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

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

DEFENDANTS' BRIEF IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs – two manufacturing companies, as well as their controlling shareholders – ask this Court to preliminarily enjoin regulations that are intended to help 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. The preventive services coverage regulations that plaintiffs challenge require all group health plans and health insurance issuers offering non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible).[1] As relevant here, except as to group health plans of certain non-profit religious employers (and group health insurance coverage sold in connection with those plans), the preventive services that must be covered include all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. The plaintiffs in this case are Autocam Corporation and Autocam Medical, LLC ("Autocam"), two for-profit manufacturing companies based in Michigan, and five owners and/or officers with a controlling interest in Autocam.[2] Plaintiffs claim that their sincerely held religious beliefs prohibit them from providing health coverage for certain contraceptive services.

Plaintiffs' challenge rests largely on the legal theory that a for-profit corporation established to engage in manufacturing can claim to exercise religion and thereby avoid the reach of laws designed to regulate commercial activity and protect the rights of employees. This cannot be. Indeed, the Supreme Court has 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

[1] A grandfathered plan is one that existed on March 23, 2010, and that has not undergone any of a defined set of changes. *See, e.g.*, 45 C.F.R. § 147.140.

[2] Following plaintiffs' convention, defendants generally will refer to the two company plaintiffs as a single entity, "Autocam." The individual plaintiffs will be referred to collectively as "the Kennedys."

are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can the owners or officers of such a company eliminate the legal separation provided by the corporate form to impose their personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit companies and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general commercial laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court, therefore, should reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

For this reason and others, plaintiffs' motion for preliminary injunction should be denied because plaintiffs are not likely to succeed on the merits of their claims. As a threshold matter, plaintiffs have not met their burden of establishing Article III standing. But even if they had, with respect to plaintiffs' Religious Freedom Restoration Act (RFRA) claims, none of the plaintiffs can show, as they must, that the preventive services coverage regulations substantially burden their religious exercise. Autocam is a for-profit, secular employer, and a secular entity by definition does not "exercise religion" under RFRA and the Free Exercise Clause.

The Kennedys' allegations of a substantial burden on their own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to certain group health plans and health insurance issuers. The Kennedys are neither. It is well established that a corporation and its shareholders and officers are wholly separate entities, and the Court should not permit the Kennedys to eliminate that legal separation to impose their personal religious beliefs on the corporate entity's group health plan or its employees. None of the Kennedys is required to provide health coverage; only the corporation is subject to the challenged regulations. Autocam's owners and shareholders cannot use the corporate form alternatively as a shield and a sword, depending on what suits them in any given circumstance.

Furthermore, even if Autocam could exercise religion within the meaning of RFRA, the

preventive services coverage regulations still would not impose a substantial burden on plaintiffs' exercise of religion because any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. Indeed, in a decision plaintiffs fail to cite, the first court to address the merits of a challenge to the preventive services coverage regulations dismissed the plaintiffs' RFRA claim for this reason. *See O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476(CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal docketed*, No.12-3357 (8th Cir. Oct. 4, 2012). It will remain the independent choice of Autocam's employees (and their health care providers) whether to use their employer-provided health care coverage to procure particular health care services – including the contraceptive services to which plaintiffs object – just as it is currently their choice whether to use their employer-paid salaries to procure those services, subject to the employees' own moral and other preferences, rather than those of their employer. And Autocam remains free to advocate particular choices to its workforce. Finally, even if the preventive services coverage regulations were deemed to substantially burden 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 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). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously-motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with religious affiliations. Indeed, the *O'Brien* court dismissed a Free Exercise challenge identical to that brought by plaintiffs here. *See* 2012 WL 4481208, at *7-9. Nor do the regulations violate plaintiffs' Free Speech or Free Association rights. The regulations compel conduct, not speech. They do not

require plaintiffs to say anything; nor do they prohibit plaintiffs from expressing to employees or the public their views in opposition to the use of contraceptive services. For that reason, the *O'Brien* court dismissed just such a free speech challenge. *See* 2012 WL 4481208, at *11-13. And the regulations do not interfere with the composition of Autocam's workforce. Indeed, the highest courts of both New York and California have upheld state laws similar to the preventive services coverage regulations against First Amendment challenges like those asserted here.

Finally, plaintiffs cannot establish irreparable harm, and entering an injunction would injure the government and the public. Absent a showing of likelihood of success on the merits (which plaintiffs cannot make), plaintiffs cannot establish that they will be irreparably harmed if the Court does not enjoin the application of the regulations to Autocam. Independently, plaintiffs cannot show irreparable harm because they waited more than a year after the contraceptive coverage requirement was established before filing suit. The purported urgency of plaintiffs' current request for emergency injunctive relief is belied by the tardiness of that request. Plaintiffs should not be rewarded for creating their own alleged emergency. In contrast, entering a preliminary injunction would harm both the government and the public. Enjoining application of the regulations as to Autocam would prevent the government from achieving Congress's goals of improving the health of women and children and equalizing the playing field for women and men. It would also harm the public, given the large number of employees at Autocam – as well as any covered spouses and other dependents – who could suffer the negative health and other consequences that the regulations are intended to prevent.

BACKGROUND

I. Statutory Background

Before the enactment of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due in large part to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR

WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."). Section 1001 of the ACA – which includes the preventive services coverage provision that is relevant here – seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine (IOM)[3] with developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2. After an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs). FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/

[3] IOM was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM REP. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id.*

ucm118465.htm (last visited Oct. 22, 2012). IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03; *see infra* at 21-22.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), available at http://www.hrsa.gov/womensguidelines/ (last visited Oct. 22, 2012). The amendment to the interim final regulations, issued on the same day, authorized HRSA to exempt group health plans established or maintained 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 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[4] The religious employer exemption was modeled after the religious accommodation used in multiple states that had already required health insurance issuers to provide coverage for contraception.[5] 76 Fed. Reg. at 46,623.

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the amended interim final regulations while also establishing a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any

[4] To qualify, an employer must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B).

[5] At least 28 states have laws requiring health insurance policies that cover prescription drugs to also cover FDA-approved contraceptives. *See* Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives (Oct. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Oct. 22, 2012).

associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor period, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register. 77 Fed. Reg. 16,501.

II. Current Proceedings

Plaintiffs brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage Autocam makes available to its employees to cover certain recommended contraceptive services. On October 8, 2012 – 14 months after the contraceptive coverage requirement was established – plaintiffs filed suit; they moved for a preliminary injunction on October 10, 2012, claiming they would suffer irreparable harm if the preventive services coverage regulations were not enjoined as to them. *See* Compl., Oct. 8, 2012, ECF No. 1; Pls.' Mot. for Prelim. Inj., Oct. 10, 2012, ECF No. 8. In support of their motion, plaintiffs rely solely on their RFRA, Free Exercise, and Free Speech claims. *See* Pls.' Br. Supporting Mot. for Prelim. Inj. 3-4, Oct. 10, 2012 ("Pls.' Br."), ECF No. 9.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20; *Obama For America v. Husted*, Nos. 12-4055, 12-4076, 2012 WL 4753397, at *4, 12 (6th Cir. Oct. 5, 2012). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

Plaintiffs incorrectly suggest that they need not show a likelihood of success on the

merits if the Court determines that the remaining factors strongly favor plaintiffs. *See* Pls.' Br. at 7-8. As an initial matter, this suggestion is in significant tension with the Supreme Court's express requirement that "[a] plaintiff seeking a preliminary injunction *must* establish that he is *likely* to succeed on the merits." *Winter*, 555 U.S. at 20 (emphasis added); *Obama For America*, 2012 WL 4753397, at *12. Furthermore, where a plaintiff's alleged injury is a deprivation of First Amendment rights, as here, *see* Pls.' Br. at 8, 16, the merits and irreparable harm prongs merge. *See Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, No. 11-1538, 2012 WL 5258999, at *2 (6th Cir. Oct. 25, 2012). In this respect, plaintiffs cannot show irreparable harm without also showing a likelihood of success on the merits. *See id.*; *McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) ("Because [plaintiff] does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."); *Jones v. Caruso*, 569 F.3d 258, 266 (6th Cir. 2009).

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

a. Plaintiffs have not established Article III standing

As a threshold matter, plaintiffs are unlikely to succeed on the merits because they have not met their burden of establishing Article III standing – i.e., that they have "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations omitted). Specifically, plaintiffs have not sufficiently alleged that the health plans they offer to employees are not grandfathered, and thus excluded from the requirement to cover contraceptive services. Plaintiffs state that their "insurance plans are not considered 'grandfathered' due to unrelated changes made on January 1, 2011," Compl. ¶ 42; *see also* Pls.' Br. At 7 (same), but they do not provide any of the factual allegations necessary to support this legal conclusion, *see* 45 C.F.R. § 147.140; *White v. United States*, 601 F.3d 545, 551-52 (6th Cir. 2010) ("[S]tanding cannot be inferred . . . from averments in the pleadings, but

rather must affirmatively appear in the record, nor will naked assertion[s] devoid of further factual enhancement suffice." (internal citations and quotations omitted)); *Nebraska v. U.S. Dep't of Health & Human Servs*., No. 4:12CV3035, 2012 WL 2913402, at *12 (D. Neb. July 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012) ("To meet their burden, the plaintiffs must plead *facts* showing that [their] plans are not grandfathered.").[6]

Indeed, the only court to rule on a similar issue dismissed for lack of standing when faced with allegations identical to plaintiffs'. *See Nebraska*, 2012 WL 2913402, at *12 ("[A] 'naked assertion' that a plan does not satisfy the legal definition of 'grandfathered health plans' is not sufficient [to establish standing]."). As that court explained, "the plaintiffs have failed to plead specific facts showing that [their] plans are not grandfathered. As a result, they have not shown that they are subject to the Rule's contraceptive, sterilization, and related preventive service coverage requirements, and [the court] must dismiss their claims for lack of standing." *Id.*

So too here. Because plaintiffs have not established standing to challenge the preventive services coverage regulations, they cannot show a likelihood of success on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). Even if plaintiffs had sufficiently alleged standing, however, they still have not shown a likelihood of success on the merits, as explained below.

b. Plaintiffs' Religious Freedom Restoration Act Claim lacks merit

i. The preventive services coverage regulations do not substantially burden any "exercise of religion" by for-profit, secular companies and their owners

1. There is no substantial burden on Autocam because for-profit, secular corporations do no exercise rights under RFRA

[6] Although defendants estimate that a majority of group health plans will lose their grandfather status by 2013, 75 Fed. Reg. 34,538, 34,552 (June 17, 2010), plaintiffs must establish that *their* plan is not grandfathered, *see Lujan*, 504 U.S. at 560 n.1 ("[T]he injury must affect the plaintiff in a personal and individual way.").

Congress enacted the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1, *et seq.*) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was intended to reinstate the pre-*Smith* compelling interest test for evaluating legislation that substantially burdens the free exercise of religion. 42 U.S.C. § 2000bb-1(b). Under RFRA, the federal government generally may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

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

Because Autocam is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor*

Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, 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). This case should begin and end with plaintiffs own acknowledgement that Autocam is a secular employer.

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

It would be extraordinary to conclude that Autocam is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b).[7] To

[7] Indeed, such a conclusion would 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*
(continued on next page…)

reach 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. Moreover, any secular company would have precisely 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.[8]

It is significant that Autocam elected to organize itself as a secular, for-profit entity and to enter commercial activity. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261; *see also McClure v. Sports and Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share, or even know of, the owners' beliefs). In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution). Any burden is therefore caused by the

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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).

[8] For this reason, plaintiffs' reliance on *Sherbert v. Verner*, 374 U.S. 398 (1963), *see* Pls.' Br. at 9, is misplaced. That case involved an individual plaintiff, not a for-profit, secular corporation.

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).[9]

2. The regulations do not substantially burden the religious exercise of the Kennedys because the regulations apply only to Autocam, a separate and distinct legal entity

The preventive services coverage regulations also do not substantially burden the Kennedys' religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. The Kennedys are neither. The Kennedys nonetheless claim that the regulations substantially burden *their* religious exercise because the regulations require the group health plans sponsored by their for-profit secular *companies* to provide health insurance that includes contraceptive coverage. *See* Pls.' Br. at 9. But a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden must be imposed on the plaintiff himself. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for 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 v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 2007 WL 4322157, at *734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made

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

clear that the 'substantial burden' hurdle is high . . . ."). Here, any burden on the Kennedys' religious exercise results from obligations that the preventive services coverage regulations impose on a legally separate, secular entity.[10] This type of attenuated burden is not cognizable under RFRA. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993); *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009). Not so here, where the regulations apply to the group health plans sponsored by Autocam, not to the Kennedys themselves.

The Kennedys' theory boils down to the claim that what's done to the company (or group health plans sponsored by the company) is also done to its owners. But, as a legal matter, that is simply not so. The Kennedys have voluntarily chosen to enter into commerce and elected to do so by establishing for-profit corporations – "creature[s] of statute" that are their "own 'person[s]' under Michigan law, [] distinct and separate from [their] owners." *Handley v. Wyandotte Chems. Corp.*, 325 N.W.2d 447, 449 (Mich. Ct. App. 1982); *Hills & Dales Gen. Hosp. v. Pantig*, 812 N.W.2d 793, 797 (Mich. Ct. App. 2011). Indeed, "incorporation's basic purpose 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); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."). In the companies' employment relationships, Autocam – not its officers or shareholders – "is the employing party." *Sipma v. Mass. Cas. Ins. Co.*, 256 F.3d 1006, 1010 (10th Cir. 2001). As a Michigan domestic profit corporation, Autocam Corporation has broad powers – it may, for example, conduct business, sue and be sued, and appoint or employ agents. Mich. Comp. Laws Ann. §§ 450.1261(b), (e), (p); Amended and Restated Articles of Incorporation of Autocam Corporation, *available at*

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

http://www.dleg.state.mi.us/bcs_corp/image.asp?FILE_TYPE=UCO&FILE_NAME=D200909\2009254\00000509.tif (last visited Nov. 4, 2012). The company's officers have a duty to act "in the best interests of the corporation," Mich. Comp. Laws Ann. § 450.1541a(c), and they in turn are generally not liable for the corporation's actions, *see Mich. Laborers' Health Care Fund v. Taddie Constr., Inc.*, 119 F. Supp. 2d 698, 702 (E.D. Mich. 2000).[11] In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 163. The Kennedys should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on Autocam's group health plans or its large number of employees.

Although the preventive services coverage regulations do not require the Kennedys to provide contraceptive services directly, their complaint appears to be that, through *Autocam*'s group health plans and the benefits *Autocam* provides to employees, the Kennedys will facilitate conduct (the use of contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits to its employees, including a salary, and by doing so in some sense facilitates whatever use its employees make of those benefits. But the Kennedys have no right to control the choices of their company's employees, many of whom (having been hired, presumably, without regard to their religious views) may not share the Kennedys' religious beliefs, when making use of their benefits. These employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations. More generally, if an owner's or shareholder's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization[]" to assert free exercise rights, *Hosanna-Tabor*,

[11] The same goes for Autocam Medical, LLC. *See Hills & Dales Gen. Hosp.*, 812 N.W.2d at 797 ("The rules respecting the corporate form apply equally to limited liability corporations.").

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).[12]

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

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

Indeed, in a decision not cited by plaintiffs, the first court to decide the merits of a challenge to the preventive services coverage regulations under RFRA concluded as much. *See O'Brien*, 2012 WL 4481208, at *4-7. Like plaintiffs here, the plaintiffs in *O'Brien* were a for-profit, secular company and an owner who held religious beliefs against contraception. *Id*. at *1. Assuming, but not deciding, that the company could exercise religion, the court determined that any burden on that exercise (as well as the owner's exercise of religion) is too attenuated to state a claim for relief. The court explained that "the plain meaning of 'substantial,'" as used in RFRA, "suggests that the burden on religious exercise must be more than insignificant or

[12] Defendants anticipate that plaintiffs may rely, in their reply brief, on *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), to argue that the regulations impose a substantial burden on plaintiffs' religious exercise. Both cases, however, expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619, 620. Instead, *Stormans* held that a particular corporation had standing to raise the rights of its owner (who was not a party). 586 F.3d at 1119-22. But this case does not present that standing question, as the Kennedys are also plaintiffs here. As for the question that this case *does* present – whether a burden on a corporation is also a burden on its owners – *Stormans* had absolutely nothing to say. Indeed, while the case discussed whether the challenged rules were neutral and generally applicable, *see id.* at 1130-37, it did not address the substantial burden prong at all. Similarly, nothing in *Townley* suggests that a burden on a corporation is also a burden on its owners. Although the court allowed Townley (the company) to assert the rights of its owners (who were not parties), *see Townley*, 859 F.2d at 619-20 & n.15, it did not find that Title VII imposed a substantial burden on the owners' religious exercise. Rather, *Townley* acknowledged that the challenged statute "to some extent would adversely affect [plaintiffs'] religious practices," and then proceeded to uphold Title VII on compelling interest grounds. In short, neither case supports the proposition that the preventive services coverage regulations impose a substantial burden on Autocam or the Kennedys. 859 F.2d at 620.

remote." *Id.* at *5. And cases presenting the test that RFRA was intended to restore – *Sherbert* and *Yoder* – confirm this "common-sense conclusion." *O'Brien*, 2012 WL 4481208, at *5. The plaintiff in *Sherbert*, the court explained, "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.'" *O'Brien*, 2012 WL 4481208, at *5 (quoting *Sherbert*, 374 U.S. at 404). Similarly, in *Yoder*, the 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." *O'Brien*, 2012 WL 4481208, at *5 (quoting *Yoder*, 406 U.S. at 218).

In contrast to the direct and substantial burdens imposed in those cases, the court in *O'Brien* determined that the preventive services coverage regulations result in only an indirect and *de minimis* impact on the plaintiffs. *Id.* at *6-7.

> [T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. [Plaintiff] is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The 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 plaintiffs' religion. The Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

Id. at *6. The court noted that the regulations have no more of an impact on the plaintiffs' beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *Id.* at *7. Indeed, the court observed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *Id.* at *6.

The court also noted that adopting the plaintiffs' substantial burden argument would turn RFRA, which was meant as a shield, into a sword. *Id.* "[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id.*[13] In short, because the preventive services coverage regulations "are several degrees removed from imposing a substantial burden on [Autocam], and one further degree removed from imposing a substantial burden on [the Kennedys]," *id.* at *7, the Court should dismiss plaintiffs' RFRA claim even assuming secular companies like Autocam can exercise religion.

ii. Even if there were a substantial burden on religious exercise, the regulations serve compelling government interests and are the least restrictive means to achieve those interests

1. The regulations significantly advance compelling governmental interests in women's health and 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

[13] That Autocam's group health plan is self-insured, *see* Pls.' Br. at 6, does not distinguish this case from *O'Brien*. It remains true that "[t]he burden of which plaintiffs complain" rests on "a series of independent decisions by health care providers and patients covered by [Autocam's plan]." *O'Brien*, 2012 WL 4481208, at *6. And a group health plan is a separate legal entity from the sponsoring employer even if the plan is self-insured. *See* 29 U.S.C. § 1132(d).

primary predicted benefit of the regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations. As the Supreme Court explained in *Roberts*, there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." 468 U.S. at 626. Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age

spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress intended to equalize health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728. Congress's attempt to equalize the provision of preventive health care services, with the resulting benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

Plaintiffs miss the point when they attempt to minimize the magnitude of the government's interests by arguing that contraception is widely available and even subsidized for certain low-income individuals. *See* Pls.' Br. at 11. Although a majority of employers cover FDA-approved contraceptives, *see* IOM REP. at 109, many women forgo preventive services, including certain reproductive health care, because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109. The challenged regulations eliminate that cost-sharing. 77 Fed. Reg. at 8728. And, of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies that do not currently offer such coverage, like Autocam. Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31, exempting Autocam and other similar companies from the obligation of their health plans to cover contraceptive services without cost-sharing would remove their employees (and their employees' families) from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g.*, *Graham v. Comm'r*, 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."), *overruled in part on other grounds by Navajo Nation v. USFS*, 479 F.3d 1024, 1033 (9th Cir. 2007) (en banc).

Each woman who wishes to use recommended contraceptives and who works for Autocam or a similarly situated company (and each woman who is a covered spouse or dependent of an employee of such a company) – or, for that matter, any woman in such a position in the future – is significantly disadvantaged when the company chooses to provide a plan that fails to cover such services without cost-sharing. *See United States v. Friday*, 525 F.3d 938, 956 (10th Cir. 2008) (noting that the government's interest is still compelling even when the impact is limited in scope). As revealed by the IOM Report, those women 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 themselves and their 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.[14] These harms would befall female employees (and covered spouses and dependents) who do not necessarily share the company owners' religious beliefs and might not have been aware of those beliefs when they joined the secular company. Plaintiffs' desire not to provide a health plan that permits such individuals to exercise their own choice must yield to the government's compelling interest in avoiding the adverse and unfair consequences that such individuals would suffer as a result of the company's decision to impose the company owners' religious beliefs on them. *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 v. Indus. Comm'n*, 911 F.3d 1203, 1209, 1211 n.6 (6th Cir. 1990).

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

Plaintiffs argue that the interests underlying the regulations cannot be considered compelling because many health plans are exempted from the regulations. *See* Pls.' Br. at 11-13. 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. *Lukumi*, 508 U.S. at 546-47. Nor do the "exemptions" mentioned by plaintiffs change the fact that the regulations are the least restrictive means of advancing the government's compelling interests. The "exemptions" referred to by plaintiffs are not exemptions from the preventive services coverage regulations at all, but are instead provisions of the ACA that exclude individuals and entities from other requirements imposed by the ACA. They reflect the government's attempts to balance the compelling interests underlying the challenged regulations against other significant interests supporting the complex administrative scheme created by the ACA. *See Lee*, 455 U.S. at 259 ("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."); *United States v. Winddancer*, 435 F. Supp. 2d 687, 695-98 (M.D. Tenn. 2006) (recognizing that the regulations governing access to eagle parts "strike a delicate balance" between competing compelling interest). And unlike the exemption plaintiffs seek for all employers that object to the regulations on religious grounds, the existing exemptions do not undermine the government's interests in any significant way. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church*, 911 F.2d at 1208-09 (rejecting the plaintiff's argument that the existence of exemptions indicates that a law is the not the least restrictive means of achieving a compelling interest where the exemptions do not undermine that interest).

For example, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests –

specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA – in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,540, 34,546 (June 17, 2010).

The incremental transition of the marketplace into the ACA administrative scheme does nothing to call into question the compelling interests furthered by the preventive services coverage regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See id.* at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption plaintiffs seek. Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but plaintiffs offer no support for such an untenable proposition.

Second, 26 U.S.C. § 4980H9(c)(2) does *not*, as plaintiffs assert, exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees and certain other criteria are met.[15] *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get their health insurance through other ACA provisions, primarily premium tax credits and health insurance Exchanges, and the coverage they receive will include all preventive services, including contraception.[16] In addition, small businesses that choose to

[15] In contrast, beginning in 2014, certain large employers face assessable payments if they fail to provide health coverage for their employees under certain circumstances. 26 U.S.C. § 4980H.

[16] For this reason, even if there were some connection between the preventive services coverage provision and the employer responsibility provision, excluding small employers from the employer responsibility provision would not

(continued on next page…)

offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. And there is reason to believe that many small employers will continue to offer health coverage to their employees, because the ACA, among other things, provides for tax incentives for small businesses to encourage the purchase of health insurance. *See id.* § 45R.

Third, although 26 U.S.C. § 5000A(d)(2) exempts from the minimum coverage provision of the ACA "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance and members of health care sharing ministries, this provision is entirely unrelated to the preventive services coverage regulations. *See also id.* § 1402(g). The minimum coverage provision will require certain individuals who fail to maintain a minimum level of health insurance to pay a tax penalty beginning in 2014. It provides no exemption from the preventive services coverage regulations, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61.

Furthermore, exempting these discrete and "readily identifiable," *id.* at 260-61, classes of individuals from the minimum coverage provision is unlikely to appreciably undermine the compelling interests motivating the preventive services coverage regulations. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which . . . makes payments toward the cost of, or provides services for, medical care,"

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undermine the government's compelling interest in ensuring that employees have access to recommended preventive services. As noted, employees of small employers that do not provide health coverage will be able to obtain health coverage through health insurance exchanges, and, if eligible, receive premium tax credits and cost-sharing reductions to assist them in affording such coverage. *See* 42 U.S.C. § 18021; *id.* § 18031(d)(2)(B)(i). Because the preventive services coverage requirement applies to the health plans being offered through the Exchanges, the coverage individuals buy there will necessarily cover recommended contraceptive services. *Id.* § 300gg-13(a).

26 U.S.C. § 1402(g)(1), or is a member of a health care sharing ministry described in 26 U.S.C. § 5000A(d)(2)(B)(ii) would not utilize health coverage – including contraceptive coverage – even if it were offered.

The only true exemption from the preventive services coverage regulations cited by plaintiffs is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv). But there is a rational distinction between the narrow exception currently in existence and the expansion plaintiffs seek. A "religious employer" is an employer that, among other things, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id.* Thus, the exception does not undermine the government's compelling interests. It anticipates that the impact on employees of exempted organizations will be minimal, given that any religious objections of the exempted organizations are presumably shared by most of the individuals actually making the choice as to whether to use contraceptive services. *See* 77 Fed. Reg. at 8728.[17]

The same is not true for Autocam, which presumably does not (and cannot) discriminate based upon anyone's religious beliefs when hiring, and therefore almost certainly employs many individuals who do not share the Kennedys' religious beliefs. 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

[17] Elsewhere in their brief, plaintiffs allude to "waivers of portions of the [ACA]," Pls.' Br. at 5 n.1, citing documents referring to the annual limits waiver program. *See* 42 U.S.C. § 300gg-11; 45 C.F.R. § 147.126. The annual limits provision of the ACA restricts annual dollar limits on essential health benefits provided by health insurance issuers and group health plans. *See id.* The Secretary of HHS had the authority to waive these restrictions for plans if compliance "would result in a significant decrease in access to benefits under the plan or health insurance coverage or would significantly increase premiums for the plan or health insurance coverage." 45 C.F.R. § 147.126(d)(3). These waivers are not related to the preventive services coverage regulations, and those non-exempt, non-grandfathered plans that received an annual limits waiver are still required to provide the required preventive services coverage.

made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the preventive services coverage regulations, it is difficult to see how defendants could administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. Indeed, women who receive their health coverage through corporations like Autocam would be subject to negative health and employment outcomes because they had obtained employment with a company that imposes its owners' religious beliefs on their health care needs. *See* 77 Fed. Reg. at 8728.

2. 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, albeit intertwined, 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*, 911 F.3d at 1206 (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.).

Instead of explaining how Autocam and similarly situated secular companies could be exempted from the preventive services coverage regulations without significant damage to the government's compelling interests in public health and gender equality, plaintiffs conjure up several new regulatory schemes that they claim would be less restrictive. *See* Pls.' Br. at 12.

Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010) (explaining why Congress chose to build on the employer-based system), plaintiffs would have the system turned upside-down to accommodate the Kennedys' beliefs at enormous administrative and financial cost to the government. But, just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means. *See Wilgus*, 638 F.3d at 1289 ("Not requiring the government to do the impossible – refute each and every conceivable alternative regulation scheme – ensures that scrutiny of federal laws under RFRA is not strict in theory, but fatal in fact." (quotation omitted)); *New Life Baptist Church Acad.*, 885 F.2d at 946 ("[A] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.'" (internal citation and quotation marks omitted)).

In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme or fundamentally alter an existing one. But a proposed alternative scheme is not an adequate alternative – and thus not a viable less restrictive means to achieve the compelling interest – if it is not "feasible" or "plausible." *See, e.g.*, *New Life Baptist*, 885 F.2d at 947 (considering "in a practical way" whether proffered alternative would "threaten potential administrative difficulties, including those costs and complexities which . . . may significantly interfere with the state's ability to achieve its . . . objectives"); *Graham*, 822 F.2d at 852 ("To allow an exception for Scientologists is, we think, possible; but it is not feasible."). In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011) (rejecting proffered alternative because it "would place an unreasonable burden" on the government); *New Life Baptist*, 885 F.2d at 947 ("[T]he Court has made clear that administrative considerations play an important role in determining whether or not the state can follow its preferred means."). Plaintiffs' alternatives would impose

considerable new costs and other burdens on the government and would otherwise be impractical. *See Lafley*, 656 F.3d at 942; *New Life Baptist*, 885 F.2d at 947; *see also Gooden v. Crain*, 353 F. App'x 885, 888 (5th Cir. 2009).[18]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See, e.g.*, *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (finding that state's means was least restrictive where no alternative means would achieve its interests). As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to utilize the existing employer-based system. The anticipated benefits of the preventive services coverage regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost sharing – an attribute a few of plaintiffs' alternatives admittedly share – but also to the fact that these services will be available through the existing employer-based system of health coverage through which women will face minimal logistical and administrative obstacles to receiving coverage of their care. Plaintiffs' alternatives, on the other hand, have none of these advantages. They would require establishing entirely new government programs and infrastructures or fundamentally altering an existing one, and would almost certainly require women to take steps to find out about the availability of and sign up for the new benefit, thereby ensuring that fewer women would take advantage of it. Nor do plaintiffs offer any suggestion as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposals – in addition to raising myriad administrative and logistical difficulties – are less likely to achieve

[18] 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.

the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means.[19]

c. Plaintiffs' First Amendment claims are meritless

i. The regulations do not violate the Free Exercise Clause

For the reasons explained above, a for-profit, secular employer like Autocam does not engage in any exercise of religion protected by the First Amendment. Nevertheless, even if it did, the preventive services coverage regulations do not violate the Free Exercise Clause because they are neutral laws of general applicability. That was precisely the holding in *O'Brien*, 2012 WL 4481208, at *7-9, and the highest courts of two states have also rejected free exercise claims nearly identical to the one raised by plaintiffs here in cases challenging state laws that are similar to the preventive services coverage regulations. *See Catholic Charities of Diocese of Albany v.*

[19] Plaintiffs rely heavily on *Newland v. Sebelius*, Civil Action No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), in arguing that they are likely to succeed on their RFRA claim. But the court in *Newland* explicitly declined to address defendants' claim that a for-profit, secular company cannot exercise religion within the meaning of RFRA, concluding that the question needed "more deliberate investigation." *Id.* at *6. For the reasons explained above, *see supra* 8-9, this Court cannot enter a preliminary injunction without addressing this issue. Moreover, defendants believe the *Newland* court's compelling interest and least restrictive means analysis is flawed for the reasons explained above.

Similarly, the recent ruling in *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), does not help plaintiffs, as the *Legatus* court also declined to decide whether a for-profit corporation can assert Free Exercise or RFRA rights. *Id.* at *4-5. In *Legatus*, the court preliminarily enjoined the government from enforcing the contraceptive coverage requirement against a for-profit company and its owner. The court appropriately recognized that, with respect to First Amendment and RFRA claims, the likelihood of success on the merits and irreparable harm prongs of the preliminary injunction analysis merge such that, to obtain a preliminary injunction, a plaintiff must establish a likelihood of success on the merits. 2012 WL 5359630, at *3. Nevertheless, the court entered a preliminary injunction without determining that plaintiffs were likely to succeed on the merits. *Id.* at *13. Indeed, the court concluded that "[p]laintiffs . . . have [not] shown a strong likelihood of success on the merits." *Id.*; *see also Adams v. City of Marshall*, No. 4:05-cv-62, 2006 WL 2095334, at *1 (W.D. Mich. 2006) ("Both parties have a possibility of success, but that is not enough to satisfy Plaintiffs' obligation to show a 'substantial' likelihood of success."). Moreover, in its substantial burden analysis, the court merely "assume[d]" that plaintiffs could demonstrate a substantial burden on their religious exercise, observing that "courts often simply assume that a law substantially burdens a person's exercise of religion when that person so claims." *Legatus*, 2012 WL 5359630, at *6. This approach, however, reads the substantial burden requirement right out of RFRA, which a court may not do. As the *O'Brien* court explained, Congress's use of the term "substantial" means that "the burden on religious exercise must be more than insignificant or remote." 2012 WL 4481208, at *5. For these reasons, and those set forth above, the government respectfully maintains that *Legatus* was incorrectly decided as to the for-profit company and its owner.

Serio, 859 N.E.2d 459, 468-69 (N.Y. 2006); *Catholic Charities of Sacramento*, 85 P.3d at 81-87. This Court should do the same.

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. A law is neutral if it does not target religiously motivated conduct but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 545. A law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id.* at 535-37, 545. Unlike such selective laws, these regulations are neutral and generally applicable. They do not target religiously motivated conduct. Their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *See O'Brien*, 2012 WL 4481208, at *7 (holding that the "regulations are neutral"). The regulations reflect expert recommendations about the medical need for the services, without regard to any religious motivations for or against such services. As the IOM Report shows, this purpose is entirely secular in nature. IOM REP. at 2-4, 7-8; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007).

Plaintiffs contend that the regulations are not generally applicable because they contain certain categorical exceptions. Pls' Br. at 14. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *see O'Brien*, 2012 WL 4481208, at *8 (rejecting identical argument); *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) (refusing to "interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption"); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991).

Although the regulations refer to religion in the context of exempting certain religious employers from the requirement to cover contraceptive services, this reference does not, as plaintiffs suggest, *see* Pls.' Br. at 15, destroy the regulations' neutrality. *See O'Brien*, 2012 WL 4481208, at *8. Any burden on plaintiffs' religious beliefs – and there is none – would "arise[] not from the religious terminology used in the exemption, but from the generally applicable requirement to provide coverage for contraceptives." *Catholic Charities of Sacramento*, 85 P.3d at 83. Moreover, contrary to plaintiffs' suggestion, *see* Pls.' Br. at 14-15, the First Amendment does not prohibit the government from distinguishing between *organizations* based on their purpose and composition; it prohibits the government from favoring one *religion*, *denomination*, or *sect* over another. *See Lukumi*, 508 U.S. at 533, 535; *cf. Larson v. Valente*, 456 U.S. 228, 244 (1982) (explaining that "one religious *denomination* cannot be officially preferred over another" (emphasis added)); *Gillette v. United States*, 401 U.S. 437, 450-51 (1971). Therefore, not providing an exemption for secular companies does not destroy neutrality. *See O'Brien*, 2012 WL 4481208, at *8; *cf. Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (upholding tax exemption for realty owned by associations organized exclusively for *religious purposes*); *Amos*, 483 U.S. at 344 (upholding Title VII's exemption for *religious* organizations).

The regulations are also generally applicable because they do not apply "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. They apply to all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage and do not qualify for the religious employer exemption. *See O'Brien*, 2012 WL 4481208, at *8 ("The regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations."). Thus, "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); *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997).[20]

Plaintiffs also maintain that defendants have created a system of individualized exemptions. Pls.' Br. at 14. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none.[21]

The regulations are no different from other neutral and generally applicable laws governing employers that have been upheld against free exercise challenges. *See United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (upholding federal employment tax laws because they were "not restricted to [the church] or even religion-related employers generally, and there [was] no indication that they were enacted for the purpose of burdening religious practices"); *Am. Friends Serv. Comm. Corp.*, 951 F.2d at 960 (upholding law that required employers to verify the immigration status of their employees); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same). Because the regulations are neutral laws of general applicability, plaintiffs' free exercise claim is without merit.[22]

ii. The regulations do not violate the Free Speech Clause

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[20] This case is a far cry from *Lukumi*, 508 U.S. 520, on which plaintiffs rely. *See* Pls.' Br. at 13-14. In *Lukumi*, the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36. There is no evidence of a similar targeting of religious practice here.

[21] Plaintiffs misunderstand the regulations when they assert that HRSA has "unbridled discretion" to grant or deny an exemption to an employer that meets the religious employer exemption criteria. Pls.' Br. at 14-15. Any employer that meets the criteria is not required to cover contraceptive services. *See* HRSA Guidelines.

[22] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra*, at 19-30.

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). But the preventive services coverage regulations do not require plaintiffs – or any other person, employer, or other entity – to say anything. Contrary to plaintiffs' assertion, *see* Pls.' Br. at 16, the regulations do not require plaintiffs themselves to provide any education or counseling.[23] Thus, the regulations are not like the law at issue in *Wooley v. Maynard*, which compelled speech. 430 U.S. 705, 707 (1977) (requiring residents to display license plate that read "Live Free or Die"); *see* Pls.' Br. at 15-16. Plaintiffs here are not required to speak at all. Nor do the regulations limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) or the regulations. Indeed, under the regulations, plaintiffs may encourage Autocam's employees not to use contraceptive services. The regulations thus regulate conduct, not speech.

Moreover, the conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *FAIR*, 547 U.S. at 66; *see O'Brien*, 2012 WL 4481208, at *12. 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 on campus is not conduct that indicates colleges' support for, or sponsorship of, recruiters' message), *with Hurley*

[23] Rather, if Autocam decides to offer a non-grandfathered health plan to their employees, the plan must cover the costs of any education and counseling provided by a health care provider to its participants. It is the health care provider who will be speaking, not plaintiffs. And the regulations do not purport to regulate the content of the education or counseling provided – that is between the patient and her health care provider. *See* HRSA Guidelines (requiring coverage to include "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider). Therefore, as the *O'Brien* court explained, this case does not involve the sort of political and ideological causes at issue in the compelled-subsidy cases cited by plaintiffs. *See* Pls.' Br. at 16 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *O'Brien*, 2012 WL 4481208, at *12 (distinguishing *Keller* and *Abood*). Those cases do not stand for the proposition that an employer may refuse to provide coverage for medical services because, during the course of a medical visit, a provider may say something with which the employer disagrees. Plaintiffs' theory would preclude virtually all government efforts to regulate health coverage, as a medical visit almost invariably involves some communication between a patient and a health care provider, and there may be many instances in which the entity providing the health coverage disagrees with the content of this communication. *See O'Brien*, 2012 WL 4481208, at *12.

v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 568-70 (1995) (openly gay, lesbian, and bisexual group marching in parade is expressive conduct), *and Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning during political demonstration is expressive conduct), *and Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-14 (1969) (wearing black armbands to show disapproval of Vietnam hostilities is expressive conduct). Because the regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause. *See O'Brien*, 2012 WL 4481208, at *11-13 (rejecting identical claim because "the government has not compelled plaintiffs to speak, to subsidize speech, or to subsidize expressive conduct"); *Catholic Charities of Sacramento*, 85 P.3d at 89 (upholding similar California law against free speech challenge because "a law regulating health care benefits is not speech").

Plaintiffs' cursory expressive association claim is similarly flawed. The regulations do not interfere in any way with the composition of Autocam's workforce. *See Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) ("A government action does not interfere with the right of expressive association unless it directly or indirectly interferes with *group membership*." (emphasis added)); *e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding Boy Scouts' freedom of expressive association was violated by law requiring organization to accept gay man as scoutmaster). The regulations do not force Autocam to hire employees it does not wish to hire (although Title VII prohibits Autocam from religious discrimination in hiring, as it is not a religious corporation). The Kennedys, moreover, are free to associate to voice their disapproval of the use of contraception and the regulations. If the statute at issue in *FAIR*, which required law schools to allow military recruiters on campus if other recruiters were allowed on campus, did not violate the law schools' right to expressive association, 547 U.S. at 68-70, neither do the preventive services coverage regulations violate plaintiffs' right. *See also Diocese of Albany*, 859 N.E.2d at 465 (upholding similar New York law against free speech and free association challenges); *Miller*, 622 F.3d at 538.

II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC

Although "[t]he loss of First Amendment freedoms," or a violation of RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), in this case, plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time. *Id.* In this respect, the merits and irreparable injury prongs of the analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly*, 684 F.3d at 621 ("Because McNeilly does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."). Nor can plaintiffs claim irreparable harm from their alleged need to prepare upcoming health plans, *see* Pls.' Br. at 17, for any purported planning emergency is of plaintiffs' own making. As the Court noted in denying plaintiffs' request for expedited consideration of their motion for preliminary injunction, plaintiffs have "create[d] the need for prompt action by delaying a filing that could reasonably have been brought earlier." Order at 3, Oct. 12, 2012, ECF No. 12.

Indeed, plaintiffs' delay further counsels against a finding of irreparable harm. The contraceptive coverage requirement was issued on August 1, 2011. Yet plaintiffs waited fourteen months – until October 10, 2012 – to seek preliminary injunctive relief. Such a substantial and unexplained delay seriously undermines plaintiffs' claim of irreparable harm. *See Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 2:12-CV-197, 2012 WL 3060146, at *14 (W.D. Mich. 2012) ("'Since an application for preliminary injunction is based on an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.'" (quoting *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir.1989)); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunctive relief and noting that a delay of forty-four days after final

regulations were issued was "inexcusable").[24]

On the other hand, issuing a preliminary injunctive would harm the government and the public. With regard to the government, "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) (indicating that granting an injunction against the enforcement of a likely constitutional statute would harm the government). Enjoining the regulations as to a for-profit, secular corporation after January 2013 would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services 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.[25] It would also be contrary to the public interest to deny the employees of Autocam the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[C]ourts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Because Autocam is a for-profit, secular employer, many of its employees undoubtedly do not share the Kennedys' religious beliefs. Those employees should not be denied the benefits of receiving a health plan through their employer that covers contraceptive services. Enjoining the government from enforcing the

[24] *See also, e.g.*, *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.") (internal quotation marks and citation omitted); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994) ("As a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury." (quotations omitted)); *Quince Orchard Valley Citizens Ass'n*, 872 F.2d at 80 ("Equity demands that those who would challenge the legal sufficiency of administrative decisions . . . do so with haste and dispatch."); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("[L]ong delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

[25] Plaintiffs miss the mark with their suggestion that the government will not be harmed by the entry of a preliminary injunction here. Defendants have already refuted plaintiffs' first contention, *see* Pls. Br. at 17, that the preventive services coverage regulations are not generally applicable. *See supra*, at 30-33. And the fact that a preliminary injunction was entered as to one employer in one unrelated case, *see* Pls. Br. at 17, in no way undermines the harm to the government of enjoining the regulations *in this case*, especially given that plaintiffs have failed to show a likelihood of success on the merits of their RFRA or Free Exercise claim.

regulations, the purpose of which is to eliminate these burdens, 75 Fed. Reg. at 41,733; *see also* 77 Fed. Reg. at 8728, as to plaintiffs would thus harm the public. *See, e.g.*, *Stormans*, 586 F.3d at 1139 (vacating preliminary injunction and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications").[26] Any potential harm to plaintiffs resulting from their desire not to provide contraceptive coverage is thus outweighed by the significant harm an injunction would cause to the public.[27]

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 7th day of November, 2012,

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[26] Having failed to show a likelihood of success on the merits, plaintiffs cannot claim that an injunction nevertheless serves the public interest because plaintiffs may otherwise elect to cut coverage for Autocam's employees. *See* Pls.' Br. at 18-19. Not only is that assertion unsupported, *see Leary*, 228 F.3d at 739, but the consequences of such a potential private decision – even if regrettable for Autocam's employees – are not cognizable under the public interest prong. *See Jones*, 569 F.3d at 278 ("In First Amendment cases, the determination of where public interest lies . . . is dependent on a determination of the likelihood of success on the merits . . . because *if the regulation in question is likely to be deemed constitutional, the public interest will not be harmed by its enforcement*." (emphasis added, internal citation and quotation marks omitted)).

[27] Plaintiffs rely on the *Newland* court's determination that the equities tipped in favor of the plaintiffs in that case. Pls.' Br. at 18. But the *Newland* court based its assessment of the equities on the "potential" or "possible" violation of plaintiffs' RFRA rights. 2012 WL 3069154, at *4. As explained above, *see, e.g.*, *supra*, at 8-9, that was error.

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