dispute that

Plaintiffs have met this standard. Indeed, the Sixth Circuit panel discussing practically identical claims[4] found that "the divergence of opinion by the district courts [considering such claims] *establishes the possibility of success on the merits*." *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 2 (6th Cir. Dec. 28, 2012) (emphasis added) (**Exhibit B**). If similarly situated plaintiffs asserting identical claims have established a "possibility of success on the merits," it cannot be possible that Plaintiffs here have failed even to state a plausible claim for relief.

DISCUSSION

I. PLAINTIFFS' COMPLAINT STATES A VALID CLAIM FOR RELIEF UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

Under the Religious Freedom Restoration Act ("RFRA"), the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The *only* exception to this general rule is when the Government "demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that governmental interest." 42 U.S.C. § 2000bb-1(b).

Congress enacted RFRA to restore the constitutional standards governing free exercise claims under the First Amendment prior to *Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990), which "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress explained:

> The purposes of this chapter [RFRA] are —
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

[4] Defendants admit that the present claims are "indistinguishable" from the claims already discussed by the Sixth Circuit. *See* Mem. in Supp. of Defs.' Mot. to Dismiss, at 1.

> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

By its express terms, then, RFRA not only reestablishes the compelling interest test as developed in pre-*Smith* jurisprudence, but it also guarantees application of the compelling interest test in "*all cases* where free exercise of religion is substantially burdened." *Id.* (emphasis added).

A. Corporations, Whether Religious or Secular, and Their Owners Have the Right to Religious Freedom Under RFRA

RFRA protects the right of any "person" to free exercise of religion. § 2000bb-1(a). Indisputably, Plaintiffs Cretens and Trierweiler are "persons" entitled to RFRA's protections. But what of IAI? Is it also a "person" within the meaning of that term as used in RFRA? Plaintiffs contend that it is.

Pursuant to applicable rules of federal statutory construction, the word "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, unless the context of RFRA indicates otherwise, a corporation, whether religious or secular, for-profit or non-profit, is a "person" under the Act.

The plain language of RFRA does not exclude corporations from its scope. Rather, the definition of "religious exercise" specifically contemplates religious exercise *by an entity*, like a corporation. *See* 42 U.S.C. § 2000cc-5(7) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. . . . The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the . . . *entity* that uses or intends to use the property for that purpose.") (emphasis added) (incorporated in RFRA by 42 U.S.C. § 2000bb-2(4)). *Importantly, the word "entity" in such definition is not limited to only a "religious entity."* If Congress had intended to limit "religious exercise" under RFRA to individuals and religious entities, it easily could have done so. Instead, RFRA guarantees application of the compelling interest test in "all cases where free

exercise of religion is substantially burdened," not merely those cases involving religious exercise by an individual or by a religious organization. 42 U.S.C. § 2000bb(b). The plain language of RFRA therefore requires the inclusion of a corporation as a person. Accordingly, the claim by Defendants that a secular corporation cannot exercise religion is refuted by the statute itself.

The Supreme Court already has ruled on multiple occasions that "First Amendment protection extends to corporations." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 899 (2010) (citing cases; *see also Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053 (9th Cir. 2004) (allowing § 1981 discrimination claim by a corporation). In *Citizens United*, the Court recognized that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" *Citizens United*, 130 S. Ct. at 900; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) ("The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged regulation] abridges expression that the First Amendment was meant to protect."). Likewise, religious exercise cannot lose First Amendment protection simply because its source is a corporation.[5]

Plaintiffs are well aware that this Court previously stated that "[a] corporation cannot . . . attend worship services or otherwise participate in the sacraments and rites of the church, as individuals do." *Autocam*, 2012 WL 6845677, *4. Respectfully, this distinction is immaterial. The fact that a corporation cannot exercise religion in all the same ways as individuals does not mean that a secular, for-profit corporation cannot exercise religion at all. Indeed, there are numerous other means by which a corporation can exercise religion, one of which closely resembles a common religious practice of individuals — tithing, donations, and offerings of money.

[5] Freedoms of speech and religion are placed on equal footing in the context of the First Amendment. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech . . . .").

In *Citizens United*, the Supreme Court stated that "First Amendment protection extends to corporations" and recognized that a corporation can exercise First Amendment speech rights by adopting a particular view and using corporate funds to express and advance that view. 130 S. Ct. at 899. By extension, there is "no reason why a corporation cannot support a particular religious viewpoint by using corporate funds to support that viewpoint."[6] *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at *6 (E.D. Mich. Mar. 14, 2013). It would be illogical to hold that a corporation can adopt and express a *political* view, on the one hand, but cannot adopt or express a *religious* view, on the other. And if a corporation can adopt and express a religious view, how can it be that the corporation cannot act (i.e., exercise) consistent with that view? The Court should reject Defendants' argument that a secular, for-profit corporation cannot exercise religion.[7]

Even if the Court determines that a secular, for-profit corporation cannot exercise religion, IAI may assert a claim on behalf of its owners, who indisputably are "persons" entitled to the protections of RFRA. Other courts have allowed such claims by a corporation, particularly where the corporation was family-owned or closely held, as here. *E.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009); *Equal Emp't Opportunity Comm'n v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *Monaghan*, 2013 WL 1014026; *Geneva College*, 2013 WL 838238; *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012).

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[6] A corporation also could exercise a religious belief by choosing *not* to spend corporate funds in furtherance of a particular view, for example, by choosing not to fund employee health coverage of drugs and services that violate Plaintiffs' religious beliefs, as here.

[7] Defendants' reliance on pre-*Citizens United* cases is misplaced where the Supreme Court has now ruled that secular corporations can form and express political views and beliefs, indistinguishable, Plaintiffs submit, from religious views and beliefs. Moreover, this Court's concern in *Autocam* regarding "theocratic fiefdoms" and a "disappointed side [being permitted] simply to opt out" may apply to other statutory or regulatory challenges, but not this one. *Autocam*, 2012 WL 6845677, *7. If there are corporations or individuals that feel compelled, for religious reasons, to provide the Mandate services and drugs, they are perfectly free to do so, even if this Court were to rule in Plaintiffs' favor here. There would be no clash of religious fiefdoms or parties disappointed because they are being forced to do something they oppose.

"*Townley* and *Stormans* recognize that when beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious purposes." *Tyndale*, 2012 WL 5817323, at *8. "In such circumstances, courts must consider the rights *of the owners* as the basis for the free exercise claim brought by the corporation, even if the regulation applies only to the corporation." *Id.* (quotation marks and brackets omitted). In other words, there is "no reason why [a corporate plaintiff] cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of [its owner], while at the same time being an instrument through which [the owner] may assert a claim under the RFRA." *Monaghan*, 2013 WL 1014026, at *5.

As in *Townley* and *Stormans*, the beliefs of Plaintiff IAI and the individual Plaintiffs are indistinguishable because IAI is the instrument through which the individual Plaintiffs express their religious beliefs. In this regard, Defendants do not appear to contest that Plaintiffs included sufficient factual allegations regarding their free exercise claims but, instead, appear to argue that a secular corporation like IAI, as a legal matter, cannot exercise religion. While not specifically alleged in their Complaint (because Plaintiffs contend that such allegations are unnecessary to state a claim upon which relief may be granted), Plaintiffs are prepared to submit an affidavit attesting to (or will allege in an amended complaint, if necessary) the following facts:

- Consistent with the religious beliefs of IAI and its owners, IAI regularly donates *corporate* funds to support Catholic organizations and causes, such as Knights of Columbus and Catholic mission trips, among others.
- In addition, IAI is compelled by its religious beliefs to, and regularly does, donate *corporate* funds to benefit various underprivileged groups and other charitable causes, such as Wounded Warrior Project, Special Olympics, Water for Life, and American Cancer Society, among others.
- IAI adopts Standards of Business Ethics and Conduct, which incorporate and emphasize Christian values, such as integrity, respect, generosity, and community involvement. Every employee of IAI is given a copy of, and must sign, these written standards.

- IAI and its owners are compelled by their religious beliefs to, and do in fact, operate their business in accordance with Christian principles, such as honesty, integrity, and fairness.

Therefore, the facts in this case are much stronger than those in *Stormans*, in which the plaintiffs presented no evidence of how the individual owners incorporated their religious beliefs in the operation of their business.

The mere fact that the individual Plaintiffs own less than 100 percent of the outstanding stock in IAI is of no consequence. In *Townley*, the seminal case on this issue, the Ninth Circuit held that the rights and beliefs of the corporation (Townley Manufacturing Company) and the owners (Jake and Helen Townley) were inseparable, even though the named individuals owned about 94 percent of the outstanding stock in the company. *Townley*, 859 F.2d at 611, 619-20; *see also Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (order granting preliminary injunction where individual plaintiffs owned approximately 88 percent of corporate plaintiff). Accordingly, the fact that the individual Plaintiffs here own about 87 percent of IAI compels no different result.[8] Thus, both IAI and the named individuals may bring claims under RFRA.

B. The Mandate Imposes a Substantial Burden on Plaintiffs' Exercise of Religion

A regulation imposes a substantial burden on the exercise of religion if the regulation compels a person "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. That the regulation may be characterized as being only indirect does not mean that the ensuing burden is not substantial. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

[8] To the extent the other owners' religious beliefs are relevant, Plaintiffs are prepared to submit affidavits from other minority owners attesting to the fact that, because of their religious beliefs, they too share in Plaintiffs' objection to the Mandate.

For example, the Supreme Court in *Sherbert* held that a plaintiff's disqualification from employment benefits imposed a substantial burden on free religious exercise of religion where the plaintiff refused to accept employment that required her to work on Saturdays, based on religious beliefs. *Sherbert*, 374 U.S. at 403-04. The Court explained:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. *The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.* Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. (emphasis added).

In *Yoder*, the Court found that a compulsory-education law imposed a substantial burden on the plaintiff's free exercise of religion, explaining, "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218.

In this case, as in *Sherbert*, the regulation forces Plaintiffs to make the untenable choice between forsaking their religious beliefs and complying with the Mandate, on the one hand, or conducting their business in accordance with their religious beliefs and paying ruinous fines and penalties, on the other hand.[9] Like *Yoder*, the impact of the Mandate on Plaintiffs' exercise of religion is *severe* and *inescapable* because it compels Plaintiffs, under threat of ruinous fines, to provide coverage of objectionable drugs and services, contrary to the fundamental tenets of their religious beliefs. Such fines are of the same class already criticized by the Supreme Court in

[9] Plaintiffs are aware that this Court considered a third option in *Autocam*, i.e., dropping health coverage altogether, albeit at additional expense. *Autocam*, 2012 WL 6845677, at *9. However, Plaintiffs' religious beliefs compel them to provide health coverage to employees (coverage consistent with their religious beliefs), so dropping coverage altogether simply is not an option, and is no less ruinous or morally repugnant than the above options.

Sherbert, 374 U.S. at 403-04. Consequently, the Mandate unlawfully coerces Plaintiffs to modify their behavior and forsake their religious beliefs by paying for and providing health coverage of objectionable drugs and services. *See Thomas*, 450 U.S. at 718.

In *Autocam*, this Court considered as part of its substantial burden analysis the economic cost to the plaintiffs of providing compliant coverage. *Autocam*, 2012 WL 6845677, at *6. With all due respect, such analysis, at least for these Plaintiffs, misses the point. Exercise of religion is not merely a matter reduced to dollars and cents, and the magnitude of the burden here — to be forced to provide coverage of a religiously and morally repugnant drug or service — is no less substantial than being forced to work Saturdays or being forced to submit to compulsory education contrary to the Amish faith. *That* is the burden, not the economic cost of providing coverage of certain drugs and services, or driving to work on Saturdays, or allowing children to attend public education. The economic cost could be zero but the burden substantial, for it is the compulsion "to perform acts undeniably at odds with fundament tenets of [Plaintiffs'] religious beliefs" that is the burden. *See Yoder*, 406 U.S. at 218. Indeed, in *Yoder*, there is no discussion at all about the economic cost of complying with the education mandate. And here there can be no dispute that the cost of *noncompliance* to Plaintiffs is substantial and ruinous.

Defendants may not insulate themselves from the unlawful nature of such burden by channeling it through other parties, in this case group health plan insurers, and then arguing that Plaintiffs' religious rights are therefore not substantially impaired because the burden is too "indirect" or "attenuated." Mem. in Supp. of Defs.' Mot. to Dismiss, at 13. Indeed, it is well established that a burden may be indirect but substantial nevertheless.[10] *Thomas*, 450 U.S. at 718. Respectfully, courts that have found the burden too attenuated when considering whether to grant

[10] To the extent this Court relied on the existence of a health savings account ("HSA") in *Autocam* to find no substantial burden, that opinion is inapplicable because Plaintiffs do not offer their employees an HSA. *See Autocam*, 2012 WL 6845677, at *6.

injunctive relief have, Plaintiffs submit, misunderstood the substance of the challenge to the regulation. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, (10th Cir. Dec. 20, 2012).

In granting an injunction in a similar case, the Seventh Circuit considered — and rejected — the same argument advanced here by Defendants:

> The government also argues that any burden on religious exercise is minimal and attenuated, relying on the recent decision by the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012). *Hobby Lobby*, like this case, involves a claim for injunctive and declaratory relief against the mandate brought by a secular, for-profit employer. On an interlocutory appeal from the district court's denial of a preliminary injunction, the Tenth Circuit denied an injunction pending appeal, noting that "the particular burden on 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 corporate] plan, subsidize *someone else's* participation in an activity condemned by plaintiff[s'] religion." *Id.* at 7 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012). *With respect, we think this misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilizations, and related services, not — or perhaps more precisely, not only — in the later purchase or use of contraception or related services.*

Korte, 2012 WL 6757353, at *3 (emphasis added); *see also O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, slip op. (8th Cir. Nov. 28, 2012) (apparently disagreeing with the Tenth Circuit decision in *Hobby Lobby*, albeit without discussion) (**Exhibit C**).

Likewise, while Plaintiffs here do not believe in the use of the objectionable drugs and services, they assert no legal challenge to each individual's choice. But Plaintiffs do object to the coercion that IAI's health plan provide paid-for *coverage* of such drugs and services, and related education and counseling. Stated differently, the substance of Plaintiffs' claim here is that the Mandate substantially burdens their religious exercise, in particular, *by mandating paid coverage* of objectionable drugs and services that violate the Plaintiffs' religious beliefs. The fact that the decision to *use* such drugs and services rests with a third party does not diminish the burden on Plaintiffs to afford *coverage* of such drugs and services to employees.

Defendants attempt to downplay the burden imposed by the Mandate by pointing out that health coverage is a non-cash employee benefit and that "the owners have no right to control the choices their company's employees make when availing themselves of those benefits." Mem. in Supp. of Defs.' Mot. to Dismiss, at 12. This of course is true, but again, such argument mischaracterizes the substance of Plaintiffs' claims. The Michigan Attorney General has clearly illustrated why this is so:

> [Plaintiff's] argument is a straightforward one: that a person has a greater moral obligation if it directly provides the service to the employee or ensures that another entity (an insurer) provides the service than it does in paying an employee a wage and the employee elects to purchase the service. For example, consider a Quaker-owned business' commitment to pacifism and its owner's objection to handguns. If there were a mandate that required a business to either provide handguns to its employees for self defense or contract with a weapons supplier to provide a handgun, there would be an arguable moral difference in taking those actions than in paying the employee's wage.

Att'y General Bill Schuette's Amicus Brief in Supp. of Plfs.' Mot. for Prelim. Inj., at 12-13, filed Jan. 29, 2013, in *Monaghan*, *supra* (**Exhibit D**).

The point here is that there is one *choice* — by the covered individuals — and a separate *mandate* — no choice — imposed on Plaintiffs, which exists regardless what choices are made by the covered individuals. The burden on Plaintiffs is no less whether all, some, one, or even no covered individuals actually elect to use the coverage. Plaintiffs must offer the coverage in any case, no matter how morally and religiously repugnant it may be.

Defendants further mischaracterize Plaintiffs' claims by arguing that a corporation and its owners may not impose their religious beliefs on employees. *See* Mem. in Supp. of Defs.' Mot. to Dismiss, at 11 (arguing that "[t]he owners should not be permitted to . . . impose their personal religious beliefs on IAI's group health plans or its large number of employees."). To be clear, Plaintiffs are not challenging an employee's right to procure or use contraceptives, nor are they challenging the right of a group health plan to *offer* coverage of such drugs and services. However,

Plaintiffs do object to the government regulation requiring *Plaintiffs* to provide, under threat of great financial penalty, coverage of drugs and services that violate Plaintiffs' religious beliefs.

Plaintiffs here have drawn a line in objecting to the forced, paid coverage of objectionable drugs and services that violate their Catholic religious beliefs. It is not for the Court to determine whether such line is an unreasonable one. *Thomas*, 450 U.S. at 715-16; *see also Geneva College*, 2013 WL 838238, at *20 (recognizing that "the court must tread lightly when considering whether the mandate's requirements substantially burden the exercise of religion"). Indeed, several courts addressing challenges under RFRA to the Mandate, like those presented here, "simply assume that a law substantially burdens a person's free exercise of religion when that person so claims." *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012); *see also United States v. Lee*, 455 U.S. 252, 257 (1982) (accepting the appellee's contention that the regulation burdened his religious exercise); *Geneva College*, 2013 WL 838238 at *20 n.18. This Court should find that Plaintiffs adequately pleaded the existence of a substantial burden.

C. Defendants Have No Compelling Interest in Applying the Mandate to Plaintiffs, Particularly Where Less Restrictive Means Are Available

1. The Government's "Compelling Interest"

Under RFRA, Defendants bear the burden of proof to demonstrate an exception to the general rule that Government may not substantially burden a person's exercise of religion, even if such burden results from a rule of general applicability. 42 U.S.C. § 2000bb-1(b); 42 U.S.C. § 2000bb-2(3) (stating "the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion"); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006) (same). Defendants cannot satisfy their burden here.

In *Gonzales*, the Supreme Court set forth the applicable standard: "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being

substantially burdened." *Gonzales*, 546 U.S. at 430-31. Accordingly, a court must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and *scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants*." *Id.* at 431 (emphasis added). The Court further explained:

> In *Yoder*, for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a "paramount" interest in education, but held that "despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the *claimed Amish exemption*."

Id. (citing *Yoder*, 406 U.S. at 213, 221) (emphasis in original).

In this case, Defendants allege that the Mandate advances two 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." Mem. in Supp. of Defs.' Mot. to Dismiss, at 3.

Plaintiffs agree that the interests cited by Defendants can, in general, be compelling interests, just as the Government generally has a valid interest in education.[11] *See Gonzales*, 546 U.S. at 431(discussing *Yoder*, 406 U.S. at 213, 221). However, the Court must look beyond these broadly formulated interests justifying the general applicability of the Mandate and scrutinize the harm — if any — of granting an exemption to Plaintiffs. *Gonzales*, 546 U.S. at 431. In this regard, Defendants rely on *Graham v. Comm'r of Internal Revenue Serv.*, 822 F.2d 844, 853 (9th Cir. 1987), for the proposition that "[w]here, 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." Mem. in Supp. of Defs.' Mot. to Dismiss, at 17. Conversely, where the Government already has

[11] Indeed, Plaintiffs do not object to the ACA in its entirety, only to one provision of the Act, the Mandate, which compels Plaintiffs to violate their religious beliefs by providing paid-for coverage of objectionable drugs and services, particularly abortifacients.

created multiple broad exceptions to a regulation, as here, Plaintiffs are entitled to point out that the creation of *another* exception, not the only exception, and certainly a much narrower exception, does no violence to the rationale on which the benefit is dispensed. Several exemptions to the Mandate already exist, including exemptions for grandfathered plans (42 U.S.C. § 18011; 45 C.F.R. § 147.140), religious employers (45 C.F.R. § 147.130(a)(1)(iv)), and employers with fewer than 50 employees (26 U.S.C. § 4980H; 42 U.S.C. § 18024(b)). One court explained:

> In light of the myriad exemptions to the mandate's requirements already granted — including the most recent developments that will — if implemented — further increase the number of exempt entities — and conceding that the requirement does not include small employers similarly situated to [the corporate plaintiff], the requirement is "woefully underinclusive" and therefore does not serve a compelling government interest.

Geneva College, 2013 WL 838238, at *23 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). Indeed, courts dealing with claims identical to those made here have noted that **over 190 million persons** are exempt from the Mandate *due to grandfathering alone*. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012); *Tyndale*, 2012 WL 5817323, at *18. The existence of extraordinarily broad exemptions, excluding millions of females in the workforce, severely undermines Defendants' argument that any appreciable harm will result if Plaintiffs are exempted from the Mandate, i.e., where its application is not uniform already.[12]

Additionally, the exemptions created by Defendants beg the question whether the stated interests are compelling in the first place. As one court explained, "[t]he large swath of the population that remains unaffected by the mandate's requirements belies any notion that the government's interests are as compelling as defendants argue." *Geneva College*, 2013 WL 838238, at *23. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye*,

[12] Further, the Government's exemptions operate to remove individuals from *all* preventive care. Plaintiffs, on the other hand, object to only a small portion of the ACA, so an exemption for Plaintiffs would be much narrower than the vast exemptions already created by the Government.

Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993); *see also Tyndale*, 2012 WL 5817323, at * 17 ("Indeed, where the government's proffered compelling interest exists both with respect to employers subject to a law and with respect to those exempt from the law, 'it is difficult to see how [the] same findings [supporting the government's interest] alone can preclude any consideration of a similar exception' for a similarly-situated plaintiff.").

Consider, for example, three secular, for-profit businesses located next to one another. Business A employs 500 employees but has a "grandfathered plan" and, thus, is not subject to the Mandate. Business B employs 49 employees (many of whom happen to be women) and is exempt from the Mandate. Business C, however, employs 51 employees (both male and female) and is subject to the Mandate. All of these businesses employ women, and many of their male employees have female spouses and dependents that are included in their health plans — yet the Mandate applies only to Business C.

Apparently, the "compelling government interest" in "improving the health of women and children" and creating "an equal playing field with men" heralded by Defendants actually is not so compelling as applied to the indistinguishable employees and covered women and children of Companies A and B. The significantly limited application of the Mandate, which leaves millions of women unaffected, cannot be ignored when Defendants proclaim broad principles that they like to pretend are generally applicable to all. Here, the statute itself describes the interest protected, and it is not the universally applicable interest stated by Defendants in their motion.

Are such interests less compelling as to those women who work for an employer with less than 50 employees or a grandfathered plan? If the "compelling interests" are not impaired by excluding such companies, how then are they significantly impaired by excluding a closely held business with a sincere religious objection, which seeks exclusion from only part of the mandated coverage? The Mandate does not advance the broad interests articulated by Defendants, and

Defendants cannot seriously argue that excluding Plaintiffs for legitimate religious reasons is devastating to their interests, when they have already excluded millions of women.

Just as telling, perhaps, are Defendants actions in other cases involving challenges to the Mandate. In *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-0036, slip op. (W.D. Mo. Feb. 28, 2013) (**Exhibit E**), for example, Defendants *consented* to a preliminary injunction of the Mandate. And, in *Legatus v. Sebelius*, No. 12-12061 (E.D. Mich. Oct. 31, 2012), Defendants apparently sought to hold in abeyance their appeal to the Sixth Circuit, thereby allowing a preliminary injunction entered by the district court to continue. If Defendants truly believe the Mandate protects the stated interests, then why have they consented to, and voluntarily allowed the continuance of, injunctions in those cases? *See also Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 4 (6th Cir. Dec. 28, 2012) (Rogers, J., dissenting) ("Arguments about the government's interest in the consistent application of the law lack force where the Government has apparently not appealed or requested a stay in a similar case in which a preliminary injunction was entered.").

Given the breadth and application of the existing statutory exemptions, as well as Defendants' actions in similar cases, Defendants cannot seriously argue that recognizing an exemption for Plaintiffs would impede the stated objectives.

2. Least Restrictive Means

Even if Defendants could establish that they have a compelling interest in applying the Mandate to Plaintiffs, but not to the thousands of employers already excluded, less restrictive means are available to further the stated interests. Defendants could, for example, 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. *See Newland*, 881 F. Supp. 2d at 1298. Indeed, Defendants already are aware of viable less-restrictive alternatives to the Mandate. 78 FED. REG. 8,456; 8,462-64 (Feb. 6, 2013) (proposing ways "to provide women with contraceptive coverage without cost sharing and to

protect eligible organizations from having to contract, arrange, pay, or refer to contraceptive coverage to which they object on religious grounds"). The availability of a breadth of less-restrictive means, alone, is enough to defeat Defendants' argument.

Defendants' "slippery slope" argument fares no better. Mem. in Supp. of Defs.' Mot. to Dismiss, at 12 ("[T]his complaint has no limits, and its necessary implications are indeed 'troubling.'") (citing *Autocam*, 2012 WL 6845677, at *7). The Supreme Court already rejected such argument in the context of RFRA: "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" *Gonzales*, 546 U.S. at 436.

Indeed, the Government itself ran headlong down the "slippery slope" when it carved out millions of women who have an equal interest in "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 part of the workforce on an equal playing field with men."

II. PLAINTIFFS' COMPLAINT STATES A VALID CLAIM FOR RELIEF UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*." U.S. CONST. amend. I (emphasis added).

The Supreme Court has explained that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in judgment)). Therefore, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious

practice." *Lukumi*, 508 U.S. at 531. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

But "[t]he rule comes with an exception. If the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the law satisfies the First Amendment *only if* it 'advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests.'" *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (emphasis added).

In this case, the Mandate is neither neutral nor of general applicability and, as discussed previously, the Mandate cannot satisfy strict scrutiny. The Mandate therefore fails to satisfy the requirements of the Free Exercise Clause and must be held unconstitutional.

The Mandate is not neutral or generally applicable because of the broad exemptions, excluding millions of women, which are available to certain employers, both religious and secular. See discussion Part I(C)(1), supra. Although the Mandate may on its face appear neutral and generally applicability, in practice it is "riddled with exemptions."[13] *Ward*, 667 F.3d at 738. In *Ward*, the court explained:

> At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny. *See Smith*, 494 U.S. at 884, 110 S. Ct. 1595; *Lukumi Babalu*, 508 U.S. at 537, 113 S. Ct. 2217. A double standard is not a neutral standard. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (Alito, J.) (invalidating a police department policy that barred officers from growing beards and holding that the policy could not take refuge in the *Smith* safe harbor because it excepted officers who could not shave for medical reasons but not officers who could not shave for religious reasons).

[13] Here, it is not just the number of exceptions to applicability but also the size (number of people exempted) of the exceptions that contradicts Defendants' claim of general applicability.

Id. at 740.

In *Fraternal Order of Police*, relied upon by the Sixth Circuit above, the court further explained:

> While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a *categorical exemption* for individuals with a secular objection but not for individuals with a religious objection.

Fraternal Order of Police, 170 F.3d at 365 (emphasis added). The court then found that "the medical exemption raise[d] concern because it indicate[d] that the Department . . . made a value judgment that secular (i.e., medical) motivations for wearing a beard [were] important enough to overcome its general interest in uniformity but that religious motivations [were] not." *Id.* at 366.

Applying the above principles in similar cases, other courts have determined that the Mandate is not neutral or generally applicable. *See Geneva College*, 2013 WL 838238, at *26 ("The primary example of the 'categorical exemption' rejected in *Fraternal Order of Police* in the present case is the grandfathering provision in the ACA, which exempts as many as 191 million entities from the mandate's requirements."). Additionally, the Mandate exempts employers with fewer than 50 employees — a seemingly arbitrary number — which impacts an indisputably vast number of employees. This latter exemption impacts secular employees to at least the same degree as the grandfathering exemption and illustrates the true nature of the Mandate, a system of categorical exemptions that undermines or, at the very least, severely limits the purposes of the regulation.

Defendants impermissibly have made a value judgment that secular motivations for granting an exemption (e.g., grandfathering and size of employer) are important enough to overcome their general interest in uniform application of the Mandate, but that religious motivations are not. *Fraternal Order of Police*, 170 F.3d at 366. Such a value judgment cannot withstand scrutiny.

In *Autocam*, this Court relied on *Lee* for the proposition that the Mandate is generally applicable. *Lee*, 455 U.S. 252. Respectfully, that case is inapposite. In *Lee*, the Supreme Court rejected a claim that mandatory payment of social security taxes imposed an unconstitutional burden on the religious exercise of an Amish employer. The Court reasoned that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *Id.* at 260. The Court recognized that the social security system required *uniform application to all employers*. *See id.* at 261. However, the Government here has already exempted a multitude of employers, for both religious and secular reasons. Accordingly, the same rationale does not apply in this case, since there is no attempt at uniform application, but rather a conscious non-uniform application.

Defendants' own actions in exempting huge categories of employers demonstrate that the Government does not have a similar interest "of such a high order" to justify imposing the Mandate on Plaintiffs. "[T]he fact that the government saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best." *Geneva College*, 2013 WL 838238, at *26. Therefore, the Mandate cannot survive strict scrutiny.

III. PLAINTIFFS' COMPLAINT STATES A VALID CLAIM FOR RELIEF UNDER THE ADMINISTRATIVE PROCEDURES ACT

A. Plaintiffs' Complaint Satisfies the Liberal Pleading Requirements

Under Fed. R. Civ. Proc. 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Sixth Circuit has noted:

> There can be no dispute that our modern rules of civil procedure are based on the concept of *simplified notice pleading*, and that *all pleadings shall be so construed as to do substantial justice*. This can indeed be seen in the basic requirements for a claim for relief as set forth in Rule 8(a) . . . .

Miller v. Am. Heavy Lift Shipping, 231 F.3d 242, 247-48 (6th Cir. 2000) (citations, brackets, and quotation marks omitted) (emphasis added).

There can be no serious doubt here that Defendants have adequate notice of, and fully understand, the APA violations alleged in the Complaint. Indeed, Defendants admit, in the first sentence of their brief, that Plaintiffs' claims are "indistinguishable" from other similar cases challenging the Mandate, many of which Defendants have already responded to and defended. Mem. in Supp. of Defs.' Mot. to Dismiss, at 1. Any suggestion by Defendants that they have inadequate notice of or do not understand the APA claims in this case is simply disingenuous.

Although Plaintiffs contend that Defendants have sufficient notice of their claims, including the APA violations, if this Court is inclined to grant Defendants' motion on the basis that Plaintiffs have not satisfied pleading requirements, then Plaintiffs request leave to amend their Complaint.

B. Plaintiffs Have Alleged a Viable Claim for Relief Under the APA

Plaintiffs allege that Defendants promulgation of the Mandate was procedurally defective because Defendants failed to provide "meaningful notice of rulemaking or opportunity for public comment" and failed to consider comments relating to constitutional and statutory implications of the Mandate. *See* Comp. ¶¶ 4, 79-80. Indeed, the facts relating to the promulgation of the Mandate (see generally Compl. ¶ 4) indicate that Defendants could not possibly have "considered" objections to the Mandate received during public comment, and Defendants therefore violated required procedure. 5 U.S.C. § 553 (rulemaking procedures). Because the ACA required a one-year delay before the Mandate's requirements would take effect, Defendants sought to have interim final regulations in place by August 1, 2011 (before the comment period), one year prior to the following school year when "[m]any college student policy years begin." 76 FED. REG. 46,624 (Aug. 3, 2011) . Defendants had no intention of considering public comments, as they rushed to promulgate an interim final rule in time for the 2012-2013 academic year.

After adopting the interim rule as a final rule, without change, in February 2012, Defendants themselves proved that they had failed to consider comments and objections received during the comment period, because Defendants initiated another rulemaking process in March 2012 to change

the regulation based on the nearly 200,000 comments they ignored when the 2011 Mandate was finalized. This new rulemaking process was wholly unnecessary if Defendants had in fact considered the objections prior to finalizing the 2011 Mandate.

Further, the ACA did not authorize Defendants to circumvent normal APA notice and comment requirements, and Defendants lacked any good cause for doing so. Other courts considering this issue have raised serious doubts about Defendants' "good cause" arguments. *See* Mem. in Supp. of Defs.' Mot. to Dismiss, at 22 n.6 (citing 76 FED. REG. at 46,624). In *Geneva College*, for example, the court explained:

> [D]efendants' rationale as set forth in the Federal Register did not indicate that Congress imposed a stringent deadline or indicate that the rules were necessary to provide much-needed guidance to other entities. At this stage in the proceedings [considering a motion to dismiss], it is not appropriate for a court to weigh the parties' arguments with respect to a showing of good cause without further development of the factual record.

Geneva College, 2013 WL 838238, at *33. Thus, the Court should deny Defendants' motion to dismiss the APA claim as it relates to the failure to comply with notice and comment requirements.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss in its entirety, except as to Count III and as to Count IV insofar as Plaintiffs have alleged that Defendants' actions were arbitrary and capricious and not in accordance with 42 U.S.C. § 18023(b)(1)(A) and 42 U.S.C. § 18023(b)(1)(B). Alternatively, to the extent the Court finds that Plaintiffs have failed to state a claim upon which relief may be granted, Plaintiffs request leave to amend their Complaint.

Respectfully submitted,

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