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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

When individuals establish a for-profit, secular company, that entity becomes subject to a host of laws and regulations designed to protect employees: from Title VII of the Civil Rights Act and the Americans with Disabilities Act (which prohibit discrimination in employment) to the Occupational Health and Safety Act (which assures safe and healthy working conditions for employees) to the Fair Labor Standards Act and the Family and Medical Leave Act (which set minimum standards for employee wages and benefits) to laws, like the one at issue here, that govern the health coverage that a company provides its employees. The government is not aware of any Supreme Court case – and plaintiffs cite none – in which a for-profit, secular company like Autocam obtained an exemption from such general laws designed to protect employees under either the Religious Freedom Restoration Act ("RFRA") or the First Amendment. And for good reason: Granting such exemptions would have "troubling" implications – it would not only "paralyze the normal process of governing," *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012) ("*Op. Denying Prelim. Inj.*"), *mot. for inj. pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2012), *recons. denied*, No. 12-2673 (6th Cir. Dec. 31, 2012), but also limit the protections employees of a secular company receive to only those that are consistent with the personal religious beliefs of the company's owner(s). Because plaintiffs have failed to show that the law requires such an exemption for Autocam – a secular manufacturing company that does take an individual's religious beliefs into account when hiring – plaintiffs' RFRA and Free Exercise Clause claims should be dismissed.

This Court should also dismiss plaintiffs' remaining claims under the First Amendment. The preventive services coverage regulations do not violate the Free Exercise Clause because they are neutral and generally applicable: they do not target, or selectively burden, religiously-motivated conduct. Nor do the regulations violate the Establishment Clause by preferring some religious denominations over others, or violate plaintiffs' free speech rights. *See, e.g.*, *O'Brien v. U.S. Dept. of HHS*, No. 4:12-CV-476 CEJ, 2012 WL 4481208, *7 (E.D. Mo. Sept. 28, 2012).

ARGUMENT

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

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

Although plaintiffs acknowledge that the "substantial burden" inquiry is ultimately a legal question, they nevertheless urge that the "facts as alleged . . . state that a substantial burden applies." Br. Opposing Mot. to Dismiss at 7 ("Pls.' Br."), ECF No. 53. As an initial matter, defendants note that, while this Court must accept as true plaintiffs' well-pleaded factual allegations, it need not accept "the legal conclusion, cast as a factual allegation, that [plaintiffs'] religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[1] Defendants further note that the Court's preliminary injunction opinion essentially hewed to this approach. Without "determining the 'substance' and the 'substantiality' of the Plaintiffs' religious beliefs," Pls.' Br. at 7, or denying their factual allegations, the Court examined "whether the claimed burden – no matter how sincerely felt – . . . amounts to a substantial burden on a person's exercise of religion." *Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *6. The Court's analysis – with which a Sixth Circuit motions panel agreed, and which is reflected in rulings by the Third and Tenth Circuits[2] – fully supports dismissing plaintiffs' RFRA claim.

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[1] The government's proposed accommodation of the religious objections of certain non-profit religious organizations or exemption of certain religious employers is not, as plaintiffs argue, Pls.' Br. at 6 n.3, a concession that the challenged regulations substantially burden any exercise of religion. The Supreme Court "ha[s] long said that there is room for play in the joints between [the Religion Clauses of the First Amendment]," such that "there are some state actions permitted by the Establishment Clause *but not required by the Free Exercise Clause*." *Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (quotations omitted; emphasis added).

[2] *See Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013), *mot. for stay pending appeal denied*, No. 13-1144 (3d Cir. Feb. 7, 2013) ("*Conestoga Third Circuit Order*"); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. Nov. 19, 2012), *mot. for inj. pending appeal denied*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) ("*Hobby Lobby Tenth Circuit Order*"), *appl. for inj. pending appeal denied*, 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J., in chambers).

First, there is no substantial burden on Autocam because secular, for-profit corporations do not exercise rights under RFRA. *See* Defs.' Br. in Support of Mot. to Dismiss at 6-11 ("Defs.' Br."), ECF No. 50. Plaintiffs cite no authority, much less from the Supreme Court, that suggests otherwise.[3] *See Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 733-34 (6th Cir. 2007) (under the parallel language of the Religious Land Use and Institutionalized Persons Act, "'[t]he term "substantial burden" . . . is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise'" (quoting 146 Cong. Rec. S7774–01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy))); *id.* at 736 ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence, which suggests that a "substantial burden" is a difficult threshold to cross."); Defs.' Br. at 7-9.[4]

Second, the regulations also do not substantially burden the Kennedys' religious exercise because, as the Court has noted, the regulations apply only to the group health plan sponsored by Autocam, a legally separate entity. *See Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *7. Plaintiffs attack a straw man when they accuse the government of arguing that individuals cannot exercise religion in their conduct of business. Pls.' Br. at 9. When it comes to the government's actual argument – that any burden on the Kennedys' religious exercise is too attenuated to be substantial, because it results from obligations that the regulations impose on a legally separate,

[3] The cases plaintiffs do cite, Pls.' Br. at 8, 11, involve individuals or non-profit, religious organizations, *not* secular, for-profit corporations that are legally separate from their owners like Autocam. *See United States v. Lee*, 455 U.S. 252 (1982) (individual member of the Old Order Amish); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (individuals that operated stores on Sunday); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (non-profit church; *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 833 (9th Cir. 2012) (same); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1220 (11th Cir. 2004) (synagogues). Nor are plaintiffs helped by *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), Pls.' Br. at 12, which expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause," 586 F.3d at 1119. *Stormans* held that a particular corporation had standing to raise the rights of its owner (who was not a party). *Id.* at 1119-22. But this case does not present that standing question, as the Kennedys are also plaintiffs here.

[4] Nor could a secular, for-profit corporation such as Autocam qualify as a religious organization for purposes of other federal laws, as plaintiff suggest. Pls.' Br. at 13 n.7; *see, e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002) (organization qualifies for a religious exemption if, among other things, it is "organized as a 'nonprofit'" and holds itself out as religious); Defs.' Br. at 9; *infra* at 6-7.

secular corporation's group health plan, Defs.' Br. at 11-12 – plaintiffs say little.[5] "The law protects th[e] separation between the corporation and its owners for many worthwhile purposes. Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *7.

Finally, even assuming that Autocam exercises religion within the meaning of RFRA or that the legal separation created by the corporate form can be selectively pierced when the corporation or its owners want it to be, the regulations still do not substantially burden plaintiffs' religious exercise. As this Court and others have recognized, any burden imposed by the regulations is too attenuated to satisfy RFRA's substantial burden requirement. *Id.* at *6; *see also, e.g.*, *Hobby Lobby Tenth Circuit Order*, 2012 WL 6930302, at *3; *Conestoga Third Circuit Order* at 3.

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

Although the Court need not reach the issue, given the lack of a substantial burden on religious exercise, defendants have demonstrated why the contraceptive-coverage requirement is narrowly tailored to advance compelling governmental interests in public health and gender equality. Plaintiffs argue the government has not met its burden for "two key reasons," Pls.' Br. at 15, neither persuasive. First, plaintiffs assert that defendants rely on evidence – the IOM Report – about "women in general," rather than "the health or equality of women covered by Autocam's plans," *id.*, as though the government must separately analyze the impact of and need for the regulations as to each and every employer and employee in America. But this level of

[5] Plaintiffs' assertion that it is unconstitutional *not* to permit the owners of a secular, for-profit corporation to impose their religious beliefs upon the benefits the company offers its employees, Pls.' Br. at 9 & n.4, has no merit: "'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.'" *Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *7 (quoting *Lee*, 455 U.S. at 261); *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs.").

specificity would lead to an unworkable standard and would render this regulatory scheme – and potentially any regulatory scheme challenged by religious objectors – completely unworkable. *See Lee*, 455 U.S. at 259-60.[6] In any event, defendants have explained why a woman who wishes to use contraceptives and who works for Autocam or a similarly-situated employer (or a woman who is a covered spouse or dependent of an employee of such an employer) is significantly disadvantaged when such an employer chooses to provide a plan that fails to offer contraceptive services. *See* Defs.' Br. at 17-18.

Second, plaintiffs argue that the exemption they demand would not harm the government's compelling interests because the regulations purportedly contain "numerous exceptions that cover millions of people." Pls.' Br. at 16-17. 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. Many of the "exceptions" referred to by plaintiffs are not exceptions from the preventive services coverage regulations at all, but are instead provisions of the Patient Protection and Affordable Care Act ("ACA") that exclude individuals and entities from other requirements imposed by the ACA.[7] Another reflects the government's

[6] In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry to all similarly situated individuals or organizations. *See, e.g.*, *Lee*, 455 U.S. at 260 (considering impact on the tax system if all religious adherents – not just the plaintiff – could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990); *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003). *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006), is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See id.* at 435-36. But it construed the scope of the requested exemption as encompassing all members of the plaintiff religious sect. *See id.* at 433; *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exemption encompassed *all* Amish children); *Sherbert v. Verner*, 374 U.S. 398 (1963) (exemption encompassed *all* individuals who had a religious objection to working on Saturdays); *O Centro*, 546 U.S. at 431. The Court's warning in *O Centro* against "slippery-slope" arguments was a rejection of arguments by analogy – that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for similarly situated entities. *See, e.g.*, *Israel*, 317 F.3d at 772 (recognizing that granting plaintiff's RFRA claim "would lead to significant administrative problems for the [government] and open the door to a . . . proliferation of claims"); *Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *7.

[7] First, while 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

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attempts to balance the compelling interests underlying the challenged regulations as well as other requirements imposed by the ACA against other significant interests supporting the complex administrative scheme created by the ACA.[8] *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.").

The only true exemption from the regulations cited by plaintiffs is the exemption for certain non-profit religious organizations that qualify as "religious employer[s]." Pls.' Br. at 17. Clearly, the government can exempt non-profit, religious institutions such as churches and their integrated auxiliaries, *see* 45 C.F.R. § 147.130(a)(1)(iv)(B), and address religious objections raised by additional non-profit, religious organizations, *see* 78 Fed. Reg. 8456 (Feb. 6, 2013), without also extending such measures to for-profit, secular corporations. *See, e.g.*, *Lee*, 455 U.S.

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services coverage regulations. *See also id.* § 1402(g)(1). The minimum coverage provision provides no exemption from the regulations plaintiffs challenge, 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 recommended preventive services coverage without cost sharing. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption plaintiffs seek, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61. 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," 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.

Second, 26 U.S.C. § 4980H(c)(2) does *not*, as plaintiffs assert, exempt small employers from the challenged regulations. Small businesses that elect to offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive health services without cost sharing. *See* 42 U.S.C. § 300gg-13. And, small employers have business incentives to offer health coverage to their employees; an otherwise eligible small employer would lose eligibility for certain tax benefits if it did not do so. *See* 26 U.S.C. § 45R.

[8] The ACA's grandfathering provision, 42 U.S.C. § 18011, does not have the effect of providing the type of permanent exemption that plaintiffs seek. Although grandfathered plans are not subject to certain requirements, including the requirement to cover recommended preventive health services without cost sharing, the grandfathering provision is transitional in effect, and it is expected that a majority of plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010). The grandfathering provision is "a reasonable plan for instituting an incredibly complex health care law while balancing competing interests." *Legatus v. Sebelius*, Case No. 12-12061, 2012 WL 5359630, *9 (Oct. 31, 2012), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013). "To find the Government's interests other than compelling only because of the grandfathering rule would perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status." *Id*.

at 260 (noting that "Congress granted an exemption" from social security taxes, "on religious grounds, to self-employed Amish and others"). "Religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." 78 Fed. Reg. at 8462. The religious employer exemption and proposed accommodations are consistent with this longstanding federal law. *Id*. And, unlike the exemption plaintiffs seek for all employers that object to the regulations on religious grounds, neither these nor the other "exceptions" referred to by plaintiffs significantly undermine the government's interests. *See Lukumi*, 508 U.S. at 547; *S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1208-09 (6th Cir. 1990); 78 Fed. Reg. at 8461-62 (explaining that employees of "religious employers," i.e. house of worship, are likely to share their employer's beliefs); *supra* at nn.7, 8.

Turning to least restrictive means, defendants have demonstrated why exempting Autocam and similarly-situated companies from the regulatory requirements plaintiffs challenge "would impede the state's objectives," *S. Ridge Baptist Church*, 911 F.2d at 1206, by removing their employees (and their employees' covered spouses and dependents) from the very protections that were intended to further the government's compelling interests. Defs.' Br. at 17-19. Plaintiffs assert that the government should "more widely distribute contraception and reduce its cost," such as through "creation of a government-sponsored contraception insurance plan," "direct government compensation" for contraception providers, "a mandate on the contraception manufacturing industry itself," "tax credits or deductions," "grants to state governments and community health centers," "raising taxes," "reducing government regulation," or "requiring employers to either cover contraception in a health plan *or* provide unrestricted funds to employees in an HSA." Pls.' Br. at 18-19. These proposals – which turn the existing employer-based system upside-down to accommodate the owners of secular, for-profit companies at enormous administrative and financial cost to the government – reflect a fundamental misunderstanding of RFRA and the "least restrictive means" test that it incorporates. That test has never been interpreted to require the government to, in effect, "subsidize private religious

practices." *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance policies cover prescription contraceptives).[9]

II. THE COURT SHOULD DISMISS PLAINTIFFS' FIRST AMENDMENT CLAIMS

A. The Regulations Do Not Violate The Free Exercise Clause

Defendants have already demonstrated that the preventive services coverage regulations are generally applicable because they do not selectively "impose burdens *only* on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543 (emphasis added); Defs.' Br. at 19-22. Plaintiffs' contrary view confuses generally applicability for universality, a view this Court and others have rejected already. *See Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *5; Defs.' Br. at 20 (citing cases). In any event, the categorical exceptions cited by plaintiffs, Pls.' Br. at 20, do not show that the challenged regulations selectively burden only religious conduct because those exceptions do not themselves disfavor religion. *Supra* at nn.7, 8. To be sure, the "religious employer" exemption excludes certain non-profit religious organizations from the contraceptive-coverage requirement, but the existence of that exemption cuts *against* plaintiffs' claim that regulations selectively burden only religiously-motivated conduct. "It is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536).

As for neutrality, plaintiffs identify nothing in the regulations' text or effect to suggest that their "object . . . is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533, 535.[10] Nor could plaintiffs do so. "The regulations were

[9] 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.

[10] The allegations plaintiffs reference, Pls.' Br. at 20-21, are irrelevant. The government's subjective intent is not an element of a claim under the Free Exercise Clause. *See, e.g.*, *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292-94 & n.3 (7th Cir. 1996) ("The subjective motivations of government actors should . . . not be confused with what the Supreme Court referred to, in a Free Exercise Clause case, as the 'object' of a law."); *see*

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passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." *O'Brien*, 2012 WL 4481208, at *7 (dismissing similar claim).

B. The Regulations Do Not Violate The Establishment Clause

Plaintiffs' cursory Establishment Clause arguments fail. *See* Pls.' Br. at 21. Plaintiffs incorrectly call 26 U.S.C. § 5000A(d)(2)(A) an exemption from the contraceptive-coverage requirement. The exemption for *individuals* from the minimum coverage provision under § 5000A(d)(2)(A) has nothing to do with plaintiffs' claim that the contraceptive-coverage requirement on *group health plans* violates the Establishment Clause. *See also supra* at n.7. Similarly, plaintiffs do not state a claim by questioning the government's "authority" to "define" a "religious employer" in the context of creating a religious accommodation. Pls.' Br. at 21. "Accommodations of religion are possible because the legislative line-drawing to which the plaintiffs object, between the religious and the secular, is constitutionally permissible." *O'Brien*, 2012 WL 4481208, at *10 (dismissing similar claim); *Conestoga*, 2013 WL 140110, at *15; *see, e.g.*, *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by non-profit, religious organizations and used for religious worship).[11]

C. The Regulations Do Not Violate The Free Speech Clause

The preventive services coverage regulations do not compel any speech, any subsidy of a particular message, or any expressive conduct. Defs.' Br. at 24; *Op. Denying Prelim. Inj.*, 2012 WL 6845677, at *8. Plaintiffs' response reveals that their free speech claim is based on a fundamental misunderstanding of the regulations. Contrary to plaintiffs' assertion, the regulations do not require Autocam to subsidize patient education and counseling that "directly

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also Lukumi, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted."); *id.* at 533-35.

[11] The definition of "religious employer" is consistent with longstanding practice, *supra* at 6-7, and uses well established criteria to determine eligibility. *See, e.g.*, *O'Brien*, 2012 WL 4481208, at *9 ("[W]hile the Establishment Clause prohibits denominational preferences, it does not prohibit the government from distinguishing between religious organizations based upon structure and purpose when granting religious accommodations."). Autocam clearly does not qualify for the exemption because it fails the requirement that it be a nonprofit organization as described in section 6033 of the Internal Revenue Code. 45 C.F.R. § 147.130(a)(1)(iv)(B)(4).

promotes the drugs that the Plaintiffs oppose." Pls.' Br. at 22. Rather, the regulations require that employer health plans include coverage for "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Mar. 27, 2013). 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. Therefore, this case does not involve the sort of "political and ideological causes" at issue in the compelled-subsidy cases cited by plaintiffs, *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990) and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). Those cases do not stand for the proposition that an employer can refuse to provide health coverage for medical services because, during the course of a medical visit, a health care provider may say something with which the employer disagrees. Indeed, taken to its logical conclusion, Plaintiffs' theory would preclude virtually all government efforts to regulate health coverage, as a medical visit invariably involves communication between patient and health care provider, and there may be many instances where the entity providing coverage disagrees with the content of this communication.[12]

CONCLUSION

For the reasons above and in defendants' opening brief, the Court should dismiss this case for failure to state a claim upon which relief can be granted.[13]

Respectfully submitted this 1st day of April, 2013,

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Acting Assistant Attorney General

[12] Plaintiffs' "unbridled discretion" theory is also baseless. Once again, plaintiffs rely on 26 U.S.C. § 5000A(d)(2), which is irrelevant here. *See supra* at n.7; *id.* at 9. And the lone case cited by plaintiffs is inapposite. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992) (addressing prior restraints on speech in licensing/permit schemes). To the extent plaintiffs assert an unbridled discretion theory against the "religious employer" exemption, defendants have already explained why it lacks merit. *See* Defs.' Br. at 22-23.

[13] In their opposition, plaintiffs request oral argument on defendants' motion to dismiss. Defendants do not believe oral argument is necessary but do not oppose it if the Court believes it would be helpful.

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Jacek Pruski
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