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

AUTOCAM CORPORATION, *et al.,*

Plaintiffs,

Case No. 12-cv-01096
Hon. ROBERT J. JONKER

v.

KATHLEEN SEBELIUS, *et al.,*

Defendants

*** ORAL ARGUMENT REQUESTED ***

BRIEF OPPOSING MOTION TO DISMISS

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INTRODUCTION

The Plaintiffs challenge an unlawful and unconstitutional administrative regulation, 6 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. (the "HHS Mandate"), that violates the religious freedom of Autocam Corporation and Autocam Medical, LLC (collectively "Autocam") and Autocam's owners and operators, John Kennedy III, Paul Kennedy, John Kennedy IV, Margaret Kennedy, and Thomas Kennedy (collectively with Autocam "Plaintiffs"). The Defendants in this action (the "Government") implemented the HHS Mandate pursuant to 124 Stat. 119 and 124 Stat. 1029 (collectively the "Affordable Care Act"). The Affordable Care Act as passed by Congress requires coverage for preventative services, but it is the defendant agencies that decided to create the HHS Mandate.

The Plaintiffs challenge the HHS Mandate under the Religious Freedom Restoration Act ("RFRA") and the First Amendment. The RFRA requires a government regulation placing a substantial burden on the exercise of religion to meet strict scrutiny. The Plaintiffs believe that by covering contraception and abortion-causing drugs and related services they are committing a mortal sin, which subjects them to the prospect of eternal damnation. The Plaintiffs further believe in exercising their religion when interacting in the world at large, which includes conducting business. Thus, their religion requires them to operate their business along these lines and not to cover the objectionable drugs and services.

The HHS Mandate places substantial pressure on the Plaintiffs to violate their religious beliefs by imposing an almost $20 million fine for failure to comply. The HHS Mandate cannot survive the strict scrutiny applied by the RFRA because it is riddled with exceptions. Most employers are not subject to the HHS Mandate, undermining any claim to the rule's importance. Moreover, the Plaintiffs' employees receive generous benefits and have sufficient funds to pay for the objectionable drugs and services on their own without direct coverage by the Plaintiffs.

Furthermore, the Government cannot show that the HHS Mandate is the least restrictive means because it faces no injury from providing the Plaintiffs with a religious accommodation and the Plaintiffs' alternative suggestions can be just as effective at advancing the purported interest. For these and other reasons, the HHS Mandate also violates the various protections in the First Amendment.

The Court previously denied the Plaintiffs a preliminary injunction, a decision which is now on appeal. For-profit plaintiffs have sought preliminary relief from the HHS Mandate in 16 other cases. In 12 of those, courts awarded preliminary relief against enforcement of the HHS Mandate.[1] In applying a preliminary injunction standard, which is more difficult than what the Plaintiffs must meet to survive a motion to dismiss, the majority of federal judges considering the issue protected the Plaintiffs' religious freedom. In light of these preliminary rulings and the authority presented below, the Plaintiffs allege sufficient facts to state a claim.

FACTS

The Plaintiffs in this case are Autocam and the Kennedy family, which own and operate the business entities. The Kennedy family owns the controlling interest in Autocam, and Plaintiff John Kennedy is the President and Chief Executive Officer. (Verif. Comp. at ¶¶ 17-18.)

[1] *See Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (same); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357 (8th Cir. Nov. 28, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-cv-6756 (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction); Am. *Pulverizer Co. v. U.S. Dep't of Health & Human Servs*., No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-cv-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (same); *Legatus v. Sebelius*, No. 12-cv-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154 (D. Colo. July 27, 2012) (same); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, 13-0036-CV (W.D. Mo. Feb. 28, 2013 (same): *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs*., No. 2:12-cv-92 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Monaghan v. Sebelius*, No. 12-cv-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012) (same); *but see Hobby Lobby v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-cv-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013) (denying relief).

He is responsible for setting all policies governing the conduct of Autocam, including its decisions regarding insurance. (*Id.*) The Plaintiffs are Roman Catholics that follow the teaching of the Catholic Church. (*Id.* at ¶ 31.) The Plaintiffs "are called to live out the teachings of Christ in their daily activity." (*Id.* at ¶ 32.) Autocam is "the business form through which the individual Plaintiffs endeavor to live their vocation as Christians in the world." (*Id*. at ¶ 337.)

In accordance with the Plaintiffs' religious beliefs, Autocam provides generous healthcare benefits and wages to its employees. (*Id.* at ¶¶ 38-40.) Specifically, Autocam covers 100% of its employees preventative care, including gynecological exams, pre-natal, and post-natal care. (*Id.* at 36.) Autocam also provides its employees up to $1,500 towards a health savings account that can be used to pay for any lawful service. (*Id*.) The Plaintiffs have lived out their faith by providing employee health insurance through a self-insured plan that does not cover drugs or services such as contraception, abortion-causing contraception, and sterilization, which would violate the teaching of the Catholic Church. (*Id.* at ¶¶ 38-39.)

The Plaintiffs' religious beliefs prohibit covering, funding, or assisting others in obtaining contraception, abortion-causing drugs, and sterilization. (*Id.* at ¶ 81.) The Plaintiffs believe that cooperating with the provision of such drugs and services is a mortal sin. (*Id.* at ¶ 82.) The HHS Mandate requires the Plaintiffs to change their plan and cover drugs and services that violate their religion or face a multi-million dollar fine. But to accept the HHS Mandate would violate the Plaintiffs religious beliefs: "Plaintiffs sincerely believe that if they comply with the mandate they will be guilty of material cooperation of evil, which constitutes a mortal sin that subjects them to eternal damnation. Put another way, the Plaintiffs sincerely believe that compliance with the Mandate will deprive them of their ability to share eternal salvation." (*Id.* at ¶ 83.) This is a substantial burden on their religion.

LEGAL STANDARD

"All well-pled facts in the complaint must be accepted as true." *Savoie v. Martin*, 673 F. 3d 488, 492 (6th Cir. 2012). "To survive a motion to dismiss, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face." *Id.* (quotation omitted). "A claim is facially plausible if the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Pfeil v. State Street Bank and Trust Co*., 671 F. 3d 585, 590 (6th Cir. 2012) (quotation omitted). The factual allegations in this case, when taken as true, state a claim for relief.

ARGUMENT

I. Plaintiffs state a claim under the Religious Freedom Restoration Act.

The RFRA prohibits the Government from burdening religious exercise "even if the burden results from a rule of general applicability," except when the Government can "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1. The RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). This includes not merely worship but actions in accordance with one's faith. *Id.* Accordingly, the Plaintiffs' operation of their health insurance plans according to their religious beliefs is the "exercise of religion" under the RFRA as a matter of law.

As explained in arguments detailed below and already known to the Court, the HHS Mandate cannot survive the RFRA's strict scrutiny. The key issue for the Court is the threshold question of whether the Plaintiffs face a substantial burden. In its Order denying a preliminary injunction, the Court found that the Plaintiffs were not likely to show a substantial burden. (R. 42 at 10.) Here, though, the question is whether the Plaintiffs factual allegations, taken as true,

show a substantial burden. And they do.

A. The HHS Mandate burdens the Plaintiffs' exercise of religion.

The Plaintiffs exercise their religion by providing health insurance consistent with their religious beliefs. The Plaintiffs' religious practice requires them to live out the teachings of Christ in their daily activity and run their business in a manner that does not violate the principles of their faith. (Verif. Compl. at ¶¶ 32, 45.) The Plaintiffs live out their faith partly in the way they treat their employees. On the one hand, they provide generous salaries and benefits, including employee health insurance through a plan. (*Id.* at ¶ 36) On the other hand, the benefits package excludes coverage for contraception, abortion-causing contraception, and sterilization because Plaintiffs' religious practice forbids covering, funding, or assisting others in obtaining these drugs and procedures. (*Id.* at ¶¶ 38-40, 81.) Cooperating with the provision of such services is a mortal sin, which imposes a tremendous burden on Plaintiffs' souls. (*Id.* at ¶ 82.) Indeed, Autocam is self-insured and must pay for the mandated drugs directly. (*Id.* at ¶ 40.) Requiring Plaintiffs to provide such drugs and services—or simply requiring them to provide *coverage* for such drugs and services—either directly or through a company under their ownership and control, severely burdens their religious practice.

If the Plaintiffs continue their religious exercise, they will face substantial per employee fines for their religious exercise under 26 U.S.C. § 4980D—approximately nineteen million dollars ($19,000,000), per year. A fine is a quintessential burden. S*ee Sherbert v. Verner,* 374 U.S. 398, 403-04 (1963). And placing "substantial pressure on an adherent to modify his behavior and to violate his beliefs" is a substantial burden. *Thomas v. Review Bd. Of Ind. Empt'*

Sec Div., 450 U.S. 707, 719 (1981).[2] The Government's position is clear: Autocam either covers the drugs that the company, and its owners and operators, object to on religious grounds, or it is subject to a severe penalty. This is a substantial burden that triggers the RFRA. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972) (finding $5 fine substantially burdened religious exercise).[3]

The Government suggests otherwise by belittling the burden the HHS Mandate placed on the Plaintiffs' free exercise of religion as required by the RFRA. Their objection is based upon the religious consequences of the compliance, as enforced by a multi-million dollar fine, which is drastic because they directly impact the Plaintiffs' ability to stand before their God as upright and worthy servants of their Lord. If this were just about money, the Plaintiffs would not be before the Court.

The Government is wrong to suggest that the burden is too attenuated because it involves independent decisions by beneficiaries to use the coverage. By the same rational, a mandate requiring Catholic hospitals to provide surgical abortions would not substantially burden the religious practice of the hospital because of the independent decisions of individuals seeking abortions, which would be absurd. It is also incorrect to assume that difference between the Plaintiffs being forced to pay for objectionable drugs and services directly, rather than employees being able to purchase such things with their own funds is insubstantial.

The Court may not weigh by measure the substance of the Plaintiffs' religious objections

[2] The Government suggests that the Kennedy family's theory is what's done to the company is also done to its owners. (Br. at 12.) But that is certainly the case when the company is penalized in a way to coerce the owners to change their practice.

[3] The Government's effort to deny that the HHS Mandate burdens the religious beliefs and practices of employers is defied by its own actions. It was precisely because the Government recognized this burden when it granted a wholesale exemption from the HHS Mandate to a class of nonprofit employers, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012), and it is for this reason that the Government is also considering ways to accommodate the religious objections of even more nonprofit

or disregard their beliefs on the grounds that the objection was insubstantial in its own view or the Governments view. Courts cannot be "arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716; *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 113 (1952) ("whenever the questions . . . have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them") (quotations removed). The legal question here turns on whether the penalty the free exercise of religion is a substantial burden. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); *see also Thomas,* 450 U.S. at 718; *Sherbert,* 374 U.S. at 403-404. The legal question does not turn on whether the court believes a religious objection is substantial.

The Plaintiffs have detailed their religious objections, and these are entitled to protection under the RFRA, even if the Court finds the line drawn by the Plaintiffs' religious tradition insubstantial. Both the RFRA and the First Amendment prevent the state from determining the "substance" and the "substantiality" of the Plaintiffs' religious beliefs. The facts as alleged in the Verified Complaint state that a substantial burden applies, and the RFRA protects the Plaintiffs from suffering that burden.

B. Autocam's owners and operators are protected under the RFRA.

The Kennedy family owns the controlling interest in Autocam. (Verif. Comp. at ¶¶ 18-23.) Plaintiff John Kennedy is also the President and Chief Executive Officer of Autocam. (*Id.* at ¶ 17, Page ID # 5.) He is responsible for setting all policies governing the conduct of Autocam, including its decisions regarding insurance. (*Id.*) The HHS Mandate will require him, as not just an owner but the operator of the company, to engage in a practice repugnant to his

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employers, 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012), and has recently announced changes. *See also Wheaton College v. Sebelius*, --- F.3d ----, 2012 WL 6652505 (D.C. Cir. Dec. 18, 2012).

religious beliefs. Moreover, he acts for the Kennedy family when he operates the business that they own. Requiring the Kennedys to violate their religious beliefs when they operate the business that they own is a substantial burden under the RFRA. The burden is not too attenuated because it is experience in a commercial setting and through the corporate form.

The Plaintiffs "are called to live out the teachings of Christ in their daily activity." (*Id.* at ¶ 32.) Autocam's for-profit status is merely "the business form through which the individual Plaintiffs endeavor to live their vocation as Christians in the world." (*Id.* at ¶ 33.) Operating in the world as a business is fully consistent with and a part of its owners' religious practice. (*Id.*) Engaging in commerce is not mutually exclusive with the exercise of religion. The Supreme Court has allowed commercial proprietors to assert religious exercise claims. *See United States v. Lee*, 455 U.S. 252, 256-57 (1982) (Amish *employer* could object on religious liberty grounds to social security taxes); *Braunfield v. Brown*, 366 U.S. 5699, 605 (1961) (Jewish *merchants* could challenge Sunday closing law that made "the practice of their religious beliefs more expensive"). In both of those cases, the government action survived the challenge precisely because the Court concluded that the laws in question were narrowly tailored—the Supreme Court still applied strict scrutiny and permitted the challenge to go forward. *Lee*, 455 U.S. at 257-60; *Braunfield*, 366 U.S. at 607-609.

Although Autocam itself has rights, which are discussed below, a burden on the company in this context is certainly a burden on its proprietors. If a government regulation forced Orthodox Jewish deli owners to serve non-kosher food against the dictates of their religion, this would certainly violate their rights and deny them the ability to make a public witness about the importance of keeping kosher. Their rights would be violated even if they operated their deli for a profit and even if they operated it as a corporation.

That a company's owners enjoy the benefits of the corporate form cannot change the calculation. There is no legal or factual basis for the notion that the Kennedys forfeited their constitutional rights when they chose to conduct business through business entities authorized by state law. This is as it should be because any effort to make the Kennedy's surrender their fundamental rights in order to use the corporate form would itself be unconstitutional. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [First Amendment rights] even if he has no entitlement to that benefit"); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . . .").[4] Here, the Kennedy family seeks to live out their religious faith, in part, in the way they conduct the business they own and operate. To impose a ruinous fine for doing so substantially burdens their religious exercise and triggers the RFRA.

C. Autocam itself is protected under the RFRA.

Because Autocam itself exercises religion under the RFRA, the HHS Mandate also imposes a substantial burden upon its free exercise of religion. The Court need not decide whether Autocam itself exercises religion because its owners and operators can exercise religion, and Autocam can raise their rights. *Storman's, Inc. v. Selecky,* 586 F.3d 1109, 1120-21 (9th Cir. 2009) ("a corporation has standing to assert the free exercise rights of its owners"); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988) (company "has standing to assert [its owners'] Free Exercise rights"); *NAACP v. Button*, 371 U.S. 415, 428-430 (1963)

[4] This same doctrine would apply to any suggestion that the Plaintiffs must give up the option of operating a self-insured plan.

(corporations can assert rights of others). The Verified Complaint does state a claim on Autocam's behalf.

The Government's argument that Autocam does not and cannot exercise religion, and thus that its religious exercise cannot be burdened, does not fit with the factual allegations in the Verified Complaint, which must be taken as true for the purposes of this motion. The Verified Complaint alleges that the Autocam corporations "merely represent the business form through which the individual Plaintiffs endeavor to live their vocation as Christians in the world." (Verif. Comp. at ¶ 33.) The Complaint explicitly and repeatedly alleges that the Plaintiffs—including Autocam—are bound by their religious convictions not to provide the drugs and services at issue here and that the HHS Mandate burdens their religion. (*Id*. at ¶¶ 31-41, 44, 46, 97-100, 159-163.) And a corporation, which exercises religion, is protected by the RFRA.

The RFRA protects "a person's exercise of religion." 42 U.S.C. § 2000bb-1. Under the basic rules of construction: "In determining the meaning of any Act of Congress, ... the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Unless the plain language excludes corporations or inclusion of corporations would be inconsistent with the statutory scheme, laws covering persons are construed to cover corporations. *See Bennett v. MIS Corp*., 607 F.3d 1076, 1085 (6th Cir. 2010) (applying 1 U.S.C. § 1).

Reading the definition of person to cover corporations would be consistent with the statutory scheme because corporations already benefit from other civil rights provisions and from the First Amendment rights RFRA was designed to restore.[5] *See, e.g., Thinket Ink. v. Sun Microsystems, Inc.*, 368 F. 3d 1053, 1058-60 (9th Cir. 2004) (corporations may bring Section

1981 actions for racial discrimination); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 867 (9th Cir. 1984) (corporations may bring Section 1983 actions and qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause). And corporations qualify as "persons" under the 14th Amendment, the equal protection clause, and the due process clause. *Id*. Corporations have brought free exercise cases before. *See, e.g., Church of the Lukumi Babalu Aye, **Inc**. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (claim involving a "not-for-profit corporation organized under Florida law"); *Okleveuha Native American Church of Hawaii, **Inc.** v. Holder*, 676 F.3d 829 (9th Cir. 2012); *Mirdrash Sephardi, **Inc.** v. Town of Surfside*, 367 F.3d 1214 (11th Cir. 2004); *see also* Durham & Smith, 1 Religious Organizations and the Law § 3:44 (2012) (explaining reasons religious organizations use the corporate form).

The Supreme Court has famously recognized that free-speech protection extends directly to corporations. *Citizens United v. Fed Election Comm'n,* 558 U.S. 310; 130 S.Ct. 876, 9000 (2010) ("The Court has . . . rejecting the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). And the First Amendment's various protections are cognate rights such that free speech and free exercise cannot be separated. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (First Amendment rights "though not identical, are inseparable. They are cognate rights."). In the same way that a for-profit corporation need not be organized and operated primarily for the purpose of engaging in political speech to invoke the First Amendment's free speech protections, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784

[5] As the Government recognizes, although Autocam Medical is a Limited Liability Company, the same rules apply to LLCs as corporations. Accordingly, the Plaintiffs will simply use the phrase corporations throughout this brief.

(1978),[6] a corporation need not be organized and operated for a primarily religious purpose to benefit from the protections of the Free Exercise Clause and the RFRA, *see Storman's,* 586 F.3d at 1120, n.9 ("an organization that asserts the free exercise rights of its owners need not be primarily religious").

The undisputed factual record attests that Autocam, through the actions of its owners and operators, has been exercising religion. (Verif. Comp. at ¶¶ 31-35.) Even while providing otherwise generous healthcare benefits and wages, Autocam refused to cover contraception and abortion-causing products that violated its religious beliefs and the religious beliefs under which it was operated. (*Id.* at ¶¶ 38-40.) As the Plaintiffs have explained, the very reason they provide generous benefits, while arranging to exclude a particular category based on a moral objection, is that the company is exercising religion. A company can exercise religion and express its religious views in the same way as it can hold political beliefs and express political positions—through the actions of its human agents and operators.

The inferences the Government offers in support of its motion are inferences drawn against the Plaintiffs, and also, insupportable. Michigan law permits corporations to engage in any lawful purpose and does not, in fact, treat the exercise of religion as a prohibited practice. MCL 450.1251 (corporations); MCL 450.4201 (LLCs). The Government seeks to avoid this fact of the matter and the factual allegations of the Complaint by focusing on the word "secular" in the Verified Complaint, which is used in contrast to the HHS Mandate's religious employer

[6] *Belotti*, 435 U.S. at 778 n. 14, 701-02, *White v. United* States, 322 U.S. 694 (1944), and *Wilson v. United States*, 221 U.S. 361, 382 (1911) explain the circumstances under which a constitutional right applies to corporations. Under the analysis offered by these cases, the right to exercise religion applies to corporations because it is not in the domain subject to the powers of Congress and corporate exercise of religion serves societal interest.

exemption (*see* Verif. Compl. at ¶¶ 154-55) and Michigan's corporate lawcovering expressly ecclesiastical corporations, *see, e.g.,* MCL 450.178 et seq.; MCL 458.1 et seq.[7]

Here the Government seeks to use a dictionary definition of "secular" in an attempt to contradict the factual allegations in the complaint. But the dictionary definition does not even support the argument. The Government treats secular as being in conflict with religion and cites part of the dictionary definition of "secular," but the rest of the definition gives it proper context:

> *a* **:** of or relating to the worldly or temporal <*secular* concerns>
> *b* **:** not overtly or specifically religious <*secular* music>
> *c* **:** not ecclesiastical or clerical <*secular* courts> <*secular* landowners>

Merriam-Webster, http://www.merriamwebster.com/dictionary/secular/. Being secular does not mean the absence of religion. Instead, a secular entity operates in the world (outside the ecclesiastical sphere), in a fashion that is not exclusively religious. A "secular landowner," to give the example used by Merriam-Webster, is in contrast to the church itself as a landowner, and is certainly able to exercise religion. Certainly a "secular landowner" would enjoy the benefits of the First Amendment and the RFRA. Under Plaintiffs' religion, there is nothing wrong with being "secular" or "worldly." Quite the contrary, the whole purpose of their vocation is to practice their religion as they make their living in this world.

Plaintiffs "are called to live out the teachings of Christ in their daily activity." (Verif. Compl. at ¶ 32.) Autocam's for-profit status is merely "the business form through which the individual Plaintiffs endeavor to live their vocation as Christians in the world." (*Id.* at ¶ 33.)

[7] The Government also raises a confusing and irrelevant argument about Title VII and a purported conflict between its definition of religious organizations and employment discrimination. Congress chose not to include Title VII's definitional limits of a religious exemption when adopting the RFRA. Moreover, there is no authority for reading Title VII's exemption language into the First Amendment or RFRA. The Government also mistakenly suggests that profit making categorically excludes religious exercise; under Title VII this is just one factor among many in determining when an organization is a "religious

Operating in the world as a business is fully consistent with and a part of its owners' religious practice. (*Id.*) Secular for-profit corporations can, and often do, engage in quintessential religious acts like tithing, supporting charities, and making a public commitment to act in accordance with a religious faith. Thus, the worldly nature of Autocam does not prevent it from exercising religion. The facts allege that Autocam practices religion precisely because its owners operate through that business form. And the RFRA protects a corporation's exercise of religion. The HHS Mandate must, therefore, be tested under the RFRA's strict scrutiny.

The bottom line is that the dictionary's effort to define the terms religious and secular does not govern the Plaintiffs. And the whole point of their complaint is that they regard their entrepreneurial endeavor as a way to give glory to God.[8] Consequently, even if the false-dichotomy the Government seeks to gloss onto the dictionary definitions were correct (as a matter of interpreting the dictionary), it would not control or limit the Plaintiffs' claims.

D. The exception-riddled HHS Mandate is not justified by a compelling interest.

To show a compelling interest, the Government must "specifically identify an 'actual problem' in need of solving," and showing that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). The Government is required to go beyond "broadly formulated interests" and instead specify "the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales*, 546 U.S., 431. This is the "focused inquiry required by the RFRA and the

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corporation" for Title VII purposes. *See, e.g., Leboon v. Lancaster Jewish Comm. Ctr. Ass'n*, 503 F.3d 217, 226,-227 (3d Cir. 2007) (explaining nine-factor Title VII test)

[8] This is consistent with the Catholic Church's use of the word "secular." For example, Paragraph 928 of the Catechism of the Catholic Church covers "secular institutes," such as Opus Dei, "in which the Christian faithful living in the world strive for the perfection of charity and work for the sanctification of the world especially from within."

compelling interest test." *Id*. at 432; *see also Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

The Government bears the burden of proof, and "ambiguous proof will not suffice." *Brown*, 131 S.Ct. at 2739. As such, the Government is required to offer actual evidence. *See United States v. Playboy Ent'mt Group, Inc*, 529 U.S. 803, 821 (2000) (nothing that, "[w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is"). Specifically, this requires "evidence that granting the requested religious accommodations would seriously compromise its ability to administer this program." *Gonzales*, 546 U.S. at 435. And the evidence must show a compelling interest in applying the law to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Id*. at 430-31 (emphasis added). Even assuming that the two interests asserted by the Government—public health and gender equality—are compelling, the Government has failed to carry this burden for two key reasons.

First, the Government has no proof that Autocam's female employees and the beneficiaries of its benefits policy have a healthcare problem that needs addressing, let alone a compelling problem. It relies on a report that uses broad terms about women in general. It offers nothing that seems to relate in any way to the health or equality of women covered by Autocam's plans. Indeed, the evidence as alleged in the Verified Complaint says the exact opposite—Autocam has great preventative care: "Autocam's program covers one hundred percent (100%) of the cost of employees' preventive care, including health maintenance exams, including X-rays, scans, gynecological exams, and screenings, pre-natal, post-natal, and well-

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See http://www.vatican.va/archive/ccc_css/archive/catechism/p123a9p4.htm. To Catholics, secular means acting out religion in the world, rather than in the Church hierarchy, not the absence of religious

baby care." (Verif. Comp., at ¶ 36.) Autocam also provides its employees up to $1,500 that can be used to pay for any lawful service. (*Id.*) The Government's arguments below missed the mark because they did not address the situation presented by Autocam: a company that provides generous preventative benefits, generous wages, and $1,500 in dollars that employees can spend. Even if the Government can argue it has a compelling interest in coercing some employers to provide contraception, abortion-causing drugs, and related services at no cost to the employee, it does not have a compelling interest in requiring Autocam to do so.

Second, the Government cannot show that its scheme is undermined by accommodating the Plaintiffs when it has accommodated so many others. The HHS Mandate, and the ACA which applies it, are subject to numerous exceptions that cover millions of people, including:

- Individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as certain members of the Islamic faith or the Amish are exempt. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii). But individuals and companies whose religious beliefs allow—or encourage—them to provide health insurance are not exempt from the HHS Mandate. Thus, it is essentially the basis of the religious objection and the tenants of the religion that determines whether a religious exemption applies.
- Employers with fewer than 50 full-time employees are exempt. 26 U.S.C. § 4980H(c)(2)(B)(i). But employers with more than 50 full-time employees must provide government-approved health insurance, which is subject to the HHS Mandate.

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exercise.

- Non-profit employers who qualify under the exemption of a "religious employer" are exempt. 45 C.F.R. § 147.130 (a)(iv)(A) and (B). But employers who have chosen to organize their company on a for-profit basis are subject to the HHS Mandate.
- Employers with health care plans that are considered to be "grandfathered," which, amongst meeting other criteria, have been in place and remain unchanged since March 23, 2010, are exempt. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. But companies such as Autocam that have made plan changes after that date are subject to the HHS Mandate.

By the White House's own numbers, the 50-employee rule essentially exempts 96% of all employers in the United States, which covers about 34 million workers.[9] The exemption for grandfathered plans is even more significant. Indeed, the Government initially "exempted over 190 million health plan participants and beneficiaries" from the HHS Mandate. *Newland*, s*upra*, at *7. This scheme of exceptions "completely undermines any compelling interest" behind the HHS Mandate. *Newland*, *supra*, at *7. Thus, the Government has little or no interest in applying the HHS Mandate to women who already receive generous benefits and cannot claim such interest to be compelling when so much of the country is exempted.

E. The HHS Mandate is not the least restrictive means.

The fundamental question here is whether Autocam can be exempted without undermining the Government's interest. *See*, *e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). The Supreme Court has firmly rejected the argument that making an

[9] The Affordable Care Act Increases Choice and Saving Money for Small Businesses at p. 1: http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf

exemption for one group means you have to make exceptions for others as the "classic rejoinder of bureaucrats." *Gonzales*, 546 U.S. at 436. Under the RFRA, the Government is required to show why exceptions cannot work for *these Plaintiffs* under a compelling interest test. *Id.* And given that Autocam provided generous benefits, complete coverage of preventative care, and employer-funded health savings accounts, the Government cannot show why an exception for these Plaintiffs would not work.

The Government points to a report that admittedly provides no evidence related to the people covered by Autocam's health plan or health plans like Autocam's. The Government regurgitates general statements about women not having access to such services without showing or even trying to explain how the women covered by Autocam's plan cannot have their needs met by the $1,500 in HAS funds. At this point, the Court is reviewing the facts as alleged in the Complaint. The Plaintiffs allege that women covered by Autocam's plan receive $1,500 towards an HSA and enjoy 100% coverage of preventative care (including gynecological exams, and screenings, pre-natal, post-natal, and well-baby care). (Verif. Compl. at ¶ 36.) These facts show that exempting Autocam from the HHS Mandate would not undermine any compelling interest.

The Government also cannot show that other alternatives would not achieve its goals. "When a plausible, less restrictive alternative is offered . . . it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group*, 529 U.S. 803, 816 (2000). There are innumerable possible schemes that could more widely distribute contraception and reduce its cost at least some of which imposes no additional cost on the Government, including: 1) providing free birth control by creation of a government-sponsored contraception insurance plan, 2) providing free birth control by direct government compensation for contraception and sterilization providers, 3) providing free birth control by a mandate on the contraception manufacturing industry itself, 4) making birth control cheaper through tax credits

or deductions, 5) offering grants to state governments and community health centers, 6) raising taxes to fund such programs rather than requiring employers to directly provide drugs that violate their beliefs, 7) reducing the cost of contraception by reducing government regulation, or 8) requiring employers to either cover contraception in a health plan *or* provide unrestricted funds to employees in an HSA. The Government will not be able to respond with specifics such as numbers, costs, or anything resembling proof that the Plaintiffs' suggestions would hurt public health or women's equality because no such proof exists. Thus, the Government cannot survive the RFRA's strict scrutiny.

F. The prospect of additional litigation should not sway the Court.

As set forth above, the Government cannot meet the stringent requirements of the RFRA. Many of its arguments—e.g. the danger of individuals and companies being permitted to follow the dictates of their conscience in spite of a poorly-conceived regulatory regime—are policy arguments against the RFRA itself. This Court may have concern about the parade of horribles trotted out by the Government or the prospect of increased litigation under the RFRA. But the Court should not let these arguments concern it.

The RFRA is a product of Congress, and if Congress does not like the outcome or conflict between the laws it passes, it can change the law. If Congress prefers the HHS Mandate over the RFRA, it can prevent the RFRA from applying. It has not done so. Furthermore, most purported religious objectors to regulations of employers and the market place would likely fail on their challenges. And the Supreme Court has rejected such slippery slope arguments in the context of the RFRA. *Gonzales*, 546 U.S. at 436. This case presents a unique situation where the Government lacks any compelling interest in requiring specific coverage for individuals with generous benefits, has no evidence, and has simultaneously exempted most of the country from the supposedly critical regulation. That the Government loses here does not mean it loses the

ability to regulate employers more broadly. And that the Government is forced to respect the Plaintiffs' religious beliefs does not mean that anyone else is forced to accept those beliefs.

II. The Verified Complaint states claims under the First Amendment.

A. The HHS Mandate violates the Free Exercise Clause.

Relying on Church of the *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Government argues that the HHS Mandate is generally applicable and has an incidental, as opposed to targeted, impact on the Plaintiffs' religious practice. (Br. at 20.). But the HHS Mandate is not generally applicable. As detailed above, the law is riddled with exceptions. At least some of these exceptions are explicitly religious based and favor other religions. See 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii). Thus, certain non-grandfathered plans that are not otherwise exempt would be exempt based on religious objections. And the Government has arbitrary authority to grant waivers. (Verif. Compl. at ¶¶ 57, 101.) Simply put, the Government insists that the law is generally applicable because it applies generally to any for-profit or non-profit employers that 1) do not meet the Government's definition of religious employers, 2) cannot claim to be grandfathered, 3) have more than 50 full-time employees, 4) are not members of certain preferred, recognized religious sects, and 5) have not obtained a waiver from the Government. That is not a generally applicable mandate.

The Government's argument that the regulations do not target a particular religion run counter to the factual allegations of the complaint. (*See* Br. at 20.) The Verified Complaint alleges that Defendant Sebelius told NARAL Pro-Choice America "we are at war" shortly after the comment period on the HHS Mandate closed. (Verif. Comp. at ¶ 76.) And it alleges that the Government was well aware of the religious concerns that it chose to violate with the HHS Mandate. (*Id*. at ¶ 75.) It is incredulous for Defendant Sebelius to insist that she is waging a war in one place while insisting the actions she has taken in support of her war were not targeted.

And the Plaintiffs have already explained how the HHS Mandate burdens their religious exercise. Taking the allegations as true for the purpose of this motion, the Plaintiffs have stated a claim under the Free Exercise Clause.

B. The HHS Mandate violates the Establishment Clause.

As the Government notes: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And a law that prefers one religion over another is subject to strict scrutiny. *Id*. at 246. The HHS Mandate does just that, both in who it covers and how it permits the Government to decide who is covered.

As noted by the Government's strong resistance to this case, the HHS Mandate and the ACA law provide no religious objection for Catholics operating in the world. But individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as certain members of the Islamic faith or the Amish are exempt. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii). Entities considered to be "religious employers" by the Government are also exempt, as the Government admits. (Br. at 22-23.) The Plaintiffs allege that the Government has unbridled discretion as to the definition of a religious employer, which the Government counters simply by saying Autocam does not meet the arbitrary definition of religious employer set by the Government. (Br. at 23.) But that argument proves too much: it is precisely this arbitrary authority possessed by the Government to define who is and who is not a religious employer, based at least in part as to how that religion operates with the broader world at large, that violates the Establishment Clause. Accordingly, the Plaintiffs have stated a claim under the Establishment Clause.

C. The HHS Mandate violates the Free Speech Clause.

The Plaintiffs agree with the Government that: "The right to freedom of speech 'prohibits the government from telling people what they must say.'" (Br. at 24 (citing *Rumsfeld v. Forum for Academic & Inst. Rights* ("*Fair*"), 547 U.S. 47, 61 (2006))). "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Fair*, 547 U.S. at 62; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995) (First Amendment protects the right "not to propound a particular point of view."); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (protects the right "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable"); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (government cannot compel state bar members to finance political activities of which they disagree); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (cannot require state employees to provide financial support for ideological union activities they oppose). Indeed, the Supreme Court recognizes that compelling an organization to accept a government mandate forces "the organization to send a message," to its own people and "the world," that the organization accepts the "conduct as a legitimate form of behavior." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000).

The Plaintiffs factual allegations, which the Court must accept as true for the purposes of this motion, are exactly that they are being forced to say something. In no uncertain terms, the complaint alleges that the Plaintiffs will be forced to provide not only the objectionable drugs but also government-mandated "education and counseling" related to those drugs. (Verif. Compl. at ¶¶ 73, 82, 86, 98, 143, 150.) This counseling directly promotes the drugs that the Plaintiffs oppose. (*Id.* at ¶ 98.) Counseling and education are by their very nature inherently expressive activities. Although the Plaintiffs maintain that being forced to provide the objectionable drugs

and services itself violates the First Amendment, counseling individuals about drugs and services that the Plaintiffs object to requires them to speak in favor of that which they oppose and undermines their ability to speak out in opposition and associate with others who share these views.

The Plaintiffs have also challenged the "unbridled discretion" under which the administration grants waivers. (*Id.* at ¶¶ 153-157.) Other entities have been made exempt from ACA requirements, and the government "may" grant exemptions to religious groups. 26 U.S.C. § 5000A(d)(2)(a)(i)-(ii). "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992). And for these and the other reasons detailed above, the HHS Mandate is unconstitutional.

CONCLUSION

For these reasons, the Plaintiffs respectfully request that the Court deny the motion to dismiss.

Respectfully submitted,

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