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 sub-agency 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]

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

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

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. 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 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

[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.

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