No. _____

In The
Supreme Court of the United States

AUTOCAM CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are members of the Kennedy family and the two companies through which the Kennedys do business (referred to collectively as "Autocam"). When the petitioners run their business, they follow the teachings of the Roman Catholic Church. By virtue of their religious obligation to treat workers well, petitioners provide their employees with a generous (indeed award-winning), healthcare benefits plan including up to $1,500 towards a Health Savings Account (which employees are free to use for any lawful purpose). By virtue of their religious obligation to avoid material cooperation with acts believed to be morally wrong, petitioners have never provided coverage or payments for abortion-inducing drugs, contraceptive drugs or devices, or sterilization.

The HHS Mandate, 45 C.F.R. § 147.130, which was promulgated pursuant to the Affordable Care Act, 42 U.S.C. § 300gg-13 et seq., requires petitioners to provide their employees with abortion-inducing drugs, contraceptive drugs or devices, and sterilization. On January 1, 2013, petitioners were required to choose between obeying this federal mandate and thereby violating their religious beliefs or paying a fine of about $19,000,000, which would cripple their business.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Do petitioners have standing to advance the claim that the HHS Mandate violates the Religious Freedom Restoration Act ("RFRA") by forcing individual business owners to violate their religious beliefs when governing the corporation through which they do business upon pain of ruinous consequences?

2. Does the HHS Mandate impose a substantial burden on petitioners' exercise of religion within the meaning of the Religious Freedom Restoration Act by coercing them to violate their religious convictions when conducting business upon pain of ruinous consequences?

PARTIES TO THE PROCEEDING

Petitioners are Autocam Corporation, Autocam Medical, LLC (referred to collectively as "Autocam"), as well as John Kennedy, Paul Kennedy, John Kennedy, IV, Margaret Kennedy, and Thomas Kennedy (referred to collectively as the "Kennedys").

Respondents are Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, the United States Department of Health and Human Services, Thomas Perez, Secretary of the United States Department of Labor, the United States Department of Labor, Jacob Lew, Secretary of the United States Department of the Treasury, and the United States Department of the Treasury.

CORPORATE DISCLOSURE STATEMENT

Petitioner Autocam Corporation is a Michigan business corporation. It does not have parent companies and is not publicly held. No publicly held company owns 10% or more of the company's stock.

Petitioner Autocam Medical, LLC is a Michigan limited liability company. It does not have parent companies and is not publicly held. No publicly held company owns 10% or more of the company's stock.

The Kennedys are individual persons.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is included at App. 1-23, and the opinion of the district court is included at App. 31-58.

JURISDICTION

The judgment of the Sixth Circuit was entered on September 17, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, provides in pertinent part:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1.

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title." 42 U.S.C. § 2000bb-2(4). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7).

The Dictionary Act provides, in relevant part, that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise," the word "person . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The pertinent position of the Affordable Care Act, 42 U.S.C. § 300gg-13, provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for –
>
> * * *
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4).

STATEMENT OF THE CASE

I. The Petitioners, Their Religious Beliefs, And The HHS Mandate.

The Kennedys own and control Autocam, and John Kennedy is President and Chief Executive Officer of the companies, which make auto-parts and medical devices. Verif. Comp., App. 65, 67. The Kennedys are Roman Catholics who adhere to the teachings of the Catholic Church. *Id.* at 67-68. They believe that they "are called to live out the teachings of Christ in their daily activity." *Id.* at 68. Autocam is "the business form through which the Kennedys endeavor to live their vocation as Christians in the world." *Id*. at 33.

Autocam provides generous healthcare benefits and wages to its employees because the Kennedys' religious beliefs require them to support the human dignity of their employees. *Id.* at 69-70. In keeping with that goal Autocam covered 100% of its employees' preventative care, including gynecological exams and pre-natal care. *Id.* at 68-69. Autocam also provided its employees up to $1,500 towards a health savings account that can be used to pay for *any* lawful service. *Id.*; Kennedy Dec., App. 106. Autocam's employees are among the higher paid in their community, with hourly workers earning $53,000 per year on average and salaried workers earning more than that. *Id.*

The Kennedys' religious beliefs also prohibit covering, funding, or assisting others in obtaining contraception, abortion-causing drugs, and sterilization. Verif. Comp., App. 80-81. They manifest this conviction by providing employee health insurance through a self-insured plan that does not cover drugs or procedures such as contraception, abortion-causing contraception, and sterilization. *Id.* at 69-70. Their faith teaches that cooperating with the provision of such drugs and procedures is a mortal sin. *Id.* at 81.

This case presents a challenge to the HHS Mandate, 45 C.F.R. § 147.130, which was promulgated pursuant to the Affordable Care Act, 42 U.S.C. § 300gg-13; Pub. L. 111-148; Pub. L. 111-152. The HHS Mandate requires petitioners to provide cost-free coverage for contraceptive drugs and devices, abortion-causing contraception, sterilization, and

related counseling. 45 C.F.R. § 147.130(iv). If petitioners do not comply with the Mandate, Autocam is liable for a fine totaling approximately $19,000,000 per year, which would cripple the business and deprive the Kennedys of their livelihood. Supp. Kennedy Dec., App. 109. But complying with the HHS Mandate forces petitioners to contradict the religious beliefs they observe in the way they conduct business. Verif. Comp., App. 81.

II. Proceedings Below

Petitioners filed suit on October 8, 2012, in an effort to secure judicial relief from the burden of having to choose between contradicting their religious convictions or financial ruin. Verf. Comp., App. 59-103. The complaint named as defendants the Secretaries of the Departments of Health and Human Services, Labor, and Treasury, who are the federal officials responsible for implementing the HHS Mandate, as well as those three Departments (all of which are respondents here).

Two days later petitioners moved for a preliminary injunction on the grounds that the HHS Mandate violated RFRA and the First Amendment, requesting expedited consideration. The district court denied their request to expedite consideration of the preliminary injunction motion. The district court later denied the motion. It concluded that the petitioners were unlikely to succeed on the merits of their RFRA claim on the theory that the connection between

the actual purchase and use of the drugs and procedures to which they objected was too remote and attenuated to constitute a substantial burden on their free exercise of religion. App. 45-46.

The petitioners appealed the denial of the preliminary injunction and moved the Sixth Circuit for an injunction pending appeal. A divided motions panel denied the request for an injunction pending appeal.

Later, a different panel of the Sixth Circuit affirmed the district court's denial of preliminary injunctive relief. As an initial matter, the Sixth Circuit agreed with the government that the "shareholder standing rule prevents the Kennedys from bringing a RFRA claim arising from a legal obligation on Autocam." App. 10. The court rejected the Kennedys' assertion that forcing owners to govern their company in a way that violated their religious convictions was a harm distinct from the injury to the corporation, and that they suffered injuries to their ownership interests sufficient to overcome the prudential rule against shareholder standing. *Id.* at 12. The Sixth Circuit reasoned that when the Kennedys governed Autocam they acted as officers and directors of the corporation, and therefore, the coerced policymaking could not "fairly be classified as a harm distinct from the one suffered by Autocam." *Id.* at 13 (citing Judge Bacharach's partial dissent in *Hobby Lobby v. Sebelius*, ___ F.3d ___, 2013 WL 3216103 (10th Cir. June 27, 2013)).

At the same time, the Sixth Circuit held that Autocam did not have standing to advance the claims

of the Kennedys as owners. *Id*. The court rejected decisions holding that a corporation does have standing to advance the interest of its owners concluding that "this approach seems to abandon corporate law doctrine at the point it matters most." *Id*. Instead, the Court relied on the Third Circuit's decision in *Conestoga* to hold that when the Kennedys incorporated they forfeited their right to bring a "direct legal action to redress an injury to [them] as primary stockholder[s] of a business." *Id.* (citing *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs*., ___ F.3d ___, 2013 WL 3845365 (3d Cir. July 26, 2013)). For these reasons, the court ordered dismissal of the Kennedys' RFRA claims on remand. *Id.* at 23.

The Sixth Circuit did agree that Autocam had standing. *Id.* at 10. Consequently, it took up Autocam's claim under RFRA after noting that the Tenth Circuit and Third Circuit had split on the issue. *Id*. at 5 n.1. The court began with the Government's argument that Autocam could not advance a claim under RFRA because for-profit corporations were not "persons" within the meaning of the statute. *Id.* at 17-23. Noting that RFRA does not define person, the court turned to the Dictionary Act, emphasizing that the statute defined person to include corporation "unless the context indicates otherwise." *Id.* at 18. And here the Sixth Circuit emphasized that the question turned on whether there were "indications" that corporations engaged in business should be excluded from the term "person" as used in RFRA. *Id*. (citing *Rowland v. California Men's Colony*, 506 U.S. 194 (1993)).

The Sixth Circuit listed a number of "indications" which led it to exclude for-profit corporations from the term "person" as used in RFRA. It cited with approval the Third Circuit's decision in *Conestoga*, and the partial dissent of Judge Briscoe in *Hobby Lobby*, both of which emphasized that all the pre-RFRA free exercise cases involved either individuals engaged in for-profit business or non-profit corporations. *Id.* at 20. It relied upon language from this Court's decision in *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203 (1963), which described the purpose of the Free Exercise Clause in terms of the individual. *Id.* It thought that the absence of any authority squarely holding that for-profit corporations could advance free exercise claims suggested that Congress believed its use of the term "person" in RFRA excluded for-profit corporations. *Id.* at 20-21. And it found that the legislative history of RFRA supported this conclusion based on comments that addressed the free exercise of religion by individuals or non-profit corporations – but not for-profit corporations. *Id.* at 21-22.

The Sixth Circuit also rejected petitioners' argument that precedent squarely holding that for-profit corporations were entitled to free speech under the First Amendment showed there was no good reason to suppose that Congress believed for-profit corporations could not engage in free exercise of religion under the First Amendment when enacting RFRA. Citing the Third Circuit's opinion in *Conestoga* with approval, the court found that this precedent "did not require the conclusion that Autocam is a 'person' that can exercise religion for the purposes of RFRA." *Id.* at 23.

Based on these "indications," the Sixth Circuit concluded that the "relevant context" provided "strong indications" that Congress did not intend the term "person" as used in RFRA to include "corporations primarily organized for secular, profit-seeking purposes." *Id.* at 19. In the Court's view RFRA was designed to restore free exercise claims that were "fundamentally personal," not expand free exercise rights, and consequently, for-profit corporations had to be excluded from the term "person" as used in RFRA in order to avoid a significant expansion of free exercise claims. *Id.* at 19-20.

Observing that for "claims under RFRA, the likelihood of success on the merits will often be the determinative factor," *id.* at 15, the court found it unnecessary to consider the remaining preliminary injunction factors, *id*. at 23. Instead, the Sixth Circuit affirmed the district court's denial of preliminary relief on the grounds set forth above. *Id*. Relying on the Sixth Circuit's decision, the district court later dismissed the Kennedys claim under RFRA, among others, for lack of standing and entered a final judgment. App. 26-29.[1]

[1] Petitioners have appealed the district court's dismissal. The Sixth Circuit has stayed the appeal pending this Court's decision on this petition for writ of certiorari. Order, Case No. 13-2316 (6th Cir. Oct. 4, 2013). Petitioners also note that the Tenth Circuit has granted the Solicitor General's request to this effect in *Hobby Lobby*. Order, Case No. 13-6215 (10th Cir. Sept. 26, 2013).

REASONS FOR GRANTING THE PETITION

Review is warranted in this case. Petitioners file the third petition for writ of certiorari arising from the dispute over the application of RFRA to the HHS Mandate. The federal circuits have split on multiple issues presented by this litigation and developments in pending cases indicate that the splits will only intensify. The critical questions raised in the litigation are legal in nature, and only this Court can effectively resolve the wave of litigation moving through the federal courts. This case presents an ideal vehicle for the Court to resolve issues currently dividing federal courts around the nation.

I. The RFRA Litigation Sparked By The HHS Mandate Has Produced Circuit Splits That Require This Court's Immediate Attention.

As recognized by the opinion below, *id.* at 5 n.1, the federal appellate courts are deeply divided over the issues presented in this case. The decision of the Sixth Circuit directly conflicts with the en banc decision of the Tenth Circuit. *See Hobby Lobby v. Sebelius*, ___ F.3d ___, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc). The Sixth Circuit reached the same result as a divided panel of the Third Circuit which also rejected the Tenth Circuit's decision in *Hobby Lobby,* and later denied a request for rehearing en banc. *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, ___ F.3d

___, 2013 WL 3845365 (3d Cir. July 26, 2013), rehearing en banc denied.

Furthermore, panels of the Seventh, Eighth, and District of Columbia Circuits have granted injunctions pending appeal, suggesting the circuit split will intensify. *Gilardi v. U.S. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013); *Annex Med., Inc. v. Sebelius*, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012).

And federal district courts are likewise divided on the legal questions presented in these cases. A majority of courts have provided injunctive relief to challengers. *See, e.g., Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *19 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, at *12 (W.D. Pa. June 18, 2013); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02253 (N.D. Ill. Apr. 18, 2013); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-325 (N.D. Ind. Apr. 1, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462-AGF (E.D. Mo. Apr. 1, 2013); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-1210, slip op. at 1 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, ___ F. Supp. 2d ___, 2013 WL 1014026, at *11 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036, slip op. (W.D. Mo. Feb. 28, 2013); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-06756, slip op. at 1 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings,*

Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-92-DDN, 2012 WL 6738489, at *7 (E.D. Mo. Dec. 31, 2012); *American Pulverizer Co. v. U.S. Dept. of Health & Human Svcs*., No. 12-3459-cv-S-RED, slip op. (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 114-19 (D.D.C. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 999 (E.D. Mich. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012). But a number of courts have, at least initially, rejected injunctive relief. *See, e.g., Eden Foods, Inc. v. Sebelius*, No. 13-1677, slip op. at 2 (6th Cir. June 28, 2013); *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, slip op. at 2 (E.D. Mich. July 11, 2013); *Armstrong v. Sebelius*, No. 13-cv-00563 (D. Colo. May 10, 2013); *MK Chambers Co. v. U.S. Dep't of Health & Human Servs*., No. 13-11379, 2013 WL 1340719, at *7 (E.D. Mich. Apr. 3, 2013); *Briscoe v. Sebelius*, No. 13-00285, 2013 WL 755413, at *5 (D. Colo. Feb. 27, 2013).

The Religious Freedom Restoration Act cannot mean one thing in one part of the United States and something entirely different in another. This Court's attention is required to sort out the important legal questions presented by those seeking relief from the HHS Mandate under RFRA.

A. The circuits are split on the ability of a for-profit corporation to advance claims under RFRA.

RFRA provides that the federal government "shall not substantially burden a person's free exercise

of religion," unless its measure can survive this Court's most demanding level of scrutiny. 42 U.S.C. § 2000bb-1. RFRA does not define person so that recourse to the Dictionary Act is proper. The Dictionary Act provides that a statutory definition of "person" includes corporations "unless the context indicates otherwise." 1 U.S.C. § 1.

In this case, the Sixth Circuit held that Autocam, as a secular, for-profit corporation is not "a 'person' that can exercise religion for purposes of RFRA." App. 23. In so holding the Sixth Circuit split with the Tenth Circuit's decision which held that "as a matter of statutory interpretation . . . Congress did not exclude for-profit corporations from RFRA's protections. Such corporations may be 'persons' exercising religion for purposes of the statute." *Hobby Lobby*, slip op. at 26. In so holding, the Sixth Circuit decision reached the same result as the Third Circuit, which has also rejected the Tenth Circuit's decision in *Hobby Lobby,* although on slightly different grounds.

More specifically, the decisions of the Sixth and Third Circuit's turn on the same analysis although the holdings are grounded in two different statutory terms. The Sixth Circuit has concluded that corporations conducting business for profit were not engaged in the free exercise of religion and therefore were not "persons" exercising religion within the meaning of RFRA. App. 23. The Third Circuit has concluded that corporations conducting business for profit were not "exercising religion" within the meaning of RFRA so that it did not even need to decide whether such

corporations were persons within the meaning of RFRA. *Conestoga,* slip op. at 28-29. Thus, both cases rest upon the same grounds, i.e., the determination that corporations engaged in business for profit are not exercising religion.

Accordingly, there is a clear and fundamental split between the circuits concerning the proper interpretation of the statutory phrase "person's free exercise of religion," in RFRA. 42 U.S.C. § 2000bb-1. The Tenth Circuit has held that corporations engaged in business for profit are a person exercis[ing] religion within the meaning of RFRA. The Sixth Circuit has held that because corporations conducting business for profit are not exercising religion such corporations are not persons within the meaning of RFRA. The Third Circuit has held that for-profit corporations are not engaged in the exercise of religion within the meaning of RFRA, concluding that it was unnecessary to determine if the corporation was a person. In all these cases, the fundamental question is whether a corporation conducting business for profit is a person engaged in the exercise of religion within the meaning of RFRA. The circuits are clearly divided on this issue, the split is likely to grow, and the split requires this Court's attention.

B. The circuits are split on whether owners coerced to operate their business contrary to their religious convictions can vindicate their religious liberty pursuant to RFRA.

Another set of circuit splits concern the claims of individuals conducting business through corporations who seek to advance claims under RFRA because they are coerced to govern their corporation contrary to their religious beliefs upon pain of ruinous results. The Sixth Circuit found that the Kennedys, as the owners of Autocam, were not individually injured by the Mandate because the corporation had the duty to comply, not the Kennedys as individuals. App. 12-13. For this reason, the Sixth Circuit held that Autocam could not advance claims under RFRA for the Kennedys as its owners, and also, that the Kennedys individually could not advance their claims under RFRA. The Sixth Circuit framed its decision in terms of standing, reasoning that the owners lacked an injury "distinct" from the corporation. *Id.* at 12.

In concluding that Autocam could not advance RFRA claims on behalf of its owners, the Sixth Circuit explicitly rejected authority in the Ninth Circuit holding that the religious rights of owners can be protected by the corporation. *See EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610 (9th Cir. 1988); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). And by ruling that Autocam lacked standing to advance religious liberty claims on behalf of its owners, the Sixth Circuit agreed with the

Third Circuit, which also rejected Ninth Circuit precedent holding that corporations have standing to advance the free exercise claims of their owners.

In concluding that the Kennedys could not individually advance their own claims as owners the Sixth Circuit diverged from the Third Circuit. The Third Circuit has taken up the RFRA claims of individual owners. The Sixth Circuit refused to do so.

Here again, there are two related sets of circuit splits. First, the published opinions of the Sixth and Third Circuits are in conflict with the Ninth Circuit as to whether the corporation has standing to advance the free exercise claims of the company's owners. The Court should take up this circuit split in order to provide guidance concerning whether corporations can advance claims on behalf of their owners.

Second, the Sixth and Third Circuits are in conflict as to whether owners of corporations can advance their individual claims, based on the violation of their religious liberty as individuals who wish to govern their corporations according to their religious convictions. On this point, the Sixth Circuit has refused to allow the individual owners to advance religious liberty claims reasoning that the owners have no "distinct" injury from the corporation and characterizing its holding as one on standing. In contrast, the Third Circuit has allowed individual owners to advance claims but then rejected those claims on the merits reasoning that because the HHS

Mandate is imposed upon the corporation the individual owners suffer no injury, and therefore, cannot show a substantial burden on their free exercise of religion.

On this second point of divergence, it is worth noting that the decisions rendered by the Sixth Circuit and the Third Circuit employ the same rationale to support their varied holdings. When holding that the claims of the Kennedys could not be advanced, the Sixth Circuit put it this way: "The decision to comply with the mandate falls on Autocam, not the Kennedys. For this reason, the Kennedys cannot bring claims in their individual capacities under RFRA, nor can Autocam assert the Kennedys' claims on their own behalf." *Id.* at 14. Consequently, the Sixth Circuit directed dismissal of the Kennedys' individual claims. *Id.* at 23.

When ruling on the merits of the RFRA claims advanced by individual owners, the Third Circuit put it this way: "For the same reasons that we concluded the [owner's] claims cannot 'pass through' Conestoga, we hold that the [owners] do not have viable claims." *Conestoga,* slip op. at 29. Elaborating on this point, the court explained that the "Mandate does not impose any requirements on the [owners]. Rather, compliance is placed squarely on Conestoga." *Id.* Based on this observation, the court concluded that the "[owners] are not likely to succeed on their free exercise and RFRA claims." *Id*.

Thus, while the Sixth and Third Circuits framed their holdings differently, the Sixth Circuit in terms of standing, the Third Circuit in terms of whether the owners suffer a "substantial burden" under RFRA, their holdings turn on the same basic rationale. This goes to show that the root question addressed by the Sixth and Third Circuits, whether at the standing or merits stages of their analysis, is whether owners suffer an injury apart from the corporation.

This Court should also take up this circuit split, which reduces to the right of owners to advance their claim that the HHS Mandate injures them in a way that produces a cognizable injury which is also a substantial burden within the meaning of RFRA. The confused analysis and conflicting results reflected in the decisions below demonstrate that guidance from this Court on these issues is sorely needed.

II. Review Is Required Because The Sixth Circuit's Decision Conflicts With Decisions Rendered By This Court.

The Sixth Circuit's decision also conflicts with the decisions of this Court on multiple grounds. First, this Court's decisions show that RFRA protects petitioners' effort to conduct business according to their religious convictions. Second, this Court's decisions show that the Kennedys have a legally cognizable injury that authorizes the federal judiciary to provide the relief which the petitioners request for the violation of their RFRA rights. Third, this Court's decisions

show that the injury each petitioner suffers by operation of the HHS Mandate is a substantial burden on the petitioners' exercise of religion within the meaning of RFRA.

A. This Court's decisions show that RFRA protects the petitioners' effort to conduct business according to their religious convictions.

RFRA protects a person's religious exercise against a substantial burden. 42 U.S.C. § 2000bb-1(c). The Dictionary Act, 1 U.S.C. § 1, provides that the word "person" in a statute includes "corporations" and "companies," in addition to individuals, "unless the context indicates otherwise." The relevant context is provided by the language of RFRA and this Court's precedent.

The Sixth Circuit held that "Autocam is not a 'person' capable of 'religious exercise' as intended by RFRA. . . ." App. 17-18. In reaching this result, the Sixth Circuit read a distinction between for-profit and non-profit corporations into RFRA based on what it thought were "indications" that provided a context showing that Congress did not mean to include corporations engaged in business for profit when RFRA was enacted. The decision is inconsistent with the plain language of RFRA as well as the most relevant "indications" from this Court's precedent.

As an initial matter, the Sixth Circuit found indications where there were none. As set forth above,

the indications relied upon by the Sixth Circuit were: (1) pre-RFRA free exercise cases involved either individuals engaged in for-profit business or non-profit corporations; (2) *Schempp,* 374 U.S. 203, in which this Court described the purpose of the Free Exercise Clause in terms of individual liberty; (3) no pre-RFRA decision that squarely held that for-profit corporations could advance free exercise claims; and (4) no comment in the legislative history of RFRA that addressed the free exercise of religion by corporations engaged in business for profit.

Petitioners submit that the indications relied upon by the Sixth Circuit cannot possibly bear the weight assigned. The idea that corporations are persons is deeply rooted in the law. *See, e.g., Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010); *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). It is therefore baffling that the Sixth Circuit rejected this deeply rooted understanding of the term "person" when it interpreted RFRA by reference to far-fetched "indications" which reduce to the absence, not presence, of discussion on the point.

The Sixth Circuit's decision also defies the plain thrust of the most pertinent "indications" provided by this Court's precedent. This Court's precedents show that proprietors engaged in business can assert religious exercise claim, thus recognizing that the exercise of religion includes the effort to keep the faith when conducting business. *See United States v.*

Lee, 455 U.S. 252, 256-57 (1982) (Amish employer could object on religious liberty grounds to social security taxes); *Braunfeld v. Brow*n, 366 U.S. 569, 605 (1961) (Jewish merchants could challenge Sunday closing law that made "the practice of their religious beliefs more expensive"). Likewise, this Court has entertained RFRA claims advanced by corporations with non-profit tax status. *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (affirming RFRA claims by a New Mexico nonprofit corporation), *aff'd*, 546 U.S. 418 (2006) (evaluating the claims); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (plaintiff was "a not-for-profit corporation organized under Florida law"). Furthermore, this Court has held the First Amendment protects the speech rights of corporations. *Citizens United,* 558 U.S. at 343 ("The Court has thus rejected 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 finally, this Court has indicated that the First Amendment's various protections are cognate rights, suggesting that free speech and free exercise cannot be separated in any meaningful sense. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (First Amendment rights "though not identical, are inseparable. They are cognate rights.").

Each of these lines of precedent provides indications that virtually compel the conclusion that corporations engaged in business are persons exercising religion within the meaning of RFRA. But the Sixth Circuit glanced over them, searching far afield and returning with far-fetched indications that contradict those closest to the questions presented.

Worse still, the Sixth Circuit's decision is also inconsistent with the text of RFRA and this Court's precedent. At its core, the Sixth Circuit reasoned that because corporations engaged in business for profit were not engaged in the free exercise of religion those corporations had to be ruled out as "persons" for the purpose of RFRA. App. 20 (describing lack of free exercise rights for corporations pursuing profit).

Once the rationale for its holding is isolated, it becomes evident that the Sixth Circuit's reasoning is contrary to the statutory text. RFRA provides a broad definition of the free exercise of religion covering "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5; 42 U.S.C. § 2000bb-2(4). Accordingly, there is no reason to believe that the exercise of religious conviction when conducting business is not protected. Consequently, there is no reason to believe that Congress intended corporations engaged in business to be excluded from the term "person" when the statute was enacted.

Likewise, the Sixth Circuit's reasoning is wholly inconsistent with this Court's precedent. The Sixth

Circuit's decision hinges upon its conclusion that corporations engaged in business for profit are not engaged in the free exercise of religion. But that conclusion rests upon an implicit theological judgment, a determination that a person cannot exercise religious convictions when conducting business. Such a decision is contrary to this Court's decision in *Thomas,* where this Court emphatically rejected the notion that the civil state could define what it means to exercise religion. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (cautioning that "[c]ourts are not arbiters of scriptural interpretation.").

Finally, the Sixth Circuit's reasoning is also at odds with this Court's instruction in *Bellotti* about how to determine whether corporations receive the protection of constitutional guarantees. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-77 (1978). The question is not "whether and to what extent corporations have First Amendment rights" but instead whether the government action at issue is infringing upon something the First Amendment was designed to protect. *Id.*

In this case, petitioners are exercising their religion in how they operate their business in the market place, which is something this Court has already recognized as worthy of protection under the First Amendment. Further, both the language of RFRA and this Court's precedent indicate that it is wholly illicit for the Sixth Circuit to impose its view that the exercise of religion excludes conducting

business for profit. For all of these reasons it is plain that RFRA protects Autocam's effort to do business according to its religious convictions.

For similar reasons it is also clear that RFRA protects the Kennedys' effort to practice their religion in the way they govern Autocam and therefore guide its operations. By its terms RFRA protects persons engaged in the free exercise of religion. The term "person" includes "individual." 1 U.S.C. § 1. This Court's decisions in *Braunfeld* and *Lee* show that the Kennedys as individuals engaged in business for profit can exercise religion within the meaning of RFRA. The undisputed (and indisputable) facts show that the Kennedys seek to keep their faith when they do business, and by its terms RFRA protects their effort to do so. The Sixth Circuit refused to entertain the Kennedys' RFRA claim on the theory that the HHS Mandate does not injure the Kennedys. That error is addressed more fully below.

B. This Court's decisions show that the HHS Mandate violates RFRA because it imposes a substantial burden on petitioners' free exercise of religion.

The HHS Mandate injures each of the petitioners by imposing ruinous consequences upon every one of them if they do not comply. And those ruinous consequences rise to the level of a substantial burden within the meaning of RFRA.

1. This Court's decisions show that the HHS Mandate inflicts cognizable injuries on the petitioners.

As an initial matter, the Sixth Circuit held, and all parties agree, that Autocam is injured by the HHS Mandate. The HHS Mandate applies to Autocam and makes it liable for a multi-million dollar fine for failure to comply. Autocam is injured and was allowed to advance its RFRA claim.

But the Sixth Circuit also held that the Kennedys could not advance their individual claims as owners of Autocam under RFRA on the theory that the injuries suffered by the Kennedys could not "fairly be classified as a harm distinct from the one suffered by Autocam." App. 13. That holding was error as a matter of federal law on an issue that directly implicates the constitutional role of the federal judiciary. *See Hollingsworth v. Perry*, ___ U.S. ___, 133 S.Ct. 2652, 2667 (2013) (noting that "standing in federal court is a question of federal law, not state law").

The Kennedys' claims are properly before this Court for at least three reasons. First, as the Sixth Circuit noted, the "Kennedys assert that if Autocam complies with the mandate, it will only be because they have directed Autocam to comply by violating their religious beliefs." App. 12. RFRA protects persons engaged in the free exercise of religion, 42 U.S.C. § 2000bb-1(c), and the term "person" includes individual, 1 U.S.C. § 1. The violation of statutory

rights is the epitome of a cognizable injury. *See*, *e.g.*, *Trafficante v. Metropolitan Life Insurance Co*., 409 U.S. 205 (1972) (noting breach of statutory rights provides cognizable injury).

When advancing these claims the Kennedys simply are not asserting *the corporation's claims*, which the prudential bar is designed to prevent, but rather, they advance *their own claims* as owners forced to govern the corporation in a manner that contradicts their faith. *See, e.g., Alcan Aluminum Ltd. v. Franchise Tax Bd*., 860 F.2d 688, 693-94 (7th Cir. 1988) (explaining purpose and history of shareholder standing rule), *rev'd on other grounds*, 493 U.S. 331 (1991). Ironically, the distinction between the corporation and the owners that the Sixth Circuit purports to rely upon actually supports the Kennedys' standing here. The Kennedys' rights under RFRA did not become non-cognizable simply because they chose to incorporate in connection with their exercise of religion, and the Sixth Circuit erred when it reached that conclusion.

Second, even assuming the prudential bar to shareholder standing applied as a general matter, the Kennedys' claims fall within the exception to the rule. The Kennedys can advance claims based on the destructive impact which the HHS Mandate has on their equity interest in the business they own. *See*, *e.g*., *Alcan*, 493 U.S. at 336 ("quite right" that owners "have Article III standing to challenge the taxes that their [businesses] are required to pay"); *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006)

(shareholders have Article III standing when corporation "incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings"). Even assuming Autocam could pay the fines, doing so would cripple the business and effectively destroy the Kennedys' interest in their ongoing business. This is a harm distinct from that suffered by the corporate person which pays the fines. Consequently, the Sixth Circuit's citation to this Court's opinion in *Alcan*, *supra*, which recognizes shareholder standing, is simply mystifying.

Finally, even if the Kennedys could not advance their own claims as individuals, Autocam can advance the claims of its owners for them as it seeks to do in this case. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958) (corporation can assert rights of members that would not otherwise "be effectively vindicated"); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985) (organization has standing to bring free exercise claims on behalf of its members); *Townley*, 859 F.2d at 620 n.15 (corporation had standing to challenge Title VII on alleged ground that it violated owner's free exercise); *Stormans*, 586 F.3d at 1121 (corporation had standing to challenge state regulation on ground that it required owners to violate their consciences). Indeed, this Court's precedent permits corporations to advance claims on behalf of strangers the corporation does business with. *See, e.g., Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954-59 (1984) (fundraiser hired to

solicit charitable contributions had standing to advance claims on behalf of clients that regulation of charitable solicitations violate First Amendment); *Craig v. Boren*, 429 U.S. 190, 193-92 (1976) (beer vendor had standing to advance claims of males prohibited from purchasing alcoholic beverages by state law).

The Sixth Circuit erred as a matter of law when it concluded that the Kennedys' injuries were not cognizable because they chose to employ the corporate form in connection with their effort to do business according to the dictates of their conscience. None of the grounds offered for its decision are supported by precedent or withstand scrutiny.

First, while acknowledging the Kennedys' argument that the HHS Mandate coerces them to violate their religious beliefs when governing Autocam, the Sixth Circuit reasoned that the Kennedy's had no individual claim because when they govern Autocam they have fiduciary duties to the corporation. App. 12-13. On this line of thinking, the Sixth Circuit concluded that "the Kennedys' injury stems derivatively from their fiduciary duties under Michigan law . . . and cannot fairly be classified as a harm distinct from the one suffered by Autocam." *Id.* at 13 (quotation omitted).

But of course the question of standing is a question of federal law, not state law. Moreover, the Sixth Circuit's reasoning is backwards. The Kennedys own the corporation and are acting as owners when they

select John Kennedy to operate the corporation according to their religious faith. *See, e.g., Wallad v. Access BIDCO, Inc.*, 600 N.W.2d 664, 666 (Mich. App. 1999) (discussing fiduciary duties under Michigan law); *Wagner Electric Corp. v. Hydraulic Brake Co.*, 257 N.W. 884, 886 (Mich. 1934) (same). The law imposes no fiduciary duty on the Kennedys, as owners, *to the corporation*. And there is absolutely no basis for the notion that the law imposes a fiduciary duty on the Kennedys, as owners, to violate their religious convictions when governing their business.

Whether the HHS Mandate unlawfully restricts the Kennedys' right to keep their faith when governing Autocam is the merits question presented here, not a question of standing. The Kennedy's maintain they have a right under RFRA to do business according to their faith but the HHS Mandate prevents them from doing so upon pain of ruination. The Sixth Circuit turned a blind eye to their injury reasoning, in essence, that their injury was not cognizable because they incorporated. There is no authority for that proposition, least of all *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), which only holds that a natural "person" is distinct from an "enterprise" for the purpose of interpreting the Racketeer Influenced and Corrupt Organizations Act.

On similar reasoning, the Sixth Circuit also held that Autocam, the corporation, could not advance claims on behalf of the Kennedys, who control it. Here it reasoned that the corporation could not advance the Kennedys' RFRA claim because the

Kennedys incorporated their business and "in return, the shareholder must give up some prerogatives, including that of direct action to redress an injury to him as primary stockholder in a business." App. 13 (citation omitted). So saying, it concluded that it was "without authority to ignore the choice the Kennedys made to create a separate legal entity to operate their business." *Id.* at 13-14.

But, again, the question of standing is a question of federal law. Moreover, the Sixth Circuit's conclusion is a non-sequitur. Under the federal precedent allowing corporations to advance claims for their owners, the Kennedys are not advancing a direct action individually. Rather, the corporation is advancing the legal action on behalf of individual owners.

So the Sixth Circuit's discussion of a direct shareholder action has nothing to do with the issue. The real question is whether the corporation can advance the claim of the Kennedys, who own and control the corporation and have directed it to advance their claims. Indeed, the case cited by the Sixth Circuit and Third Circuit's to justify this result is utterly inapposite. Both Circuits have relied upon *Kush v. Am. States Ins. Co.*, 853 F.2d 1380 (7th Cir. 1988). *Kush* does not address standing at all, but rather, holds that a shareholder who is not a policyholder cannot state a claim against an insurer for intentional infliction of emotional distress because the shareholder is not covered by the policy. *Id*. at 1383.

In this regard, it is worth noting that the Ninth Circuit rule allowing the corporation to advance claims on behalf of its owner sits comfortably with this Court's precedent. *See, e.g., NAACP*, 357 U.S. at 458-59; *Tony and Susan Alamo Foundation*, 471 U.S. at 303 n.26; *Townley*, 859 F.2d 610; *Stormans,* 586 F.3d 1109. It is the Sixth Circuit's decision that defies the general rule of corporate standing to advance claims for owners or members which is, of necessity, governed by federal law.

The Sixth Circuit's decision rests upon a confused shifting between federal cases (with no holding on point) and state cases (that do not control) which yields a truly confounding result. As if by sleight-of-hand the Kennedys, who control the Autocam companies, cannot advance their claims as individuals unable to govern the corporation according to their religious convictions; but, at the same time, the corporation they govern cannot advance their claims (as owners) for the Kennedys although they have directed it to do so. Something disappeared in the play of words and precedent: the ability of individuals who incorporate in connection with their effort to keep their faith when doing business to vindicate their right to religious liberty. This result, which has no connection to reality, also has no connection with this Court's precedent.

And seen in this light the Sixth Circuit's decision can be seen for what it is, i.e., an unsupported (and insupportable) assertion that individuals who incorporate in connection with their effort to keep their

faith when doing business cannot advance religious liberty claims as a matter of federal law. In this way, the Sixth Circuit's decision cloaks an implicit ruling on the merits of the Kennedys' claims in the language of standing. This explains why the gravamen of the Sixth Circuit's ruling is the same as the Third Circuit's ruling on the merits of the owners' claims.

The truth of the matter is that the HHS Mandate inflicts an injury on the Kennedys, as individuals, notwithstanding their use of the corporate form. The courts of the United States are not barred from providing the relief they requested by Article III or any prudential rule fashioned by this Court. The Sixth Circuit erred when it ignored this Court's standing precedent to hold that the Kennedys could not advance their claim under RFRA, and also, that Autocam could not advance the Kennedys' claims for them. In so doing it created, in essence, a special civil disability which federal law is said to impose upon individuals who incorporate in connection with their effort to do business according to their faith that finds no support in this Court's case precedent or in common sense. The related error which the Third Circuit made when it dismissed the owners' claims on the merits because they employed the corporate form is discussed below.

2. This Court's decisions show that the HHS Mandate imposes a substantial burden on the petitioners' free exercise of religion.

The injury inflicted on the petitioners by the HHS Mandate is a substantial burden within the meaning of RFRA. This Court recognizes that placing "substantial pressure on an adherent to modify his behavior and to violate his beliefs" is a substantial burden. *Thomas*, 450 U.S. at 716. Autocam faces a ruinous fine of at least $19,000,000 if it continues to exercise religion in the way it conducts business. This is exactly the kind of substantial pressure that subjects government regulations to RFRA scrutiny.

The Kennedys suffer a distinct but no less ruinous injury because they try to keep their faith when they do business through Autocam. They are deprived of their right to govern their company according to their religious convictions upon pain of losing the fruits of their toil; the equity they created through long years of labor and sacrifice is effectively destroyed. This is indeed a substantial burden.

The Sixth Circuit turned a blind eye to the injury suffered by the Kennedys, as individual owners, and characterized its holding as one on standing. The Third Circuit likewise turned a blind eye to the injury suffered by individuals seeking to do business in keeping with their faith but framed its holding in terms of the merits. After noting that the "Mandate does not impose any requirements on the [owners]," the Third Circuit reasoned that "[a]s the [owners] have

decided to utilize the corporate form, they cannot 'move freely between corporate and individual status to gain advantages and avoid the disadvantages of the respective forms.'" *Conestoga*, slip op. at 29 (quoting *Potthoff v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001) (holding that sole shareholder did not have *standing* to advance claim for violation of First Amendment where his corporation suffered retaliatory eviction because of his criticism of government officials)). Consequently, it concluded that the owners had failed to show that they were likely to succeed on the merits of their Free Exercise and RFRA claims. *Id*.

Yet there is no basis in federal law for the Third Circuit's claim that individuals who incorporate in connection with their effort to keep the faith when conducting business forfeit the rights protected by RFRA. In fact, every "indication" provided by the statutory text and this court precedent is quite the contrary for the reasons laid out above.

Once light is shed on the bogus premise that undergirds the decisions of the Third and Sixth Circuits, their true thrust comes to the fore. The Sixth Circuit and Third Circuit have fashioned a special civil disability that, as a matter of federal law, bars individuals who incorporate when conducting their business from advancing claims based upon a violation of their religious liberty under RFRA.[2]

[2] The Third Circuit extended its ruling to the owners' free exercise claim. *Conestoga*, slip op. at 8-9.

Neither RFRA nor this Court's precedent provides any grounding for such a holding.

This Court should take up the question of whether religious believers who employ the corporate form in connection with their efforts to keep their faith when doing business suffer an injury that allows them to advance claims under RFRA. In so doing, this Court will decide whether the HHS Mandate inflicts a cognizable injury on the individuals who own a corporation through which they conduct business consistent with the religious faith, and also, whether the injury they suffer rises to the level of a substantial burden under RFRA. The confused analysis and conflicting results reached below demonstrate that guidance from this Court is needed very much.

III. This Case Presents An Ideal Vehicle For Review.

The petitioners' case provides an excellent vehicle for review of the questions presented. The claims are properly before this Court, and the facts are not in dispute. Petitioners ask this Court to address an unprecedented standing analysis that effectively bars the federal courts to believers who incorporate in connection with their effort to do business according to their conscience. Petitioners also ask this Court to resolve a narrow question of statutory construction needed to conclusively resolve current circuit splits.

The Sixth Circuit's holding in this case that corporations with for-profit status are not persons

within the meaning of RFRA offers a direct and acknowledged conflict with the Tenth Circuit's holding on that question of statutory construction. And the Third Circuit, approaching the issue through its interpretation of the Free Exercise clause, reached the same result as the Sixth, while rooting in its interpretation of the statutory term "exercise of religion." *Conestoga*, slip op. at 28-29.

In addition, this case gives this Court an opportunity to rule on the question of whether the claims of individuals who have incorporated in connection with their effort to do business according to their faith can be advanced under RFRA consistent with the requirements of Article III. As noted above, both the Sixth Circuit and Third Circuit have expressly diverged from the Ninth Circuit on the question of whether a corporation has standing to advance the religious claims of the individuals who own it. In addition, the Sixth Circuit has diverged from the Third Circuit on whether individual owners conducting business for profit through a corporation may advance their own claims.

The question presented here raises the narrowest statutory grounds upon which this Court can provide much needed guidance on the crucial threshold questions concerning the application of RFRA that run through the current circuit splits. This will allow the Court to give other circuits time to weigh in on whether the HHS Mandate satisfies the compelling interest standard before rendering a decision on that

ultimate step in the application of RFRA if the Court believes that wise.

In the alternative, if the Court believes application of the compelling interest tests is ripe for review on the categorical analysis employed by the Tenth Circuit, the comprehensive nature of the petitioners' religious objection provides an ideal vehicle for the Court to consider the full range of religious objections to the mandate. Petitioners' sincerely held religious convictions prohibit them from offering any of the drugs, products, or services required by the HHS Mandate. Consequently, the Court can rule on the application of RFRA as applied to the full range of drugs, products, and procedures required by the HHS Mandate, not simply the abortion-causing contraceptives, which has occasioned some quibbling about the scientific legitimacy of the challenger's religious beliefs. *See Hobby Lobby*, dissent slip op. at 28-29 (Briscoe, C.J., dissenting in part) (discussing factual dispute and lack of record evidence concerning whether the drugs at issue cause abortion and noting that "the connection is not one of religious belief, but rather of purported scientific fact"); *Conestoga*, dissent slip op. at 3-4, n.1 (Jordan, J., dissenting) (discussing whether abortion-causing properties of drugs at issue are theological or scientific questions and explaining that the government disputes whether the drugs at issue do, in fact, cause abortions). And the Court can do so in the context created by owners whose religious convictions have inspired them to provide an award-winning healthcare benefits

program that gives their employees the power to make their own healthcare choices.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 15, 2013

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY; PAUL KENNEDY; JOHN KENNEDY IV; MARGARET KENNEDY; THOMAS KENNEDY,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, in his official capacity as Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB LEW, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

No. 12-2673

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:12-cv-01096 – Robert J. Jonker, District Judge.

Argued: June 11, 2013

Decided and Filed: September 17, 2013

Before: GIBBONS and STRANCH, Circuit Judges; HOOD, District Judge.*

COUNSEL

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* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

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OPINION

JULIA SMITH GIBBONS, Circuit Judge. Autocam Corporation and Autocam Medical, LLC (collectively, "Autocam") are for-profit, secular corporations engaged in high-volume manufacturing for the automotive and

medical industries. The companies are owned and controlled by members of the Kennedy family, all of whom are practicing Roman Catholics. Pursuant to regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA"), Pub. L. No. 111-148, 124 Stat. 119, Autocam's health care plan is required to cover, without cost-sharing, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling" for female employees enrolled in its health plan. *See* Health Res. & Servs. Admin, *Women's Preventive Services: Required Health Plan Coverage Guidelines,* http://www.hrsa.gov/womensguidelines (last visited August 5, 2013); 77 Fed. Reg. 8725-01 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130(a)(1)(iv)).

Autocam and the Kennedys claim that compliance with this directive – popularly known as "the mandate" – will force them to violate the teachings of the Kennedys' church, but failure to comply with it will result in significant fines against Autocam. They sued the Cabinet departments and secretaries responsible for implementing the ACA's mandatory coverage requirements on a variety of constitutional, statutory, and procedural grounds, and moved for a preliminary injunction that would relieve Autocam of its duty to provide the disputed coverage to its employees. The district court denied the motion. On appeal, Autocam and the Kennedys argue that they have a strong likelihood of success on their claim that the mandate violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb. Our sister

circuits that have considered whether for-profit corporations may be exempted from compliance with the mandate under RFRA have split on the proper answer to the question.[1] For the reasons that follow, we dismiss the claims of the individual plaintiffs on standing grounds and otherwise affirm the judgment of the district court.

I.

The Kennedy family members named in the complaint own "a controlling interest" in the two corporate entities that comprise Autocam. John Kennedy serves as Autocam's CEO and president and is primarily responsible for "setting . . . policies governing the conduct of all phases" of Autocam's business. The two companies have 1,500 employees in fourteen facilities worldwide, including 661 employees in the United States. The Kennedys "believe that they are called to live out the teachings of Christ in their daily activity and witness to the truth of the Gospel by treating others in a manner that reflects their

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[1] *Compare Hobby Lobby Stores, Inc. v. Sebelius*, ___ F.3d ___, 2013 WL 3216103 (10th Cir. June 27, 2013 (holding that plaintiffs demonstrated a likelihood of success on the merits of their RFRA claims and remanding for consideration of the remaining preliminary injunction factors by the district court) *with Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, ___ F.3d ___, 2013 WL 3845365 (3rd Cir. July 26, 2013) (affirming district court's judgment denying a preliminary injunction on both Free Exercise Clause and RFRA grounds).

commitment to human dignity," which includes their business dealings. They characterize Autocam as a for-profit, secular corporation and "the business form through which [they] endeavor to live their vocation as Christians in the world." One of the ways that the Kennedys believe they manifest this commitment is by providing their employees with health coverage. Autocam is "self-insured and provide[s] health benefits to [its] employees by virtue of a jointly administered benefits plan which features a group insurance plan used to provide benefits to full-time employees."

The Kennedys claim that the same religious beliefs that motivate them to provide Autocam employees with health coverage also limit the scope of the coverage they are able to provide. They accept their church's teaching that artificial contraception and sterilization are immoral. They also believe that they become morally responsible for the use of contraception by others when they "directly pay for the purchase of drugs and services . . . in violation of [their] beliefs." This teaching is sometimes referred to by the plaintiffs as "material cooperation." In applying these teachings to their ownership and operation of Autocam, the Kennedys believe that they cannot direct their closely held company's health insurance plan to "provide, fund, or participate in health care insurance that covers artificial contraception, including abortifacient contraception, sterilization, and related education and counseling." The plaintiffs "do not seek to control what an employee or his or her dependants do with the wages and healthcare dollars"

they provide because they do not consider themselves morally responsible for the choices of employees in the way plaintiffs believe they are responsible when they provide insurance coverage for services they find morally objectionable.

If required to comply with the mandate, Autocam's health plan would have "to directly pay for the purchase of drugs and services" that the Kennedys find objectionable. The Kennedys believe that compliance with this law would constitute impermissible "material cooperation." But failure to comply with the mandate would lead to serious financial consequences. The ACA's primary enforcement mechanism for bringing employers into compliance with the mandate is a "tax" on the employer when its health plan fails to meet the requirements of the ACA. 26 U.S.C. § 4980D(a). The amount of additional "tax" is "$100 for each day in the noncompliance period with respect to each individual to whom such failure relates." *Id.* § 4980D(b)(1). If it chooses not to comply with the mandate, Autocam estimates that it will be assessed fines of $19 million per year. The Kennedys also allege that directing Autocam to drop health care coverage entirely is not an option because (1) they believe their faith obligates them to provide health benefits in a manner consistent with their beliefs; and (2) Autocam would still face substantial financial penalties if it chose to drop coverage entirely because it is required to provide health insurance to its employees due to the company's size. *Id.* § 4980H.

II.

On the government's motion, we asked for briefing on a variety of jurisdictional questions. These questions fell into roughly two categories: the Article III standing of the plaintiffs to assert RFRA claims, and the effect of the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"), on this suit. After a review of these issues, we agree with the parties that the AIA is not an obstacle to exercising jurisdiction and that Autocam has Article III standing to assert RFRA claims. As to the Kennedys, we agree with the government that they lack standing as individuals to bring RFRA claims arising from an obligation on their closely-held corporation. Accordingly, their claims must be dismissed for lack of subject-matter jurisdiction.

A.

The plaintiffs and the government agree that the AIA does not preclude the plaintiffs from seeking to enjoin the ACA mandate at this time. That shared conclusion is sound. The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). This means parties seeking to challenge the "assessment or collection of [a] tax" must pay the tax and sue for a refund afterwards. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2582 (2012).

This suit is not precluded by the AIA because it is not intended to "restrain[ ]" the IRS's efforts to "assess[ ] or collect[ ]" taxes. The plaintiffs seek to enjoin a part of the coverage requirements imposed by the mandate, not the IRS's mechanism for collecting "tax" from noncompliant employers.

Such suits are common in other regulatory contexts. For instance, if a regulated party violates EPA regulations regarding diesel fuels, that party is assessed a "penalty" that is treated as a "tax" for AIA purposes. *See* 26 U.S.C. § 6720A(a), 6671(a). Nonetheless, pre-enforcement challenges to these regulations are routine and courts have never applied the AIA to bar such suits. *See, e.g., Nat'l Petrochemical & Refiners Ass'n v. E.P.A.,* 287 F.3d 1130 (D.C. Cir. 2002) (considering the merits of an administrative challenge to an EPA regulation). Because the plaintiffs seek to enjoin the legal obligation created by the mandate, rather than enjoin enforcement or collection of taxes by the IRS, we agree that the AIA does not bar a RFRA challenge to the mandate. *See also Hobby Lobby Stores, Inc. v. Sebelius*, ___ F.3d ___, 2013 WL 3216103, at *7-8 (10th Cir. 2013).

B.

"Article III standing requires a litigant to have suffered an injury-in-fact, fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief." *Nat'l Rifle Ass'n v. Magaw,* 132 F.3d 272, 279 (6th Cir. 1997). The parties

agree that Autocam has standing to challenge the mandate in its corporate capacity, and we concur in that conclusion. Autocam "face[s] an imminent loss of money, traceable to the contraceptive-coverage requirement," and it "would receive redress if a court holds the contraceptive-coverage requirement unenforceable as to them." *Hobby Lobby,* 2013 WL 3216103, at *6.

By contrast, the parties do not agree regarding the standing of the Kennedys to assert a RFRA claim arising from a legal obligation on their closely held company. Generally, shareholders of a corporation cannot bring claims intended to redress injuries to a corporation, even when the corporation is closely held. *Franchise Tax Bd. v. Alcan Aluminium* [sic] *Ltd.,* 493 U.S. 331, 336 (1990); *Canderm Pharmacal, Ltd. v. Elder Pharms., Inc.,* 862 F.2d 597, 602-03 (6th Cir. 1988). We agree with the government that the shareholder standing rule prevents the Kennedys from bringing a RFRA claim arising from a legal obligation on Autocam.

As a threshold matter, the Kennedys argue that the shareholder-standing rule is not applicable in RFRA cases. RFRA provides that "[s]tanding to assert a claim or defense . . . shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). The Kennedys claim that this language is sufficient to negate any standing rules beyond the irreducible constitutional minimum of injury-in-fact, traceability, and redressability required by Article III in RFRA cases.

We agree with the government that Congress did not remove prudential standing limitations when it enacted RFRA. "Congress legislates against the background of [the Supreme Court's] prudential standing doctrine, which applies unless it is expressly negated." *Bennett v. Spear,* 520 U.S. 154, 163 (1997). RFRA makes no mention of prudential standing and does not state that Article III constitutes the exclusive set of requirements for standing in RFRA cases. At best, the statute is ambiguous as to whether prudential standing applies, and therefore, the statute does not unseat the presumption that Congress legislates with prudential standing rules in mind. We also find persuasive the D.C. Circuit's conclusion, based on its analysis of RFRA's legislative history, that Congress intended the statutory language in question to reinforce, rather than change, the *status quo* for standing in Free Exercise Clause cases prior to RFRA. *Jackson v. District of Columbia,* 254 F.3d 262, 266-67 (D.C. Cir. 2001). Accordingly, we hold that Congress did not eliminate prudential-standing restrictions when it enacted RFRA. *See also Hobby Lobby,* 2013 WL 3216103, at *39 (Bacharach, J., concurring).

Because RFRA does not eliminate the shareholder-standing rule, we must consider whether it prevents the Kennedys from bringing a RFRA claim in their individual capacities. Although the Kennedys concede that the shareholder standing rule would generally bar their individual capacity claims, they argue that their claims fall under an exception to this rule that

applies when shareholders allege "cognizable injury . . . that is distinct from the harm suffered by [the corporation]." *Potthoff v. Morin,* 245 F.3d 710, 718 (8th Cir. 2001); *see also Grubbs v. Bailes,* 445 F.3d 1275, 1280 (10th Cir. 2006) (noting that shareholders with "'*a direct, personal interest* in a cause of action'" may bring suit "'even if the corporation's rights are also implicated'" (quoting *Franchise Tax Bd.,* 493 U.S. at 336. The Kennedys assert that if Autocam complies with the mandate, it will only be because they have directed Autocam to comply by violating their religious beliefs. If they do not direct Autocam to comply with the mandate, the value of their closely held company will be significantly diminished. They claim that the harm this dilemma creates is sufficiently "distinct" from the harm to Autocam to circumvent the shareholder-standing rule.

We are not persuaded that the dilemma the Kennedys pose can be separated from the alleged harm to Autocam. "[I]ncorporation'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). The Kennedys' actions with respect to Autocam are not actions taken in an individual capacity, but as officers and directors of the corporation. As such, the Kennedys are "entrust[ed] . . . with the management of [Autocam's] affairs," and the law "impose [s] upon them fiduciary duties requiring the utmost good faith whenever they

deal with the corporation they serve." *Thomas v. Satfield Co.,* 108 N.W.2d 907, 911 (Mich. 1961). "[T]he [Kennedys'] injury stems derivatively from their fiduciary duties under [Michigan] law to advance the conflicting financial and religious interests of [Autocam]," and cannot fairly be classified as a harm distinct from the one suffered by Autocam. *See Hobby Lobby,* 2013 WL 3216103, at *41 (Bacharach, J., concurring).

For much the same reasons, we reject the Kennedys' argument that Autocam can assert the Kennedys' RFRA claims on their behalf on a "pass through" theory. The Ninth Circuit has recognized on two prior occasions that for-profit corporations can assert claims under the Free Exercise Clause on behalf of their owners when the corporations behave as "an extension of the beliefs" of the natural persons who own and direct it. *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1120 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610, 619-20 (9th Cir. 1988). But this approach seems to abandon corporate law doctrine at the point it matters most. "The corporate form offers several advantages 'not the least of which was limitation of liability,' but in return, the shareholder must give up some prerogatives, 'including that of direct legal action to redress an injury to him as primary stockholder in the business.'" *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, ___ F.3d ___, 2013 WL 3845365, at *6 (3d Cir. 2013) (quoting *Kush v. Am. States Ins. Co.,* 853 F.2d 1380, 1384 (7th Cir. 1988)). We are without

authority to ignore the choice the Kennedys made to create a separate legal entity to operate their business.

We acknowledge that "there is a natural inclination for the owners of [closely-held] companies to elide the distinction between themselves and the companies they own. But there is a distinction, and it matters in important respects." *Grote v. Sebelius,* 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting). The decision to comply with the mandate falls on Autocam, not the Kennedys. For this reason, the Kennedys cannot bring claims in their individual capacities under RFRA, nor can Autocam assert the Kennedys' claims on their behalf. Accordingly, we will remand the case with instructions to dismiss the Kennedys' individual claims.

III.

A.

We now turn to the merits of Autocam's request for a preliminary injunction. This court reviews the denial of a preliminary injunction for an abuse of discretion, examining findings of fact for clear error and legal conclusions *de novo. Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.,* 511 F.3d 535, 540 (6th Cir. 2007). The reviewing court looks to the same four factors the district court considered: likelihood of success on the merits, irreparable harm to the movant in the injunction's absence, harm to others as a result of the injunction's issuance, and the

public interest. *Hunter v. Hamilton Cnty. Bd. of Elections,* 635 F.3d 219, 233 (6th Cir. 2011). "[T]he plaintiff bears the burden of establishing his entitlement to a preliminary injunction." *Jones v. Caruso,* 569 F.3d 258, 265 (6th Cir. 2009).

Because RFRA claims are, as a procedural matter, very similar to First Amendment claims, "the likelihood of success on the merits often will be the determinative factor" in analyzing whether the district court should have issued the preliminary injunction. *Connection Distributing Co. v. Reno,* 154 F.3d 281, 288 (6th Cir. 1998); *see also Gonzales v. O Centro Espirito Beneficente* [sic] *Uniao do Vegetal,* 546 U.S. 418, 430 (2006) ("Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test, including at the preliminary injunction stage."). Since "likelihood of success" is a legal question that this court reviews *de novo,* the effective standard of review for a denial of a preliminary injunction in this posture is also *de novo. Bays v. City of Fairborn,* 668 F.3d 814, 819 (6th Cir. 2012).

B.

In *Employment Division v. Smith,* 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause of the First Amendment does not enjoin legislatures from passing "a 'valid and neutral law of general applicability on the ground that the law

proscribes (or prescribes) conduct that [a person's] religion prescribes (or proscribes).'" 494 U.S. at 879 (quoting *United States v. Lee,* 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Congress responded to *Smith* by enacting RFRA, which President Clinton signed into law in 1993. In the text of the statute, Congress noted its concern that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Its stated purposes in passing RFRA were "to restore the compelling interest test" for free-exercise cases that prevailed prior to *Smith* and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b)(1)-(2) (citing *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972)). To that end, RFRA requires that government action "not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a). Congress defined "exercise of religion" broadly to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7); *see also id.* § 2000bb-2(4) (incorporating § 2000cc-5(7) into RFRA).

RFRA provides that "[a] person whose religious exercise has been burdened . . . may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government," subject to the requirements of Article III standing. *Id.* § 2000bb-1(c). RFRA claims proceed in two steps.

First, the plaintiff must make out *a prima facie* case by establishing Article III standing and showing that the law in question "would (1) substantially burden (2) a sincere (3) religious exercise." *O Centro Espirita,* 546 U.S. at 428. If the plaintiff makes out a *prima facie* case, it falls to the government to "demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice. *Id.* § 2000bb-2(3).

C.

RFRA affords a cause of action to any "person whose religious exercise has been burdened." 42 U.S.C. § 2000bb-1(c). The government argues that Autocam's claim fails at the outset because Autocam is not a "person" capable of "religious exercise" in the sense RFRA intended. This is a matter of first impression in our court and the subject of a recent split among our sister circuits. *Compare Hobby Lobby,* 2013 WL 3216103, at *9 (holding "as a matter of statutory interpretation . . . Congress did not exclude for-profit corporations from RFRA's protections") *with Conestoga,* 2013 WL 3845365, at *8 ("Since [a for-profit, secular corporation] cannot exercise religion, it cannot assert a RFRA claim."). In this case, we agree with the government that Autocam is not a "person"

capable of "religious exercise" as intended by RFRA and affirm the district court's judgment on this basis. In so holding, we do not reach the government's arguments that the mandate fails to impose a substantial burden on Autocam or that the mandate can be justified under RFRA's strict scrutiny test.

Congress did not define the term "person" when it enacted RFRA, so our analysis begins with the Dictionary Act, which provides default definitions for many commonly used terms in the U.S. Code. According to the Dictionary Act, "unless the context indicates otherwise . . . 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. The relevant "context" courts should look to when construing terms found in the Dictionary Act is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council,* 506 U.S. 194, 200 (1993). When considering RFRA, that "context" includes "the body of free exercise case law that existed at the time of RFRA's passage," which Congress explicitly invoked in the statute's text. *Hobby Lobby,* 2013 WL 3216103, at *45 (Briscoe, C.J., concurring in part and dissenting in part). The statute being construed only has to "indicate" a definition of the contested term contrary to the baseline provided by the Dictionary Act, rather than "require" or "necessitate" such a result. *Rowland,* 506 U.S. at 200-01 ("[A] contrary 'indication' may raise a specter short

of inanity, and with something less than syllogistic force.").

Looking to RFRA's relevant context, we find strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as "persons" under RFRA. Again, Congress's express purpose in enacting RFRA was to restore Free Exercise Clause claims of the sort articulated in *Sherbert* and *Yoder,* claims which were fundamentally personal. 42 U.S.C. § 2000bb(b)(1); *Yoder,* 406 U.S. at 207 (Amish parents objecting to compulsory schooling laws); *Sherbert,* 374 U.S. at 399-401 (Seventh-Day Adventist denied unemployment compensation benefits after she refused her employer's request to work on a Saturday). Congress did not intend to expand the scope of the Free Exercise Clause. *See Vill. of Bensenville v. Fed. Aviation Admin.,* 457 F.3d 52, 62 (D.C. Cir. 2006) ("RFRA was not meant to 'expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.'" (quoting S. Rep. No. 103-111, at 12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902)).

Reading the term "person" in the manner suggested by Autocam would lead to a significant expansion of the scope of the rights the Free Exercise Clause protected prior to *Smith*. "[D]uring the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals

and non-profit religious organizations." *Hobby Lobby,* 2013 WL 3216103, at *45 (Briscoe, C.J., concurring in part and dissenting in part); *see also Conestoga,* 2013 WL 3845365, at *5 ("[W]e are not aware of any case preceding the commencement of litigation about the [m]andate[ ] in which a for-profit, secular corporation was itself found to have free exercise rights."). While the Supreme Court has recognized the rights of sole proprietors under the Free Exercise Clause during this period, it has never recognized similar rights on behalf of corporations pursuing secular ends for profit. *United States v. Lee,* 455 U.S. 252, 254 (1982) (Amish farmer objecting to the imposition of Social Security taxes); *Braunfeld v. Brown,* 366 U.S. 599, 601 (1961) (Jewish merchants objecting to laws requiring them to close their stores on Sunday). Moreover, the Supreme Court has observed that the purpose of the Free Exercise Clause "is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority." *Sch. Dist. of Abington Twp., Pa. v. Schempp,* 374 U.S. 203, 223 (1963) (emphasis added); *see also Conestoga,* 2013 WL 3845365, at *5 ("[W]e simply cannot understand how a for-profit, secular corporation – apart from its owners – can exercise religion.").

We recognize that many religious groups organized under the corporate form have made successful Free Exercise Clause or RFRA claims, and our decision today does not question those decisions. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 525 (1993) (plaintiff was "a

not-for-profit corporation organized under Florida law"); *O Centro Espirito Beneficiente Uniao do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir. 2004) (affirming RFRA claim by a New Mexico nonprofit corporation), *aff'd,* 546 U.S. 418 (2006). Furthermore, we acknowledge that our sister circuits have held that on very rare occasions, a "corporate entit[y] which [is] organized expressly to pursue religious ends . . . may have cognizable religious liberties independent of the people who animate them, even if they are profit seeking." *Grote,* 708 F.3d at 856 (Rovner, J., dissenting); *see also Tyndale House Publishers, Inc. v. Sebelius,* 904 F. Supp. 2d 106 (D.D.C. 2012) (granting a preliminary injunction on the basis of RFRA to a for-profit Christian bookseller that was closely held by a nonprofit religious entity and several trusts, all of which were organized around the same religious beliefs). But we need not "draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion." *Conestoga,* 2013 WL 3845365, at *5. The absence of any authority for the latter proposition suggests that Congress did not adopt it when it enacted RFRA.

Our interpretation is also supported by RFRA's legislative history. When enacting RFRA, Congress specifically recognized that individuals and religious organizations enjoy free exercise rights under the First Amendment and, by extension, RFRA. *See, e.g.,* Religious Freedom Restoration Act of 1993, S. Rep. No.

103-111, at 7 (1993), *reprinted in* 1993 U.S.S.C.A.N. 1892, 1897 ("The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the *individual* to government and to God." (emphasis added) (quoting *Church of the Lukumi Babalu Aye,* 508 U.S. at 577 (Souter, J., concurring in part and concurring in the judgment))); *id.* at 12 ("[T]he courts have long adjudicated cases determining the appropriate relationship between religious organizations and government."); *see also Hobby Lobby,* 2013 WL 3216103, at *46 (Briscoe, C.J., concurring in part and dissenting in part) (examining RFRA's legislative history). In contrast, the legislative history makes no mention of for-profit corporations. This is a sufficient indication that Congress did not intend the term "person" to cover entities like Autocam when it enacted RFRA.

Autocam's attempt to fill this void by relying on freedom of speech cases, most notably *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), is unavailing. In *Citizens United,* the Court "recognized that First Amendment protection extends to corporations" and collected a significant number of cases recognizing this rule. 558 U.S. at 342. But these cases all arose under the Free Speech Clause. *Conestoga,* 2013 WL 3845365, at *3. No analogous body of precedent exists with regard to the rights of secular, for-profit corporations under the Free Exercise Clause prior to the enactment of RFRA. The

Free Exercise Clause and Free Speech Clause of the First Amendment have historically been interpreted in very different ways. *Id.* at *6 (tracing the differences in the Court's treatment of these clauses). Therefore, the Court's recognition of rights for corporations like Autocam under the Free Speech Clause nearly twenty years after RFRA's enactment does not require the conclusion that Autocam is a "person" that can exercise religion for purposes of RFRA.

We agree with the government that Autocam has not carried its burden of demonstrating a strong likelihood of success on the merits in this action. Accordingly, we need not consider the remaining preliminary injunction factors in order to conclude that the district court's decision to deny the relief sought by Autocam was proper.

IV.

For these reasons, we affirm the district court's denial of Autocam's motion for a preliminary injunction and remand the case with instructions to dismiss the Kennedys' RFRA claims due to a lack of jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-2673

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY; PAUL KENNEDY; JOHN KENNEDY IV; MARGARET KENNEDY; THOMAS KENNEDY,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, in his official capacity as Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB LEW, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

Before: GIBBONS and STRANCH, Circuit Judges; HOOD, District Judge.

JUDGMENT

(Filed Sep. 17, 2013)

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's denial of Autocam's motion for preliminary injunction is AFFIRMED, and the case is REMANDED to the district court with instructions to dismiss the Kennedys' Religious Freedom Restoration Act claims due to a lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*,

Plaintiffs,

v.

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

Defendants. /

CASE NO. 1:12-CV-1096

HON. ROBERT J. JONKER

ORDER

This matter is before the Court on the Defendants' Motion to Dismiss (docket # 49). The motion has been fully briefed. In addition, on September 17, 2013, the United States Court of Appeals issued its Opinion in *Autocam Corporation v. Sebelius*, ___ F.3d ___, Case No. 12-2673 (6th Cir. Sept. 17, 2013). The Opinion affirmed this Court's denial of Plaintiffs' Motion for a Preliminary Injunction in that case on grounds that would seem to require immediate dismissal of the claims of the individual plaintiffs in this case for lack of standing, and to provide a basis for granting the Defendants' pending Motion to Dismiss all of the counts in this case asserted by the corporate Plaintiffs. The Court invited the parties to show cause (docket # 62) why the Court should not apply the reasoning of the Court in *Autocam* by dismissing

the claims of the individual Plaintiffs in this case for lack of standing, and by granting the Defendants' Motion to Dismiss all claims asserted by the corporate Plaintiffs.[1] Defendants have not responded. Plaintiffs have responded with a Motion to Stay the Case (docket # 63).

Plaintiffs assert that because the mandate in the *Autocam* decision has not yet issued, the Court lacks jurisdiction to consider the substantive merits of the case. Generally, "an effective notice of appeal divests the Court of jurisdiction over the matter forming the basis for the appeal." *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F2d. 585, 588 (6th Cir. 1987). Here, the matter forming the basis for the appeal was the Court's denial of Plaintiffs' motion for preliminary injunction. Until the mandate issues, that divests the Court of jurisdiction over the preliminary injunction motion. "However, 'an appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits.'" *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) (quoting *Moltan v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995)). Indeed, soon after Plaintiffs filed their interlocutory appeal in this case, the parties tendered a joint motion to stay proceedings in this Court (docket

[1] Plaintiffs earlier sought dismissal without prejudice of their Counts VI (First Amendment – Expressive Association) and Counts IX-XII (Administrative Procedures Act) under FED. R. CIV. P. 41(a) (docket # 48).

46), apparently in recognition that without a stay order, ordinary case management deadlines would remain in place during the pendency of the interlocutory appeal.

Plaintiffs also contend that the Court should stay the case on prudential grounds because the Supreme Court is likely to resolve a Circuit split on issues presented in this case. The Court agrees that the Supreme Court is likely to act, but that does not persuade the Court that it should stay these proceedings, in light of the clear guidance from our Circuit on the merits of the case. When the Supreme Court rules – assuming it does, as seems likely – the ordinary judicial process will provide an appropriate pathway for any necessary relief.

For these reasons, the Court concludes that dismissal of the case is appropriate. **ACCORDINGLY, IT IS ORDERED**:

1. Plaintiffs' Counts VI and IX-XII are **DISMISSED WITHOUT PREJUDICE** under FED. R. CIV. P. 41(a).

2. Plaintiffs' Motion to Stay (docket # 63) is **DENIED**.

3. The claims of the individual Plaintiffs in Counts I-V, VII, and VIII are **DISMISSED** for lack of standing under the reasoning of the Court of Appeals in *Autocam*.

4. Defendants' Motion to Dismiss (docket # 49) is **GRANTED** as to the corporate Plaintiffs' claims in Counts I-V, VII, and VIII based on

the reasoning of the Court of Appeals in *Autocam*.

Judgment will enter accordingly.

Dated: September 30, 2013

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*,

Plaintiffs,

v.

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

Defendants. /

CASE NO. 1:12-CV-1096

HON. ROBERT J. JONKER

JUDGMENT

Based on the Order of the Court (docket # 65), Judgment is entered in favor of Defendants and against Plaintiffs Autocam Corporation and Autocam Medical, LLC, dismissing Counts I-V, VII, and VIII for failure to state a claim, and Counts VI and IX-XII without prejudice under Rule 41(a). Judgment is further entered dismissing the claims of the individual Plaintiffs in Counts I-V, VII, and VIII for lack of standing.

Dated: September 30, 2013

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*,

Plaintiffs,

v.

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

Defendants. /

CASE NO. 1:12-CV-1096

HON. ROBERT J. JONKER

OPINION AND ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction (docket # 8). The Court heard oral argument on the motion on December 17, 2012 and gave the parties the opportunity to file supplemental briefing. The motions are fully briefed. The Court also accepted amicus briefs from the American Civil Liberties Union Fund of Michigan; the Attorney General of the State of Michigan; the Life Legal Defense Foundation; and the Bioethics Defense Fund. The Court has thoroughly reviewed the record and carefully considered the applicable law. The motion is ready for decision.

Background

Plaintiff Autocam Corporation ("Autocam") is a Michigan corporation, and Plaintiff Autocam Medical (Autocam Medical) is a Michigan limited liability company (collectively, the "Autocam Plaintiffs"). (Verified Compl., docket # 1, at ¶¶ 14-15.) Plaintiff John Kennedy is the president and chief executive officer of Autocam and an owner of Autocam. (*Id.* at ¶ 17.) Plaintiffs Margaret Kennedy, Thomas Kennedy, John Kennedy IV, and Paul Kennedy are also owners of Autocam. (*Id.* at ¶¶ 18-21.) The Kennedy Plaintiffs own and control the Autocam Plaintiffs. (*Id.* at ¶ 22.) Plaintiffs bring this suit against the United States Departments of Health and Human Services, Treasury, and Labor, and the Secretaries of each of those agencies. (*Id.* at ¶¶ 25-30.)

The Autocam Plaintiffs are for-profit business entities. (*Id.* at ¶ 33.) They employ approximately 661 employees in the United States. (*Id.* at ¶ 16.) They are self-insured and provide health insurance to their full-time employees via a benefits plan (the "Plan") they administer jointly. (*Id.* at ¶ 34.) Autocam's Plan is designed so that the employee is not charged a premium, and Autocam gives each of its insured employees up to fifteen hundred dollars for a health savings account each year. (*Id.* at ¶ 36; Plaintiffs' Reply, docket # 24, at 13.) The Kennedy Plaintiffs "are adherents of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church." (Verified Compl., docket # 1, ¶ 31.) According to Plaintiffs, Catholic "teachings prohibit the

Plaintiffs from participating in, paying for, training others to engage in, or otherwise cooperating in the practice of contraception, including abortifacient contraception, and sterilization." (*Id.*) The Autocam Plaintiffs' Plan is designed "to exclude contraception, including abortifacient contraception, sterilization, and counseling relating to the same . . . because Plaintiffs seek to do business in a manner fully consistent with their religious convictions." (*Id.* at ¶ 39.)

Plaintiffs challenge the application of regulations issued under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "ACA"). The ACA explicitly provides that:

> [a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall at a minimum provide coverage for and shall not impose any cost-sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4). The Health Resources and Services Administration ("HRSA"), a subagency of the Department of Health and Human Services ("HHS"), requested that the Institute of Medicine ("IOM")

recommend guidelines. The IOM did so, recommending, among other things, that health care plans cover, without cost-sharing, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited December 18, 2012). Contraceptive methods approved by the FDA include, without limitation, diaphragms, oral contraceptives, intra-uterine devices, and emergency contraceptives such as Levonorgestrel (sometimes called the "morning after pill") and ulipristal acetate (sometimes called the "week after pill"). *See* FDA Birth Control Guide, available at http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited December 18, 2012). On August 1, 2011, HRSA adopted the IOM recommendations, subject to an exemption for certain religious employers. 76 Fed. Reg. 46621 (August 3, 2011); 45 C.F.R. § 147.130.

On February 15, 2012, HHS, the Department of the Treasury ("Treasury"), and the Department of Labor ("DOL") published final rules memorializing the HRSA guidelines. 77 Fed. Reg. 8725 (February 15, 2012). The rules require all non-exempt, non-grandfathered health care plans to provide the coverage the guidelines describe for plan years beginning on or after August 1, 2012. Employers with fewer than 50 employees are not required to provide any health insurance plan. 26 U.S.C. § 4980H(c)(2)(A). The rules also exempt some religious employers from

providing plans that cover contraceptive services. To qualify as an exempt religious employer, an employer must satisfy the following criteria:

> (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs people 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 non-profit 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); 76 Fed. Reg. 46621-01, 46623. There is also a temporary safe harbor for non-profit organizations that do not qualify for any other exemption and "do not provide some or all of the contraceptive care otherwise required, consistent with any applicable State law, because of the religious beliefs of the organization." 77 Fed. Reg. 8725 (Feb. 15, 2012). While the safe harbor is in effect, the government "will work with stakeholders to develop alternative ways of providing contraception coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage." *Id.* A grandfathered plan is a plan in existence on March 23, 2010, that has not undergone a defined set of changes. 26 C.F.R. § 54-9815-1251T; 29 C.F.R. § 2950.715-1251; 45 C.F.R. § 147.240.

It is undisputed that the Autocam Plaintiffs' Plan is neither exempt nor grandfathered. The governing regulations therefore require the Autocam Plaintiffs to provide their employees a health care plan that includes contraceptive services coverage. Non-exempt, non-grandfathered employers that do not provide the required coverage face financial consequences – whether characterized as fines, taxes, or penalties – and other potential enforcement actions for failure to comply. *See* 29 U.S.C. § 1132(a) (providing for civil enforcement by the Department of Labor and insurance plan participants); 26 U.S.C. § 4980D (providing for a tax of $100 per day per employee for failure to comply with ACA coverage provisions, subject to caps for certain failures); 26 U.S.C. § 4980H (annual tax assessment for failure to comply with ACA coverage requirement). Autocam's new Plan year begins on January 1, 2013. (Verified Compl., docket # 1, at ¶ 45.) The immediate enforcement risk, in Plaintiffs' view, is the tax or penalty imposed under 26 U.S.C. § 4980D for plans that do not include the contraceptive coverage.

Plaintiffs claim that the contraceptive coverage requirement "effectively strips . . . their ability to provide employee benefits in a manner that is consistent with their sincerely held religious convictions." (*Id.* at ¶ 41.) They state that religious convictions preclude Autocam from complying with the contraceptive coverage requirement. (Kennedy aff., docket # 36-1, ¶ 5.) They note that the "actual expense for Autocam to comply with the HHS Mandate would be

approximately $100,000 per year." (*Id.*) Plaintiffs estimate that the "penalty [or tax under section 4980D] for failure to comply . . . is approximately $19,000,000 per year based on the employees now covered by the [P]lan." (*Id.*) Plaintiffs contend that they face a stark dilemma: either comply with the contraceptive coverage requirement, and violate their religious convictions, or refuse to comply, and face ruinous penalties. (Verified Compl., docket # 1, ¶ 54.) Plaintiffs recognize they could alternatively choose not to offer any group plan at all. This might trigger a shared responsibility payment under 26 U.S.C. § 4980H, but Plaintiffs have not claimed that any such payment obligation would be ruinous.

In this lawsuit, Plaintiffs challenge the contraceptive coverage requirement on several grounds, asserting that the requirement violates the First Amendment of the Constitution, the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), and the Administrative Procedures Act, 60 Stat. 237, 5 U.S.C. § 1001, *et seq*. (Verified Compl., docket # 1, at ¶¶ 107-195.) Plaintiffs now seek a preliminary injunction that would stay the application of the contraceptive coverage requirements to them during the pendency of this case. (Mot. for Prelim. Inj., docket # 8.) Plaintiffs premise their motion for preliminary injunction on their claims that the requirement violates RFRA and their rights of free exercise and freedom of speech under the First Amendment.

Legal Standard

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 Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A movant seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities favors the movant; and (4) that the requested preliminary injunction is in the public interest. *Id.* at 20. "[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).

1. Likelihood of Success on the Merits

A threshold question is whether the Autocam Plaintiffs, which are self-described secular, for-profit business organizations, have any right to free exercise of religion under the First Amendment or RFRA. The law is not settled on this question. While corporations have some constitutional rights, such as the right to freedom of speech, *see Citizens United v. Fed. Election Com'n*, 558 U.S. 310 (2010), the constitutional rights of corporations and individuals are not necessarily coextensive. Courts have found repeatedly that religious organizations have free exercise rights. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran*

Church and School v. EEOC, 132 S.Ct. 694, 706 (2012). But Plaintiffs have not identified any authority, and the Court has not found authority independently, for the proposition that a secular, for-profit corporation has a First Amendment right of free exercise of religion. RFRA is a somewhat different matter, however, because Congress has applied the protection of the act to "person[s]," not simply individuals. This suggests a Congressional intention to apply RFRA's protection to entities as well as individuals. *See* 1 U.S.C. § 1. Even so, it still leaves open the question of exactly how a for-profit corporation engages in the "exercise of religion," or for such a corporation to experience a substantial burden on it. A corporation cannot, for example, attend worship services or otherwise participate in the sacraments and rites of the church, as individuals do. But ultimately the Court does not find it necessary to resolve the threshold question because even assuming the Autocam Plaintiffs have free exercise rights under the Constitution and RFRA, Plaintiffs are still unlikely to succeed on the merits of either claim. *Cf. Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, Order at 6 n.4 (10th Cir. Dec. 20, 2012 (sustaining district court's denial of preliminary injunction against the contraception mandate without resolving this threshold issue).

A. Free Exercise Clause of the First Amendment

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., Amdt. 1. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). The exercise of religion "often involves not only belief and profession but the performance of (or abstention from) physical acts," such as, for example, participating in sacraments and abstaining from particular foods or modes of transportation. *Id.* If the government were to ban such religious practices "only when they are engaged in for religious reasons, or only because of the religious belief that they display," the government would most likely be prohibiting the free exercise of religion, in violation of the Constitution. *Id.* However, for First Amendment purposes, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

According to Plaintiffs, the ACA's contraceptive coverage requirement impinges upon their exercise of religion because it requires them to violate their

religious principles or face substantial consequences. Under *Smith*, Plaintiffs' claim based on the Free Exercise Clause of the First Amendment is almost sure to fail. The ACA's contraceptive coverage requirement is neutral and generally applicable. It does not target a particular religion or religious practice or have as its objective the interference with a particular religion or religious practice. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."). The ACA contraception coverage requirement applies to all non-exempt, non-grandfathered plans. To the extent the contraceptive coverage requirement restricts Plaintiffs' exercise of religion, it does so incidentally. As in *Smith*, because the law does not "represent[ ] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," Plaintiffs' conscientious objection to the coverage requirement does not relieve Plaintiffs from their duty to comply with the law. *Smith*, 494 U.S. at 882.

Plaintiffs argue that the ACA does not apply generally, noting that exemptions exist for certain religious organizations as well as some other secular employers. That categorical exemptions exist does not mean that the law does not apply generally, however. *See*, *e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) (finding social security tax requirements generally applicable despite existence of categorical

exemptions). The law applies to all non-grandfathered, non-exempt plans, regardless of employers' religious persuasions, and this is enough to create a neutral law of general application.

For these reasons, Plaintiffs have little likelihood of success on their Free Exercise Clause Claim.

B. Religious Freedom Restoration Act

Congress responded to the *Smith* decision by enacting RFRA, which adopted a statutory rule similar to the rule *Smith* rejected. "Under RFRA, the Federal Government may not, as a statutory matter, 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)). The statute does, however, permit rules that substantially burden the exercise of religion if the government demonstrates "that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Thus, under RFRA, strict scrutiny applies to federal statutes that substantially burden a person's exercise of religion.

The particular burden Plaintiffs describe is the requirement that the Autocam Plaintiffs provide a health insurance plan that includes the contraceptive coverage the ACA requires. The Court is not

persuaded that Plaintiffs are likely to prevail on their claim that this is a substantial burden on the Plaintiffs in this case. "[A] 'substantial burden' is a difficult threshold to cross," *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736. (6th Cir., Dec. 10, 2007), and Plaintiffs are unlikely to cross it. There is certainly no significant financial burden on the Autocam Plaintiffs, as even the Plaintiffs agree the cost of compliance is only about $100,000. Moreover, the requirement differs little in substance from Autocam's current practice of providing undesignated cash that employees are free to apply to uncovered health expenses – including contraception – of their choosing. In particular, the Autocam Plaintiffs already give each employee up to $1500 for a health savings account. Plaintiffs themselves point out that "Autocam's plan permit[s] employees to make their own decisions on contraception – they just need to pay for it out of the health savings dollars held in their own name rather than requiring Autocam to cut the check directly for the service." (Pls.' Reply, docket # 24, at 13.) Mr. Kennedy explains that Plaintiffs do not seek to control what an employee or his or her dependents do with the wages and healthcare dollars we provide. Our employees are free to make decisions with their money – including the funds in their personal health savings account – that we do not agree with." (Kennedy aff., docket # 36-2, at § 7.)

Implementing the challenged mandate will keep the locus of decision-making in exactly the same place: namely, with each employee, and not the

Autocam plaintiffs. It will also involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and money originating from the Autocam Plaintiffs will pay for it. The Plaintiffs nevertheless want to draw a line between the moral culpability of paying directly for contraceptive services their employees choose, and of paying indirectly for the same services through wages or health savings accounts. According to Plaintiff Kennedy: "Because our plan does not pay for the drugs and services that we object to, we are not engaging in material cooperation with evil." (*Id.*) The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden – no matter how sincerely felt – really amounts to a substantial burden on a person's exercise of religion. On the surface there certainly appears to be virtually no functional difference: in both situations, the Autocam Plaintiffs are responsible to pay wages or benefits that their employees earn; and in neither situation do the wages and benefits earned pay – directly or indirectly – for contraception products and services unless an employee makes an entirely independent decision to purchase them. The incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs.[1]

[1] If the Plaintiffs are more comfortable religiously and morally with more layers of insulation between the wages and

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A similar analysis applies to the Kennedy Plaintiffs, but the application of the contraceptive coverage requirement to the Kennedy Plaintiffs is even more removed. Standing between the Kennedy Plaintiffs and the decisions some Autocam employees make to procure contraceptive services are not only the independent decisions of an employee and the employee's health care provider, but also the corporate form itself. The ability to operate in a corporate form has tax and liability consequences that promote aggregation of capital and productive enterprise. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). As corporate owners, the Kennedy Plaintiffs quite properly enjoy the protections and benefits of the corporate form. But the legal separation of the owners from the corporate enterprise itself also has implications at the enterprise level. A corporate form brings obligations as well as benefits. "When followers of a particular sect enter into commercial activities 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.

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benefits earned, on the one hand, and an employee's decision to acquire contraceptives with them, Plaintiffs have the option of restructuring from a self-insured plan to an insured plan. *Cf. Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278 (W.D. Okla. 2012) (denying preliminary injunction against the contraception mandate in a challenge from an insured health plan), *aff'd*, Order, Case No. 12-6294 (10th Cir. Dec. 20, 2012). This would further attenuate the claimed burden.

Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.

Any burden on the Kennedy Plaintiffs' free exercise caused by regulation on the corporation they own is probably too attenuated to be substantial. The mandate does not compel the Kennedys as individuals to do anything. They do not have to use or buy contraceptives for themselves or anyone else. It is only the legally separate entities they currently own that have any obligation under the mandate. The law protects that 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.

Finally, the implications of the Plaintiffs' theory are troubling in a way that further undermines their probability of success. Plaintiffs argue, in essence, that the Court cannot look beyond their sincerely held assertion of a religiously based objection to the mandate to assess whether it actually functions as a substantial burden on the exercise of religion. But if accepted, this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objection. This would subject virtually every government action to a potential private veto based on a person's

ability to articulate a sincerely held objection tied in some rational way to a particular religious belief. Such a rule would paralyze the normal process of governing, and threaten to replace a generally uniform pattern of economic and social regulation with a patchwork array of theocratic fiefdoms. After all, almost every governmental decision involves policy choices. And religiously inclined persons can often sincerely trace their preferred policy outcome to some religious and moral principle. In fact, this often winds up pitting sincerely religious people on opposite sides of social, economic, and political issues, each side fervently convinced of the moral and religious imperative of its position. Applying RFRA in a way that permits the disappointed side simply to opt out because it tied its opposition to a religious or moral principle would be a recipe for chaos, not a meaningful protection of religious liberty. Rather, to earn the unique protection of RFRA, the disappointed side should have to demonstrate not only that it believed in its losing position for reasons tied to religious belief, but also that the resulting regulation actually imposes a substantial burden on their ability to exercise religion. Accordingly, careful judicial attention to the "substantial burden" gateway of the statute is critical. *See Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729 (6th Cir. Dec. 10, 2007).

The Court does not doubt the sincerity of the Kennedy Plaintiffs' religious convictions. Nor is it "within the judicial function and judicial competence"

to determine whether Plaintiffs have a proper interpretation of the Catholic faith. *Lee*, 455 U.S. at 257 (quotation marks omitted). But it remains a separate question whether the sincerely held belief amounts, in fact, to a substantial burden on the exercise of religion within the meaning of RFRA, and because the Court finds Plaintiffs are unlikely to establish such a substantial burden, the Court finds it unlikely that Plaintiffs will succeed on their claim under RFRA.

C. Freedom of Speech

Plaintiffs have little likelihood of success on their claim that the contraceptive coverage requirement violates their First Amendment right to freedom of speech. Plaintiffs theorize that offering a health care plan that covers contraceptive services amounts to speech endorsing the use of contraceptives. This theory is not persuasive. Including contraceptive coverage in a health care plan is not inherently expressive conduct, particularly when the coverage is included to comply with a neutral, generally applicable law. *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006). In *Rumsfeld*, the court upheld the Solomon Amendment, a statute denying federal funding to law schools that refused to permit military recruiters from gaining access to campuses or to students. The court explained that the statute "neither limits what law schools may say nor requires them to say anything," and that under the statute, "[l]aw schools remain free . . . to express

whatever views they may have on the military's congressionally mandated employment policy." *Id.* at 60. The same is true of the contraceptive coverage requirement. Plaintiffs are free to say whatever they want about the requirement. Like the Solomon Amendment, the contraceptive coverage requirement "regulates conduct, not speech. It affects what [employers] must *do* . . . not what they may or may not *say.*" *Id.* Like the Solomon Amendment, the contraceptive coverage requirement differs from cases concerning compelled-speech violations, in which the violations "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. For example, the "expressive nature of a parade" was a key part of the holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995). *Id.* In contrast, there is nothing inherently expressive about health care coverage options, just as there is nothing inherently expressive about a law school's decision to allow military recruiters on campus. *Id.* First Amendment protection does not extend to conduct that is not inherently expressive. *Id.*

Accordingly, Plaintiffs have little likelihood of success on the merits of their freedom of speech claim.

2. Likelihood of Imminent, Irreparable Harm in Absence of Injunction

Plaintiffs have not shown a risk of imminent, irreparable harm in the absence of the preliminary

injunction they seek. According to Plaintiffs, they face a difficult choice effective January 1, 2013, when the new Plan year begins. In particular, Plaintiffs say they must either comply in violation of religious principle or face ruinous financial risk under section 4980D. There are multiple problems with Plaintiffs' theory that lead the Court to conclude that Plaintiffs have failed to make a convincing showing of irreparable and imminent harm.

First, the immediacy of the dilemma Plaintiffs face is in no small part of their own making. The mandate they challenge roots in the HRSA decision to adopt the IOM recommendations almost 17 months ago, on August 1, 2011. Final rules promulgating the mandate issued over ten months ago, on February 15, 2012. Plaintiffs did not file this lawsuit until October 8, 2012, eight months after the final rule, nearly a year and a half after the HRSA decision, but less than two months before the deadline Plaintiffs say is critical. Equity does not favor the dilatory. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2946 (2d ed. 1995).

Second, the dilemma Plaintiffs frame is not quite as stark as they make it appear. Plaintiffs posit only two choices: comply in violation of conscience or face ruinous financial costs under Section 4980D. But as Plaintiffs themselves recognize, they do have a third option: namely, drop all group coverage. This would subject them to some financial risk under Section 4980H, but even Plaintiffs do not contend this risk

would be ruinous. Of course, the choice to eliminate all group coverage would have obvious labor relations impact, and potential adverse impact for the Autocam employees, but it is still an available pathway that avoids the stark dilemma Plaintiffs posit. As such, it undermines Plaintiffs' efforts to show irreparable harm. Moreover, even if Plaintiffs opt to continue their current coverage without contraceptive benefits, and run the risk of larger financial consequences under Section 4980D, those consequences are not immediate and self-executing. They are imposed and collected as a tax, probably no earlier than 12 months after the tax year beginning January 1, 2013. Furthermore, the tax is by its terms subject to caps and even complete waiver in certain cases, including a failure to comply based on "reasonable cause." 26 U.S.C. § 4980D(c)(3)-(4). Plaintiffs say they are not likely to qualify for the caps or waiver, but the fact remains that Congress has capped the tax, and has also empowered the Secretary of the Treasury to waive some or all of the tax in cases due "to reasonable cause and not willful neglect." That possibility of relief militates against a finding of irreparable harm. *Cf. Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991) (finding that post-deprivation review process saves CERCLA penalty provisions from due process challenge).

Third, the claim of irreparable harm is further undermined because it really hinges on financial impact. Preliminary injunctions normally do not issue to protect a party from monetary harm. *See*, *e.g.*,

Overstreet v. Lexington-Fayette Urban County Government, 305 F.3d 566, 578-79 (6th Cir. 2002); *United States v. Michigan*, 230 F.R.D. 492, 494-95 (E.D. Mich. 2005). This is because strictly financial consequences incurred during litigation can almost always be adjusted at final judgment in a way that reflects the ultimate adjudication on the merits. *Id. Cf. Oklahoma Operating Co. V. Love*, 252 U.S. 331, 338 (1920) (directing trial court to use the final judgment in the case to abate any penalties accrued during the litigation if the penalized party ultimately lost on the merits but had reasonable cause for maintaining its position during the litigation). Plaintiffs say the preliminary injunction is about religious liberty, and not money, but that conflates the preliminary injunction analysis with final decision on the merits. To be sure, the overall case the Plaintiffs are bringing is about religious liberty. But that is not the same thing as saying the preliminary injunction itself is about religious liberty. To the contrary, on this record, the Plaintiffs are perfectly free to continue offering their existing group coverage without honoring the contraception mandate, and therefore without violating their religious beliefs. A preliminary injunction is not necessary to protect that choice. Rather, the harm Plaintiffs seek to avoid is the risk that choosing to honor their conscience would trigger the tax under Section 4980D – a strictly financial matter. More than that, it is a financial consequence that is not likely to be finally assessed – much less paid – until after this case is resolved on the merits. If Plaintiffs win on the merits, they will not incur or pay the

4980D tax, or at worst will have a right to reimbursement of any tax they have paid under the section. A preliminary injunction is entirely beside the point in such a scenario.

But what if Plaintiffs ultimately lose on the merits? This actually leads to a fourth problem with the irreparable harm theory Plaintiffs advance. Plaintiffs believe that a preliminary injunction in their favor now will automatically insulate them from all financial risk under Section 4980D, at least until such time as they lose on the merits. The Court has considerable doubt about that. In the first place, Section 4980D is by its codified terms[2] a tax, not a penalty. If it really is a tax – as the codified version says it is-then this Court would lack power to enjoin it, preliminarily or permanently, before its collection. 26 U.S.C. § 7421(a). *But cf. Nat'l Fed. of Independent Business v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2582 (2012) (finding the anti-injunction act inapplicable to a financial consequence that Congress labels a penalty even when Congress chooses to place the penalty in the Internal Revenue Code). But wholly apart from this, the office of a preliminary injunction is not to adjudicate anything on a final basis; rather, the preliminary injunction functions to give a party some temporary breathing room, subject *always* to

[2] Plaintiffs say the originally enacted version of section 4980D describes the tax as a penalty in the title of the operative section. PL 104-191, 110 Stat. 2084 (1996). Plaintiffs say the section functions as a penalty in any event.

final adjudication. It is for that reason that a party winning a preliminary injunction normally has to post security to pay costs and damages if the party ultimately loses on the merits. FED. R. CIV. P. 65(c). In this case, if Plaintiffs won the preliminary injunction they seek, but ultimately lost on the merits, by what authority could the Court relieve them of the consequences Congress decreed? Under this scenario, Congress and the Secretary acted lawfully in adopting the contraception mandate, and it is hard to see why Plaintiffs should not then be exposed to Section 4980D (including not only the tax assessment provisions, but also the "reasonable cause" cap and exemption provisions) from January 1, 2013, just as they would without a preliminary injunction. At a minimum, automatic relief seems unlikely and inconsistent with the office of preliminary injunction.

The Court discussed these issues with counsel at the preliminary injunction hearing, and the parties have now submitted post-hearing briefs on the issue. *See* docket ## 40-41. Plaintiffs' lead case is the *Love* decision, *supra*, a rate-making case. In *Love*, the State of Pennsylvania fixed the rate for certain laundry charges on a monopolization theory. The laundries challenged the rates as confiscatory because they allegedly did not allow the laundries to recoup their costs, much less earn reasonable profit. The laundries also complained that the State violated their due process rights by precluding all possibility of judicial review of the rate-making apart from a post-deprivation hearing following imposition of

contempt citations and penalties imposed on laundries choosing to charge more than the allowed rates. The Supreme Court affirmatively declared a due process violation based on the lack of pre-deprivation judicial review-something even the State apparently recognized and had tried to remedy by legislative amendment while the case was on review. The Court then remanded the case for final determination of whether the rates really were confiscatory. If so, permanent relief would issue in favor of the laundries. But even if not – that is, even if the trial court ultimately determined that the rates were not confiscatory – the Supreme Court opined that the trial court should still enter a final judgment that would abate penalties accrued during the litigation as long as the trial court concluded the laundries had reasonable cause for their position, despite their ultimate loss.

In the Court's view, *Love* further undermines a showing of irreparable harm. First, the *Love* Court affirmatively found a constitutional defect in the State's legislative scheme. Here, there has been no finding of a likely constitutional or statutory violation. To the contrary, this Court has concluded that Plaintiffs are almost certain to fail on their constitutional theories, and are not likely to succeed on their statutory theory. Second, the constitutional challenge in *Love* was to the process itself, and specifically to the accrual of daily penalties without the possibility of adequate judicial review. In this case, there is obviously a pathway for judicial review and Plaintiffs

are exercising it. The question is whether they will ultimately prevail on their substantive free exercise claims. Plus, even if they fail on the merits, the financial tax they may trigger under Section 4980D has built in cap and exemption provisions for failures to comply due to "reasonable cause." Finally, and most importantly for preliminary injunction consideration, what *Love* demonstrates is that final judgment in the case can still address and adjust the propriety of any financial penalties – if they are penalties – imposed under Section 4980D or otherwise during the pendency of the case even if Plaintiffs ultimately lose on the merits. The touchstone of any such adjustment under *Love* is the reasonable cause of the Plaintiffs in pursuing the litigation. True, a preliminary injunction strengthens Plaintiffs' hand in that analysis, as the government brief recognizes. But losing the preliminary injunction is not necessarily fatal to a reasonable cause finding, whether by the Court under *Love*, or by the Secretary under Section 4980D itself.

Because Plaintiffs have not shown a risk of imminent, irreparable injury, this factor favors Defendants.

3. Balance of Equities and Public Policy

These factors do not weigh heavily in favor of either party. At a minimum, Plaintiffs have not made a sufficient showing under these factors to overcome the weaknesses the Court sees in the first two factors.

The Court does note an irony: namely, one very real possibility in this case is that Plaintiffs will choose to terminate their existing group coverage and run the risk of a shared responsibility payment obligation under Section 4980H, rather than the more draconian financial consequences under Section 4980D for non-compliant group plans. This would, of course, leave Autocam's employees without group coverage of any kind, and with limited options at present because the envisioned insurance exchanges for individuals who do not have group coverage are not yet available, and likely will not be for at least another year. The net result of this scenario would seem to be a loss for everyone – for the Autocam Plaintiffs, for the Autocam employees, and for the Defendants – all of whom would presumably prefer to see at least continuation of existing group coverage, rather than termination of all group coverage. But such a result is traceable directly to the policy decisions of Congress and the Executive branch in selecting the substance, the timing, and enforcement incentives of the rules at issue. The Court will ultimately decide if those choices violate the Constitution, RFRA, or the APA, and will order final relief accordingly. But if there is a solution that avoids a short term outcome unsatisfying to everyone, it will have to come from the mutual agreement of the parties that their respective and ultimately divergent interests on the merits are nevertheless served by an interim agreement that avoids the short term outcome no one wants to see.

Balancing the four preliminary injunction factors together, the Court concludes that they weigh against Plaintiffs' request for relief.

Conclusion

For these reasons, the Court concludes that Plaintiffs are not entitled to the preliminary injunction they seek.

ACCORDINGLY, IT IS ORDERED:

Plaintiffs' Motion for Preliminary Injunction (docket # 8) is **DENIED**.

DATED: December 24, 2012

/s/ _____
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

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

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY; PAUL KENNEDY; JOHN KENNEDY IV; MARGARET KENNEDY; and THOMAS KENNEDY

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Case No.
Hon.

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VERIFIED COMPLAINT AND DEMAND FOR INJUNCTIVE RELIEF

Comes now Plaintiffs Autocam Corporation and Autocam Medical Corporation, John Kennedy, Paul Kennedy, John Kennedy IV, Margaret Kennedy, and Thomas Kennedy (collectively "Plaintiffs"), by and through undersigned counsel, bring this Verified Complaint against the above-named Defendants, and in support thereof state the following:

NATURE OF THE ACTION

1. This case presents constitutional and statutory challenges to administrative regulations ("the

Mandate") ostensibly issued under the "Patient Protection and Affordable Care Act" (Pub. L. 111-148, March 23, 2010, 124 Stat. 119) and the "Health Care and Education Reconciliation Act" (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively known and hereinafter referred to as the "Affordable Care Act"), which force the Plaintiffs to pay for and facilitate access to drugs and services which the Plaintiffs believe to be intrinsically wrong and gravely sinful in light of their sincerely held religious convictions. Plaintiffs object to the Mandate because it compels them to violate deeply held religious convictions and subsidize speech with which they disagree. As a result, the Mandate violates the right to religious liberty and free speech protected by the First Amendment as well as rights protected under federal law. Plaintiffs seek judicial relief that will prevent the Defendants from enforcing the tyrannical Mandate and thereby redress the violation of their rights demonstrated herein.

2. The Affordable Care Act mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" and directs the Secretary of the United States Department of Health and Human Services to determine what would constitute "preventative care" under the mandate. 42 U.S.C. § 300gg-13(a)(4).

3. Without meaningful notice of rulemaking or opportunity for public comment, the United States Department of Health and Human Services, the United States Department of Labor, and the United States Department of Treasury adopted the Institute of Medicine ("IOM") recommendations in full and promulgated the Mandate as an interim final rule that requires that all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" provide all FDA-approved contraceptive methods, including abortifacient contraception, and sterilization procedures. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

4. The Health Resources and Services Administration issued guidelines adopting the IOM recommendations. (http://www.hrsa.gov/womensguidelines).

5. Under the IOM guidelines, the Mandate requires *all* insurance insurers to provide not only sterilization and contraception but also abortions, because certain drugs and devices such as the "Plan B," known as the "morning-after pill," and "ella," known as the "week-after pill," come within the Mandate's and Health Resources and Services Administration's definition of "Food and Drug Administration-approved contraceptive methods" despite their known abortifacient mechanisms of action, as well as sterilization methods approved by the FDA.

6. Thus, the Mandate requires covered group health plans and health insurance issuers to provide contraception, including abortifacient contraception,

and sterilization services, as well as counseling relating to the same, in all of its insurance plans, group and individual.

7. The Mandate from the United States Department of Health and Human Services forces the Plaintiffs to choose between their sincerely held religious beliefs and civil penalties. By virtue of their sincerely held religious convictions the Plaintiffs believe that each human person is created in the image and likeness of God and must be protected from the moment of conception to the moment of natural death. Plaintiffs further believe that human sexuality is a gift from God designed to unite spouses in marriage and transmit human life. As a result of these sincerely held religious beliefs Plaintiffs cannot provide, facilitate access to, subsidize, or cooperate with the provision of drugs or services that facilitate contraception, including abortifacient contraception, or sterilization, because to do so would be cooperation with practices they sincerely believe to be gravely wrong and sinful.

8. The Mandate, if left unchecked, forces Plaintiffs to violate their religious beliefs because it requires them to provide drugs and services contrary to their deeply held religious beliefs or pay ruinous fines which would total sixty-six thousand dollars per day of noncompliance ($66,000) or twenty-four million dollars ($24,000,000) a year.

9. Plaintiffs seek a declaration that the Mandate violates their rights as well as a preliminary and

permanent injunction enjoining Defendants from implementing and enforcing provisions of the regulations promulgated under the Affordable Care Act, specifically the Mandate, so that they can continue to conduct their business operations in a manner that is consistent with their sincerely held religious convictions.

10. Plaintiffs bring this action to vindicate not only their own rights, but also to protect the rights of all Americans who care about our constitutional guarantees of free exercise of religion and freedom of speech, as well as the protection of innocent human life and the sanctity of marriage.

JURISDICTION AND VENUE

11. This action in which the United States is a defendant arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1346.

12. Plaintiffs' claims for declaratory and preliminary and permanent injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, by 28 U.S.C. § 2000bb-1, and by the general legal and equitable powers of this Court.

13. Venue is proper under 28 U.S.C. § 1391(e) because this is the judicial district in which Plaintiffs are located.

PLAINTIFFS

14. Plaintiff Autocam is a Michigan corporation with its registered office located at 4436 Broadmoor SE, Kentwood, MI 49512.

15. Plaintiff Autocam Medical is a Michigan limited liability corporation with its registered office located at 4436 Broadmoor SE, Kentwood, MI 49512.

16. The Autocam Plaintiffs are West-Michigan based manufacturing companies that, along with their subsidiaries, have 14 facilities worldwide and over 1,500 employees, 661 of whom work in the United States of America, of which 478 are employed by Autocam and 183 are employed by Autocam Medical.

17. John Kennedy is the President and Chief Executive Officer of Autocam and is an owner of Autocam. He has the responsibility for setting all policies governing the conduct of all phases of business of Autocam, including decisions concerning insurance. He resides in the Western District of Michigan.

18. Plaintiff Margaret Kennedy resides in the Western District of Michigan and is an owner of Autocam.

19. Plaintiff Thomas Kennedy resides in the Western District of Michigan and is an owner of Autocam.

20. Plaintiff John Kennedy IV is an owner of Autocam residing outside the district.

21. Plaintiff Paul Kennedy is an owner of Autocam residing outside the district.

22. The Kennedy Plaintiffs own and control the Autocam Plaintiffs.

23. The Kennedy Plaintiffs with a controlling interest in the Autocam Plaintiffs object to the Mandate.

DEFENDANTS

24. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing the Mandate.

25. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). In this capacity, she has responsibility for the operation and management of HHS. Defendant Sebelius is sued in her official capacity only.

26. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the regulation that is the subject of this lawsuit.

27. Defendant Hilda Solis is the Secretary of the United States Department of Labor. In this capacity, she holds responsibility for the operation

and management of the United States Department of Labor. Defendant Solis is sued in her official capacity only.

28. Defendant United States Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the regulation that is the subject of this lawsuit.

29. Defendant Timothy Geithner is the Secretary of the United States Department of the Treasury. in this capacity, he holds responsibility for the operation and management of the United States Department of Treasury. Defendant Geithner is sued in his official capacity only.

30. Defendant United States Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the regulation that is the subject of this lawsuit.

FACTUAL ALLEGATIONS

Plaintiffs' Religious Beliefs and Business Operations.

31. Plaintiffs are adherents of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church. These teachings prohibit the Plaintiffs from participating in, paying for, training others to engage in, or otherwise cooperating in the

practice of contraception, including abortifacient contraception, and sterilization.

32. Plaintiffs' sincerely held religious convictions also prevent them from adopting the spurious position that their religious beliefs do not apply when they enter the world of work. Quite the contrary, Plaintiffs believe that they are called to live out the teachings of Christ in their daily activity and witness to the truth of the Gospel by treating others in a manner that reflects their commitment to human dignity.

33. Plaintiffs Autocam and Autocam Medical are for-profit corporations that merely represent the business form through which the individual Plaintiffs endeavor to live their vocation as Christians in the world.

34. The Autocam Plaintiffs are self-insured and provide health benefits to their employees by virtue of a jointly administered benefits plan which features a group insurance plan used to provide benefits to full-time employees.

35. Plaintiffs have earnestly endeavored over the years to provide their employees with high quality employee health coverage. Plaintiffs recognize that this is a practical need insofar as they must be able to attract skilled employees in order for them to remain in business.

36. But precisely because Plaintiffs seek to live their Christian vocation as individuals who do not

check their religious beliefs at the door of the workplace, they have gone above and beyond the minimal requirements of the market in their treatment of their employees. For example, Autocam's benefits plan is designed so that the employee is not charged a premium and ninety-one percent (91%) of its current employees pay no premiums at present; Autocam gives its employees fifteen hundred dollars ($1,500) toward meeting the plan's deductible and advances funds to employees in need; Autocam's benefits plan includes a wellness feature recently selected to the Honor Roll of the 2012 Michigan's Healthiest Employers program; and 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-baby care. In these and other ways Autocam seeks to recognize and support the dignity of their employees.

37. Despite their evident desire to support the health and well-being of employees Plaintiffs cannot provide, fund, or participate in health care insurance that covers artificial contraception, including abortifacient contraception, sterilization, and related education and counseling, without violating Plaintiffs' deeply held religious beliefs. If they did so, the Plaintiffs would contradict the very set of core religious convictions that inspire their efforts to treat employees well.

38. For these reasons Plaintiffs have taken great pains through the years to ensure that its

employees' insurance plans do not cover the objectionable drugs or services at issue here, i.e., contraception, including abortifacient contraception, and sterilization.

39. Plaintiffs specifically designed a health insurance plan to exclude contraception, including abortifacient contraception, sterilization, and counseling relating to the same, precisely because Plaintiffs seek to do business in a manner fully consistent with their religious convictions.

40. Plaintiffs have always taken great care to do so because as a self-insuring entity the Plaintiffs play a direct role in paying for the drugs and services used by their employees. The Plaintiffs cut the check that pays for expenses which means that Plaintiffs would be forced to pay for drugs and procedures directly contrary to their religious convictions.

41. The Mandate effectively strips the Plaintiffs of their ability to provide employee benefits in a manner that is consistent with their sincerely held religious convictions. If Plaintiffs do not comply with the mandate then the Autocam Plaintiffs, which have 682 employees in the United States and 1,500 worldwide would become liable for fines in excess of twenty-four million dollars ($24,000,000), effectively crippling the Plaintiffs' business.

42. The Autocam Plaintiffs' insurance plans are not considered "grandfathered" due to unrelated changes made on January 1, 2011.

43. The Autocam Plaintiffs' insurance is not subject to any "safe harbor" provision.

44. Due to the Mandate, Plaintiffs will no longer be allowed to exclude objectionable drugs and services from their benefits plan – and will be forced to provide and pay for these services that violate their religious beliefs.

45. The Autocam Plaintiffs' next plan year starts January 1, 2013.

46. Plaintiffs wish to conduct their business in a manner that does not violate the principles of their religious faith.

The Affordable Care Act

47. The Affordable Care Act regulates the national health insurance market by directly regulating "group health plans" and "health insurance issuers." The Affordable Care Act does not apply equally to all insurers or to all individuals.

48. The Affordable Care Act requires employers with more than 50 full-time employees or full-time employee equivalents to provide federal government-approved health insurance or pay a substantial per-employee fine. (26 U.S.C. § 4980H).

49. Plaintiffs Autocam employ well over 50 full-time employees in Michigan alone and must provide federal government-approved health insurance under

the Affordable Care Act or pay substantial per-employee fines.

50. Certain provisions of the Affordable Care Act do not apply equally to members of certain religious groups. *See*, *e.g.*, 26 U.S.C. § 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(B)(ii) (individual mandate does not apply to members of "health care sharing ministry" that meets certain criteria).

51. Plaintiffs do not qualify for an individual exemption under 26 U.S.C. § 5000A(d)(2)(a)(i) and (ii) as Plaintiffs do not object to acceptance of public or private insurance funds in their totality and currently enjoy health insurance benefits that exclude contraceptives, sterilization, abortion, and abortifacients.

52. The Affordable Care Act's preventive care requirements do not apply to employers who provide so-called "grandfathered" health care plans. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.

53. Plaintiffs' current insurance plans do not qualify as "grandfathered" health care plans, and are considered "non-grandfathered." Furthermore, Plaintiffs do not qualify for the "religious employer" exemption contained in 45 CFR § 147.130(a)(1)(A) and (B). Since the Plaintiffs do not qualify for the "religious employer" exemption, they are not permitted to

take advantage of the "temporary safe-harbor" as set forth by the Defendants at 77 Fed. Register 8725 (Feb. 15, 2012).

54. Plaintiffs are subject to the Mandate now and must choose between complying with the requirements of the Affordable Care Act in violation of their religious beliefs or paying ruinous fines that would have a crippling impact on their ability to survive economically.

55. Plaintiffs are confronted with complying with the requirements of the Affordable Care Act in violation of their religious beliefs or removing themselves from the health insurance market in its entirety – endangering the health and economic stability of Autocam, its employees, and its employees' families. Indeed, Plaintiffs' current analysis indicates that about half of their employees will become exposed to a premium of sixteen thousand dollars ($16,000) and made liable for up to twelve thousand dollars ($12,000) in costs per year. Other employees will become exposed to a penalty between six-hundred and ninety-five dollars ($695) and over two thousand dollars ($2,000) per year or 2.5% of income (whichever is higher), banking on their ability to purchase coverage after an incident. Plaintiffs must make this decision by November 1, 2012 in order to be able to roll it out to employees on January 1, 2013 so as to comply with federal deadlines relating to plan changes.

56. The Affordable Care Act is not generally applicable because it provides for numerous exemptions from its rules. The Affordable Care Act is not neutral because some groups, both secular and religious, enjoy exemptions from the law, while certain religious groups do not. Some groups, both secular and religious, have received waivers from complying with the provisions of the Affordable Care Act, while others – such as the Plaintiffs – have not.

57. The Affordable Care Act creates a system of individualized exemptions. Under the Affordable Care Act, the United States Department of Health and Human Services has the authority under the Affordable Care Act to grant compliance waivers ("HHS waivers") to employers and other health insurance plan issuers. HHS waivers release employers and other plan issuers from complying with the provisions of the Affordable Care Act. HHS decides whether to grant waivers based on individualized waiver requests from particular employers and other health insurance plan issuers. Upon information and belief, more than a thousand HHS waivers have been granted.

The "Preventive Care" Mandate

58. A provision of the Affordable Care Act mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in

comprehensive guidelines supported by the Health Resources and Services Administration" and directs the Secretary of United States Department of Health and Human Services to determine what would constitute "preventative care" under the mandate. 42 U.S.C. § 300gg-13(a)(4).

59. On July 19, 2010, HHS, along with the United States Department of Treasury and the United States Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010). The interim final rule required providers of group health insurance to cover preventive care for women as provided in guidelines to be published by the Health Resources and Services Administration at a later date. 75 Fed. Reg. 41759 (2010).

60. On February 15, 2012, the United States Department of Health and Human Services promulgated a Mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012. *See* 45 CFR § 147.130(a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration ("HRSA") Guidelines, (http://www.hrsa.gov/womensguidelines).

61. The Mandate was enacted pursuant to statutory authority under the Affordable Care Act.

62. In its ruling, HHS included all FDA-approved contraceptives under the banner of preventive services, including contraception, abortion, and abortifacients such as the "Plan B," known as the "morning-after pill," and "ella," known as the "week-after pill," which operate in a manner similar to the abortion pill RU-486. (http://www.hrsa.gov/womensguidelines).

63. The Mandate's reach seeks to control the decisions of employers, individuals, and also the decisions of *all* insurance issuers. *See* 42 USC § 300gg-13(a)(1),(4). *All* insurance issuers are mandated to include contraception, sterilization, abortion, and abortifacients such as the "morning-after pill," "Plan B," and "ella" in *all* of its group *and* individual plans, not specifically exempted, beginning as of August 1, 2012.

64. Individuals and employers, regardless of the number of employees they employ, will eventually be forced to select an insurance plan that includes what HHS deemed "preventative care." All individuals and employers will be stripped of their choice not to pay for the "preventative care," regardless of whether paying for such "services" violates one's conscience or deeply held religious beliefs.

65. The Mandate reaches even further than the Affordable Care Act to eliminate all employers and individuals from selecting a health insurance plan in which the insurance issuers do not automatically

provide contraception, sterilization, abortion, and abortifacients.

66. Prior to promulgating the Mandate, HHS accepted public comments to the 2010 interim final regulations from July 19, 2010 to September 17, 2010. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for certain kinds of services, including contraception, including abortifacient contraception, and sterilization..

67. HHS directed a private health policy organization, the IOM, to suggest a list of recommended guidelines describing which drugs, procedures, and services should be covered by all health plans as preventative care for women. (http://www.hrsa.gov/womensguidelines). In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These groups were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), John Santelli, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America, and Sara Rosenbaum. All of these groups are notorious supporters of abortion, contraception, including abortifacient contraception, and sterilization.

68. No groups that oppose government-mandated coverage of contraception, sterilization,

abortifacients, abortion, and related education and counseling were among the invited presenters.

69. One year after the first interim final rule was published, on July 19, 2011, the IOM published its recommendations. It recommended that the preventative services include "All Food and Drug Administration approved contraceptive methods." (Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps (July 19, 2011))

70. Preventative services therefore include FDA-approved contraceptive methods such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures.

71. Plan B and "ella" can prevent the implantation of a human embryo in the wall of the uterus and can cause the death of an embryo. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus or to cause the death of an embryo each constitute an "abortion" as that term is used in federal law and Catholic teaching. Consequently, Plan B and "ella" are abortifacients.

72. Thirteen days later, on August 1, 2011, without notice of rulemaking or opportunity for public comment, HHS, the United States Department of Labor, and the United States Department of Treasury adopted the IOM recommendations in full and promulgated the Mandate. The Health Resources and

Services Administration issued guidelines adopting the IOM recommendations. (http://www.hrsa.gov/womens-guidelines).

73. The Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity relating to drugs and services connected with abortion, contraception, including abortifacient contraception, and sterilization.

74. The Mandate went into effect immediately as an interim final rule.

75. HHS did not take into account the concerns of religious organizations in the comments submitted before the Mandate was issued. Instead the Mandate was unresponsive to the concerns stated in the comments submitted by religious organizations.

76. When it issued the Mandate, HHS requested comments from the public by September 30 and indicated that comments would be available online. Upon information and belief, over 100,000 comments were submitted against the Mandate. On October 5, 2011, six days after the comment period ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America. She told the assembled crowd that "we are in a war." She did not state whom she and NARAL Pro-Choice America were warring against.

77. During a congressional hearing on April 26, 2012, Defendant Sebelius admitted that she is totally

unfamiliar with the United States Supreme Court religious freedom cases. Defendant Sebelius showed little concern for the constitutional issues involved in promulgating the Mandate. At the aforementioned congressional hearing, she admitted that prior to issuing the Mandate she did not review any written materials or any sort of legal memo from her general counsel discussing the effects of the Mandate on religious freedom.

78. The Mandate fails to take into account the statutory and constitutional conscience rights of individuals who own and operate for-profit companies but dictates that such individuals must check their religious convictions at the door of the workplace, an approach that is inimical to the great tradition of religious liberty at the heart of the American experiment in self-government.

79. The Mandate requires that Plaintiffs assist, provide, and fund coverage for contraception, including abortifacient contraception, sterilization, and related education and counseling against their conscience in a manner that is contrary to law.

80. The Mandate pressures Plaintiffs to change or violate their religious beliefs or suffer adverse consequences in terms of fines or disadvantages that undermine its ability to conduct business on competitive terms with regard to recruitment and retention of competent employees.

81. The Mandate places the Autocam Plaintiffs at a competitive disadvantage in their efforts to recruit and retain employees and members.

82. The Mandate forces Plaintiffs to provide, fund, and assist its employees and plan participants in the purchase of drugs and services, including counseling, relating to use of contraception, including abortifacient drugs, and drugs, services, and sterilization in violation of Plaintiffs' religious beliefs that doing so is gravely immoral and sinful.

83. 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, Plaintiffs sincerely believe that compliance with the Mandate will deprive them of their ability to share eternal salvation.

84. Plaintiffs have a sincere religious objection to providing coverage for emergency contraceptive drugs such as Plan B and "ella" since they believe those drugs could prevent a human embryo, which they understand to include a fertilized egg before it implants in the uterus, from implanting in the wall of the uterus, causing the death of a person.

85. Plaintiffs consider the prevention by artificial means of the implantation of a human embryo to be an abortion. Plaintiffs believe that Plan B and "ella" can cause the death of the embryo, which is a person. Plan B can prevent the implantation of a human embryo in the wall of the uterus. "Ella" can

prevent the implantation of a human embryo in the wall of the uterus. Plan B and "ella" can cause the death of the embryo. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus constitutes an "abortion" as that term is used in federal law. The use of artificial means to cause the death of a human embryo constitutes an "abortion" as that term is used in federal law.

86. The Mandate forces Plaintiffs to provide emergency contraception, including Plan B and "ella," free of charge, regardless of the ability of insured persons to obtain these drugs from other sources. The Mandate further forces Plaintiffs to fund education and counseling concerning contraception, sterilization, abortifacients, and abortion that directly conflicts with Plaintiffs' religious beliefs and teachings.

87. Plaintiffs cannot cease providing its employees with health insurance coverage without violating their sincere religious conviction that they should take all reasonable steps to support the health and well-being of their employees and their families, particularly given the Plaintiffs knowledge that their employees would be unable to attain similar coverage in the market as it now exists.

88. The Mandate forces Plaintiffs to choose among violating their religious beliefs, incurring substantial fines, or terminating their employee or individual health insurance coverage.

89. The Mandate forces Plaintiffs to choose among violating their religious beliefs, incurring substantial fines, or terminating their employee or individual health insurance coverage.

90. Plaintiffs have already had to devote significant institutional resources, including both staff time and funds, to determine how to respond to the Mandate. Plaintiffs anticipate continuing to make such expenditures of time and money.

The Narrow Discretionary Religious Exemption

91. The Mandate indicates that the HRSA "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A).

92. The Mandate allows HRSA to grant exemptions for "religious employers" who "meet[ ] all of 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)(iv)(B).

93. The Mandate imposes no constraint on HRSA's discretion to grant exemptions to some, all, or

none of the organizations meeting the Mandate's definition of "religious employers." HHS stated that it based the exemption on comments on the 2010 interim final rule. 76 Fed. Reg. 46621.

94. Although Plaintiffs run their company in a manner consistent with their religious convictions, they are not a religious employer as defined by the law.

95. Plaintiffs have confirmed that they will be subject to the Mandate despite the existence of exemptions to the Mandate as none of the exemptions apply to them.

96. It is inevitable given the current state of the law that Plaintiffs will have to comply with the Mandate, despite the fact that Plaintiffs will violate the teachings of their religious beliefs and the teachings of their Catholic faith by directly providing, funding, and/or allowing its members to engage in disseminating information and guidance about where to obtain sterilization, contraception, abortion, or abortifacient services.

The Mandate's Illegality

97. The Mandate issued by the Defendants does not accommodate the Plaintiffs' religious beliefs, which are longstanding religious convictions shared by millions of other Americans.

98. The Mandate not only forces Plaintiffs to finance contraception, abortifacients, abortion, sterilization, and related education and counseling, but also subverts the expression of Plaintiffs' religious beliefs, and the beliefs of millions of other Americans, by forcing Plaintiffs to fund, promote, and assist others to acquire and use drugs and services which Plaintiffs believe involve gravely immoral practices, including the destruction of innocent human life.

99. The Mandate unconstitutionally coerces Plaintiffs to violate their deeply held religious beliefs under threat of directly violating their consciences, in addition to any imposed fines and penalties. The Mandate also forces Plaintiffs to fund government-dictated speech that is directly at odds with their own speech and religious beliefs. Having to pay a fine to the taxing authorities or being entirely forced out of the insurance market in order to ensure the privilege of practicing one's religion or controlling one's own speech substantially burdens Plaintiffs' religious liberty and freedom of speech under the First Amendment.

100. Complying with the Mandate requires a direct violation of the Plaintiffs' religious beliefs because it would require Plaintiffs to pay for and assist others in paying for or obtaining not only contraception and sterilization but also abortion, because certain drugs and devices such as "Plan B," and "ella" come within the Mandate's and Health Resources and Services Administration's definition of

"Food and Drug Administration-approved contraceptive methods" despite their known abortifacient mechanisms of action.

101. The Defendants' refusal to accommodate the conscience of the Plaintiffs, and of other Americans who share the Plaintiffs' religious views, is highly selective. Numerous exemptions exist in the Affordable Care Act which appear arbitrary and were granted to employers who purchase group insurance. This evidences that Defendants do not mandate that all insurance plans need to cover "preventative services" (e.g., the thousands of waivers from the Affordable Care Act issued by Defendants for group insurance based upon the commercial convenience of large corporations, the age of the insurance plan, or the size of the employer).

102. Although the Defendants have granted waivers to those whose requests they believe are "legitimate" no exemption exists for an employer or individual whose religious conscience instructs him that certain mandated services are immoral and gravely sinful. Defendants' plan fails to give the same level of weight or accommodation to the exercise of one's fundamental First Amendment freedoms that it assigns to the yearly earnings of a corporation.

103. The Defendants' actions violate Plaintiffs' right to freedom of religion, as secured by the First Amendment to the United States Constitution and civil rights statutes, including the Religious Freedom Restoration Act (RFRA).

104. The Defendants' actions also violate Plaintiffs' right to the freedom of speech, as secured by the First Amendment to the United States Constitution.

105. Furthermore, the Mandate is also illegal because it was imposed by Defendants without prior notice or sufficient time for public comment, and otherwise violates the Administrative Procedure Act, 5 U.S.C. § 553.

106. Had Plaintiffs' religious beliefs, or the beliefs of the million other Americans who share Plaintiffs' religious beliefs been obscure or unknown, the Defendants' actions might have been an accident. But because the Defendants acted with full knowledge of those beliefs, and because they arbitrarily exempt some plans for a wide range of reasons other than religious conviction, the Mandate can be interpreted as nothing other than a deliberate attack by the Defendants on the Catholic Church, the religious beliefs held by Plaintiffs, and the similar religious beliefs held by millions of other Americans. The Defendants have, in sum, intentionally used government power to force individuals to believe in, support, and endorse the mandated services manifestly contrary to their own religious convictions, and then to act on that coerced belief, support, or endorsement. Plaintiffs seek declaratory and injunctive relief to protect against this attack.

CLAIMS

COUNT I
(Violation of the First Amendment to the United States Constitution – Free Exercise Clause)

107. Plaintiffs incorporate by reference all preceding paragraphs.

108. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage for contraception, abortion, sterilization, and related education and counseling either directly or through entities that they own, operate, and control. Plaintiffs' compliance with these beliefs is a religious exercise.

109. Neither the Affordable Care Act nor the Mandate is neutral.

110. Neither the Affordable Care Act nor the Mandate is generally applicable.

111. Defendants have created categorical exemptions and individualized exemptions to the Mandate.

112. The Mandate furthers no compelling governmental interest.

113. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

114. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

115. The Mandate chills Plaintiffs religious exercise.

116. The Mandate exposes Plaintiffs Autocam to substantial fines for their religious exercise and, accordingly, imposes a substantial cost on their owners and operators for their religious exercise.

117. The Mandate exposes Plaintiffs to monetary and health risks as they will no longer be able to purchase or provide health care insurance without violating their religious beliefs.

118. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

119. The Mandate is not narrowly tailored to any compelling governmental interest.

120. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

121. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT II
(Violations of the first Amendment to the United States Constitution – Free Exercise Clause)

122. Plaintiffs incorporate by reference all preceding paragraphs.

123. Plaintiffs' sincerely held religious beliefs prohibit them or a business under their ownership or control from voluntarily and knowingly purchasing or providing coverage for contraception, sterilization, abortifacients, abortion, and related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

124. Despite being informed in detail of these beliefs beforehand, Defendants designed the Mandate and the religious exemption to the Mandate in a way that made it impossible for Plaintiffs to comply with their religious beliefs.

125. Defendants promulgated both the Mandate and the religious exemption to the Mandate in order to suppress the religious exercise of Plaintiffs and others.

126. The Mandate and Defendants' threatened enforcement of the Mandate thus violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

127. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT III
(Violation of the First Amendment to the United States Constitution – Free Exercise Clause)

128. Plaintiffs incorporate by reference all preceding paragraphs.

129. By design, Defendants imposed the Mandate on some religious organizations or religious individuals but not on others, resulting in discrimination among religions.

130. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

131. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no religious individuals.

132. The Mandate and Defendants' threatened enforcement of the Mandate thus violate Plaintiffs' rights secured to it by the Free Exercise Clause of the First Amendment of the United States Constitution.

133. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IV

(Violation of the First Amendment to the United States Constitution – Establishment Clause)

134. Plaintiffs incorporate by reference all preceding paragraphs.

135. By design, defendants imposed the Mandate on some organizations and individuals but not on others, resulting in a selective burden on Plaintiffs.

136. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

137. The Mandate also vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no individuals.

138. The Mandate and Defendants threatened enforcement of the Mandate therefore violates Plaintiffs' rights secured to it by the Establishment Clause of the First Amendment to the United States Constitution.

139. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT V

(Violation of the First Amendment to the United States Constitution – Freedom of Speech)

140. Plaintiffs incorporate by reference all preceding paragraphs.

141. Plaintiffs profess that contraception, sterilization, abortion, and abortifacients violate their religious beliefs.

142. The Mandate would compel Plaintiffs to provide or subsidize activities that Plaintiffs profess are violations of the Plaintiffs' religious beliefs.

143. The Mandate would compel Plaintiffs to fund and to provide education and counseling related to contraception, sterilization, abortion, and abortifacients.

144. Defendants' actions thus violate Plaintiffs' right to be free from compelled speech as secured to it by the First Amendment of the United States Constitution.

145. The Mandate's compelled speech requirement is not narrowly tailored to a compelling governmental interest.

146. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VI
(Violation of the First Amendment to the United States Constitution – Expressive Association)

147. Plaintiffs incorporate by reference all preceding paragraphs.

148. Plaintiffs support, contribute to, and affiliate with other individuals and organizations for [sic] that share a religious objection to contraception, sterilization, abortion, and abortifacients.

149. The Mandate would compel Plaintiffs to subsidize activities that are violations of Plaintiffs' religious beliefs.

150. The Mandate would compel Plaintiffs to fund and to provide education and counseling related to contraception, sterilization, abortion, and abortifacients.

151. Defendants' actions thus violate Plaintiffs' right of expressive association as secured to [sic] by the First Amendment of the United States Constitution.

152. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VII
(Violation of the First Amendment to the United States Constitution – Free Exercise Clause and Freedom of Speech)

153. Plaintiffs incorporate by reference all preceding paragraphs.

154. By stating that HRSA "may grant an exemption to certain religious groups, the Mandate vests HRSA with unbridled discretion over which organizations or individuals can have its First Amendment interests accommodated. *See* 26 U.S.C. § 5000A(d)(2)(a)(i)-(ii).

155. The Mandate furthermore seems to have completely failed to address the constitutional and statutory implications of the Mandate on for-profit, secular employers such as Plaintiffs Autocam. As such, Plaintiffs Autocam and its owners and operators are subject to the unbridled discretion of HRSA to determine whether it would be exempt.

156. Defendants' actions therefore violate Plaintiffs' right not to be subjected to a system of unbridled discretion when engaging in speech or when engaging in religious exercise, as secured to it by the First Amendment of the United States Constitution.

157. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VIII
(Violation of the Religious Freedom Restoration Act)

158. Plaintiffs incorporate by reference all preceding paragraphs.

159. Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing coverage for contraception, sterilization, abortion, abortifacients, and related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

160. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

161. The Mandate chills Plaintiffs' religious exercise.

162. The Mandate exposes Plaintiffs Autocam to substantial fines for their religious exercise and the religious exercise of their owners, thus causing financial injury to their owners.

163. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

164. The Mandate furthers no compelling governmental interest.

165. The Mandate is not narrowly tailored to any compelling governmental interest.

166. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

167. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to it by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

168. Absent injunctive and declaratory relief against the Defendants, Plaintiffs have been and will continue to be harmed.

COUNT IX
(Violation of the Administrative Procedure Act)

169. Plaintiffs incorporate by reference all preceding paragraphs.

170. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute "good cause."

171. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by completing a meaningful "consideration of the relevant matter presented." Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule.

172. Therefore, Defendants have taken agency action not in observance with procedures required by

law, and Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

173. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT X
(Violation of the Administrative Procedure Act)

174. Plaintiffs incorporate by reference all preceding paragraphs.

175. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the mandate on Plaintiffs and similar companies and individuals.

176. Defendants' explanation for its decision not to exempt Plaintiffs and similar employers and individuals from the Mandate runs counter to the evidence submitted by religious organizations during the comment period.

177. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rules fail to consider the full extent of their implications and because they do not take into consideration the evidence against them.

178. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT XI
(Violation of the Administrative Procedure Act)

179. Plaintiffs incorporate by reference all preceding paragraphs.

180. The Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (September 30, 2008).

181. The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for Defendants United States Department of Labor and United States Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

182. The Mandate requires issuers, employers, and individuals, including Plaintiffs to provide and purchase coverage of all Federal Drug Administration-approved contraceptives.

183. Some FDA-approved contraceptives cause abortions.

184. As set forth above, the Mandate violates RFRA and the First Amendment.

185. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the Administrative Procedure Act.

186. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT XII
(Violation of the Administrative Procedure Act)

187. Plaintiffs incorporate by reference all preceding paragraphs.

188. The Mandate is contrary to the provisions of the Affordable Care Act.

189. Section 1303(b)(1)(A) of the Affordable Care Act states that "nothing in this title" – i.e., title I of the Act, which includes the provision dealing with "preventive services" – "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."

190. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.

191. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.

192. However, the Mandate requires all issuers, including Plaintiffs and Plaintiffs' insurance issuer

Blue Cross/Blue Shield of Michigan, to provide coverage of all Federal Drug Administration-approved contraceptives.

193. Some FDA-approved contraceptives cause abortions.

194. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the Administrative Procedure Act.

195. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs request that this honorable Court:

a. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the First Amendment to the United States Constitution;

b. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Religious Freedom Restoration Act.

c. Declare that the Mandate was issued in violation of the Administrative Procedure Act;

d. Issue both a preliminary and a permanent injunction prohibiting and enjoining Defendants from enforcing the Mandate against Plaintiffs and other

religious individuals, employers, and companies that object to funding and providing insurance coverage for contraceptives, sterilization, abortion, abortifacients, and related education and counseling;

e. Award Plaintiffs the costs of this action and reasonable attorney's fees; and

f. Award such other and further relief as it deems equitable and just.

Respectfully submitted,

MILLER JOHNSON
Counsel for Plaintiffs

Dated: October 8, 2012

/s/ *Jason C. Miller*

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to be filed.

VERIFICATION

COUNTY OF KENT)

) ss

STATE OF MICHIGAN)

Pursuant to 28 U.S.C. §1746 I declare under penalty of perjury of the laws of the United States that the factual statements set forth above are true accurate to the best of my knowledge, information, and belief.

/s/ John Kennedy
John Kennedy, individually
and on behalf of Autocam
Corporation and Autocam
Medical, LLC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*

Defendants. /

Case No. 1:12-cv-01096-RJJ

DECLARATION OF JOHN KENNEDY

Pursuant to 28 U.S.C. § 1746, John Kennedy declares:

1. This Declaration is submitted in support of Plaintiffs' motion for preliminary injunction.

2. I am above the age of 18, of sound mind, and have personal knowledge as to the matters set forth herein.

3. I am the President and Chief Executive Officer of the Autocam corporations that are plaintiffs in this suit (referred to herein collectively as "Autocam").

4. Autocam does not meet the definition of a grandfathered plan. On January 1, 2011, Autocam's insurance plans were changed for reasons unrelated to the issues in this lawsuit. Autocam's plans have not continuously covered someone since March 23,

2010. Because of this, Autocam has been advised by its insurer and others that it is not considered grandfathered and will be subject to the HHS Mandate at its next plan year, which begins January 1, 2013.

5. We filed this lawsuit as soon as it was practical [sic] do so after consulting with our insurance provider. It took significant time to consult with our insurance provider and to asses [sic] any alternatives available to our employees in the private market and under the state exchanges contemplated by the PPACA. Autocam received its most recent (but still tentative) assessment of probable impact on its employees on October 2, 2012. It was not until that point that we had a realistic sense of the drastic and negative consequences our employees would suffer if Autocam was required to cease coverage in response to the HHS Mandate. This lawsuit was filed shortly after receiving that assessment. In particular, it took significant time to assess the status of the creation of the exchanges themselves in Michigan, as the political situation is in flux. It now seems certain that Michigan's exchanges will not take effect until 2014. This situation effectively leaves our employees with no other options to purchase affordable coverage comparable to Autocam's plan in 2013. In addition, the information about the coverage options that will be available to my employees indicates that many will be drastically and adversely affected if forced to seek coverage through the exchanges. My goal is to be able to preserve my existing plan, which provides generous benefits to my employees in keeping with

my commitment to living out the social teachings of the Catholic Church, without being forced to cooperate in the provision of drugs and services that I believe are intrinsically evil.

6. Autocam currently provides generous wages and benefits to its employees. The average W-2 income for an hourly worker at Autocam is approximately $53,000 per year. Salaried employees typically earn more than hourly workers. Autocam also provides up to $1,500 per year towards a health savings account for our employees. These funds are owned by the employees and can be used for any lawful purpose.

7. We do not seek to control what an employee or his or her dependants do with the wages and healthcare dollars we provide. Our employees are free to make decisions with their money including the funds in their personal health savings account – that we do not agree with. Because our plan does not pay for the drugs and services that we object to, we are not engaging in material cooperation with evil.

8. Under Autocam's self-insured plan, application of the HHS Mandate would require us to directly pay for the purchase of drugs and services, including abortifacient drugs, in violation of our beliefs. Under Catholic doctrine, our financial support for these drugs and services through a self-insured plan would be material cooperation of evil. I cannot do that. But I do not want to terminate the benefits programs we have in place because all the information that I have

currently available indicates that many of my employees will suffer drastic adverse consequences.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2012

/s/ John Kennedy
John Kennedy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*

Defendants. /

Case No. 1:12-cv-01096-RJJ

SUPPLEMENTAL DECLARATION OF JOHN KENNEDY

Pursuant to 28 U.S.C. § 1746, John Kennedy declares:

1. I am above the age of 18, of sound mind, and have personal knowledge as to the matters set forth herein.

2. I am the President and Chief Executive Officer of the Autocam corporations that are plaintiffs in this suit (referred to herein collectively as "Autocam").

3. Autocam's health insurance plan lost the possibility of grandfathering by virtue of a change in coverage effective on January 1, 2011. On that date, the plan was changed from having a $500 (single plan) deductible / $1,000 (family plan) deductible with 80-20% coinsurance to a high deductible health plan with a $2,000 (single) deductible / $4,000 (family) deductible in which Autocam contributes $1,500 in

matching funds dollar for dollar annually to each employee's Health Savings Account (HSA).

4. The change was made as part of Autocam's effort to preserve a top-notch employee benefits plan with the same approximate out-of-pocket cost to each employee ($2,500 per year) While moving to a more consumer-oriented healthcare plan.

5. Autocam cannot comply with the HHS Mandate based on religious convictions. The actual expense for Autocam to comply with the HHS Mandate would be approximately $100,000 per year. The penalty for failure to comply, on the other hand, is approximately $19,000,000 per year based on the employees now covered by the plan.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 14, 2012.

/s/ John Kennedy
John Kennedy