IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W.L. (BILL) ARMSTRONG; JEFFREY S. MAY; WILLIAM L. (WIL) ARMSTRONG III; JOHN A. MAY; DOROTHY A. SHANAHAN; and CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services, et al.,

Defendants-Appellees

No. 13-1218

Defendants' Opposition To Plaintiffs' Motion For Injunction Pending Appeal; and Defendants' Motion To Remand This Case To District Court

Plaintiffs' appeal presents the same legal question that was decided by the en banc Court in *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013): whether the Religious Freedom Restoration Act ("RFRA") allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law. The five-judge majority in *Hobby Lobby* held that the plaintiff corporations were likely to succeed on the merits of their RFRA claims. The

majority further held that the corporations would experience irreparable harm in the absence of a preliminary injunction. A four-judge plurality would have resolved the two remaining preliminary injunction factors (balance of equities and public interest) in the corporations' favor, but the Court lacked a majority to do so. Accordingly, this Court remanded the case to allow the district court to evaluate those two factors in the first instance.[1]

A similar disposition is appropriate in this appeal. The district court denied a preliminary injunction from the bench on May 10, 2013, before this Court issued its en banc decision in *Hobby Lobby*. The district court did not address the irreparable harm, balance of equities, or public interest factors. Recently, however, the district court indicated that it is prepared to reconsider its preliminary injunction ruling in light of the en banc decision in *Hobby Lobby*, if this Court gives it jurisdiction to do so through a remand order. *See* R.54 (8/19/2013 order) (copy attached). Therefore, this Court should remand this case to district court.

This Court has discretion to accomplish such a remand through either of two procedural mechanisms. This Court may summarily reverse the denial of a preliminary injunction and remand to allow the district court to address the remaining preliminary injunction factors. Such a remand also will permit the

[1] On remand, the district court in *Hobby Lobby* issued a preliminary injunction and stayed proceedings until October 1, 2013, to allow the government to determine whether to seek Supreme Court review of the en banc decision.

district court to consider whether plaintiffs' delay in bringing this suit counsels against issuance of a preliminary injunction, an issue that did not arise in *Hobby Lobby*. That approach would dispose of this appeal entirely. Alternatively, this Court may suspend this appeal and remand to district court pursuant to Rule 12.1 of the Federal Rules of Appellate Procedure, which authorizes such a remand when, as here, the district court indicates that it is prepared to reconsider a matter over which it lacks jurisdiction because it is the subject of a pending appeal. We defer to the Court's judgment regarding which approach to take.

Plaintiffs instead ask this Court to decide, in the first instance, whether the balance of equities and public interest warrant a preliminary injunction in their case. *See* Pl. Mot. 16-20. That approach would be inconsistent with the en banc decision in *Hobby Lobby*, which held that these preliminary injunction factors should be addressed by the district court in the first instance.

BACKGROUND

1. Plaintiff Cherry Creek Mortgage Company, Inc., is a full-service residential mortgage banking corporation. *See* R.1 ¶ 3. The corporation is licensed to do business in 27 states and has 730 full-time employees throughout its various locations. *See* R.1 ¶¶ 3, 51. People employed by the corporation received health coverage for themselves and their family members through the Cherry Creek Mortgage Company group health plan, which is provided by CIGNA, the

company's insurer. *See* R.1 ¶ 50. About 400 employees and their dependents are participants in this group health plan. *See* R.1 ¶ 51.

In December 2012, plaintiffs discovered that the Cherry Creek Mortgage Company group health plan covers Food and Drug Administration ("FDA")-approved contraceptives. *See* R.1 ¶ 53. Plaintiffs allege that the controlling shareholders of the corporation regard certain contraceptives (intrauterine devices, Plan B and Ella) as contrary to their religious beliefs because the devices and drugs may prevent the implantation of a fertilized egg in a woman's uterus. *See* R.1 ¶¶ 6, 53. The corporation, however, does not hire employees on the basis of their religion, and the employees thus are not required to share the religious beliefs of the company's controlling shareholders.

In this suit, plaintiffs contend that, under RFRA and the First Amendment, the Cherry Creek Mortgage Company's group health plan must be exempted from the federal requirement to cover all forms of FDA-approved contraceptives, as prescribed by a health care provider. The district court denied plaintiffs' motion for a preliminary injunction in a ruling issued from the bench on May 10, 2013. *See* R.38 (minute order). The court addressed the merits of plaintiffs' claims but it did not evaluate the remaining preliminary injunction factors, nor did the court decide whether plaintiffs' delay in bringing this suit counsels against issuance of a preliminary injunction. *See* R.42 at 87-99 (transcript).

Plaintiffs filed a notice of appeal on May 16, 2013. *See* R.39. The appeal was held in abeyance pending this Court's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), which presented the same legal issue.

2. On June 27, 2013, this Court issued its en banc decision in *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013). The five-judge majority held that the plaintiff corporations are likely to succeed on the merits of their RFRA claims. *See id*. at *1. The majority further held that the corporations would experience irreparable harm in the absence of a preliminary injunction. *See id* at *2. A four-judge plurality would have resolved the two remaining preliminary injunction factors (balance of equities and public interest) in the corporations' favor, but the Court lacked a majority to do so. *See ibid*. Accordingly, this Court remanded the case to allow the district court to evaluate those two factors in the first instance. *See ibid*.

On remand, the district court in *Hobby Lobby* entered a preliminary injunction. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. Civ. 12-1000 (W.D. Okla.), 7/19/13 Order (R.76). The district court also granted a stay of proceedings until October 1, 2013, to allow the government to determine whether to seek Supreme Court review of the en banc decision. *See id*. at 3.

3. After this Court issued its en banc decision in *Hobby Lobby*, plaintiffs in this case moved in district court for injunctive relief, which the government

opposed. The district court requested supplemental briefing regarding (*inter alia*) its authority to reconsider its preliminary injunction ruling in light of this Court's *Hobby Lobby* decision. *See* 8/1/13 Order at 2 (R.50). The order asked whether the pendency of this appeal divests the district court of jurisdiction to enter a preliminary injunction. *See ibid*.

In its response, the government explained that the pendency of this appeal divests the district court of jurisdiction to enter a preliminary injunction. *See* R.51 at 2-5. The government further explained that, if the district court was inclined to grant a preliminary injunction over the government's opposition, the Federal Rules of Civil Procedure provide a mechanism by which the district court could obtain jurisdiction to do so. *See id*. at 5. The government explained that the district court could indicate, pursuant to Rule 62.1 of the Federal Rules of Civil Procedure, that it would grant plaintiffs' motion if this Court remands for that purpose. *See ibid*.

On August 19, the district court issued an order that indicated that it is prepared to reconsider its preliminary injunction ruling if this Court remands to allow the district court to do so. *See* R.54. The order stated, in pertinent part:

> If (1) plaintiffs file a motion to suspend their appeal pending reconsideration of the injunction issue by this Court, which the government has indicated it will not oppose, or (2) the defendant files a similar motion in the Circuit, and (3) either as a result of such a motion by either party or *sua sponte* the Tenth Circuit remands the case to this Court to reconsider its decision in light of *Hobby Lobby*, the Court will then do so.

Id. at 2.

ARGUMENT

In *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013), this Court held that RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law. We respectfully submit that the decision is incorrect for the reasons set out in Chief Judge Briscoe's dissent and the Third Circuit's subsequent decision in *Conestoga Wood Specialties Corp. v. HHS*, __ F.3d __, 2013 WL 3845365 (3d Cir. July 26, 2013). We recognize, however, that the en banc decision in *Hobby Lobby* is controlling precedent within this Circuit unless and until its reasoning is rejected by the Supreme Court. Therefore, the disposition of this appeal should be consistent with the disposition of the appeal in *Hobby Lobby*.

To that end, this Court should remand this case to permit the district court to evaluate the preliminary injunction factors (balance of equities and public interest) that this Court did not resolve in *Hobby Lobby*. It is also appropriate to allow the district court to consider whether plaintiffs' delay in bringing suit counsels against issuance of a preliminary injunction, an issue that did not arise in *Hobby Lobby*.

This Court has discretion to accomplish such a remand through either of two procedural mechanisms. This Court may reverse the denial of a preliminary injunction and remand for further proceedings in district court. That approach,

which disposes of this appeal entirely, mirrors the disposition of *Hobby Lobby*. Alternatively, this Court may suspend this appeal and remand to district court pursuant to Rule 12.1 of the Federal Rules of Appellate Procedure, which authorizes such a remand when, as here, the district court indicates that it is prepared to reconsider a matter that is the subject of a pending appeal. We defer to the Court's judgment regarding which approach to take.

Plaintiffs instead ask this Court to decide, in the first instance, whether the balance of equities and public interest warrant a preliminary injunction. *See* Pl. Mot. 16-20. That approach is inconsistent with this Court's decision in *Hobby Lobby*, which held that these preliminary injunction factors should be addressed by the district court in the first instance.[2]

[2] Plaintiffs note that, within certain circuits, the government has not opposed preliminary injunctions, but that is because those circuits had already issued injunctions pending appeal in comparable cases. This Court, by contrast, did not issue injunctive relief in *Hobby Lobby* and instead remanded to the district court to determine whether such relief is warranted.

CONCLUSION

This Court should deny plaintiffs' motion for an injunction pending appeal, and remand this case to permit the district court to reconsider its preliminary injunction ruling in light of this Court's *Hobby Lobby* decision.

Respectfully submitted,

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August 23, 2013

CERTIFICATIONS

I hereby certify that:

1. on August 23, 2013, I filed and served the foregoing document on counsel of record through this Court's CM/ECF system;

2. all required privacy redactions have been made;

3. any required paper copies are exact versions of the document submitted electronically;

4. this electronic document was scanned for viruses with the most recent version of a commercial virus scanning program and found to be virus free.

/s Alisa B. Klein
_____
Alisa B. Klein

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 13-cv-00563-RBJ

W.L. (BILL) ARMSTRONG;
JEFFREY S. MAY;
WILLIAM L. (WIL) ARMSTRONG III;
JOHN A. MAY;
DOROTHY A. SHANAHAN; and
CHERRY CREEK MORTGAGE CO., INC.,
a Colorado corporation,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor,
JACOB J. LEW, in his official capacity as Secretary of the United States Department of Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

ORDER

The parties' respective responses to the Court's order of August 1, 2013 show that they sharply disagree as to whether plaintiffs' pending appeal divests this Court of jurisdiction to reconsider its denial of a preliminary injunction in light of the en banc decision in *Hobby Lobby Stores, Inc. v. Sebelius,* 2013 WL 3216103 (10th Cir. June 27, 2013). They do appear to agree that if the Court has, or reacquires, jurisdiction, an evidentiary hearing is not necessary.

If (1) plaintiffs file a motion to suspend their appeal pending reconsideration of the injunction issue by this Court, which the government has indicated it will not oppose, or (2) the defendant files a similar motion in the Circuit, and (3) either as a result of such a motion by either party or *sua sponte* the Tenth Circuit remands the case to this Court to reconsider its decision in light of *Hobby Lobby*, the Court will then do so.

DATED this 19th day of August, 2013.

BY THE COURT:

R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-00563-RBJ-BNB

W. L. (BILL) ARMSTRONG; JEFFREY S. MAY; WILLIAM L. (WIL) ARMSTRONG III; JOHN A. MAY; DOROTHY A. SHANAHAN; and CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor; JACK LEW, in his official capacity as Secretary of the United States Department of the Treasury; the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; the UNITED STATES DEPARTMENT OF LABOR; and the UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

REPORTER'S TRANSCRIPT
HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Proceedings before the HONORABLE R. BROOKE JACKSON, Judge, United States District Court for the District of Colorado, commencing at 9 a.m., on the 10th day of May, 2013, in Courtroom A902, Alfred A. Arraj United States Courthouse, Denver, Colorado.

Proceeding Reported by Mechanical Stenography, Transcription Produced via Computer by Kara Spitler, RMR, CRR, 901 19th Street, Denver, CO, 80294, (303) 623-3080

Kara, I'm going to rule from the bench. Are you still okay?

THE REPORTER: Yes.

THE COURT: I certainly have considered the briefs. I found them very interesting to read and good arguments and I wanted to say to you lawyers and others that this kind of a case is really why one wants to be a federal judge. You've got fairly interesting, difficult, challenging issues, good counsel, and that's really what we live for. At the same time, this case and the abortion issues generally I think maybe call for wisdom that no judge really can have. They're just too difficult. And our country and our society are just too divided with people very sincerely feeling really strongly on both sides. And the courts have a job to do, but it's not an easy job at all.

And I do not shrink from the job. Mr. Norton said at the beginning that it is my duty, and he's absolutely correct, to decide cases that come before me. And I will decide this motion this morning.

But as I will say as we move forward here, it comes before this Court from a unique and different way than I think it has probably come before most other courts who have considered the issue. The issue really today is whether or not the Court should grant an injunction. This is not the "decision on the merits" day. This is injunction day.

Possibly the first of more than one injunction day in this case.

It was a little curious to me that in the plaintiffs' lengthy and excellent brief, they did not really get to the injunction issues until page 63 or so. But they are on page 1 for me because that's what I face.

The issue is whether the Court should grant a preliminary injunction by reason of a substantial likelihood that the plaintiffs can and will be able to prove a violation of the Religious Freedom Restoration Act of 1993, which we have been calling RFRA, reported at 42 U.S.C. section 2000bb-1. That statute is the focus of my attention today because as both parties have said, and I agree, that provides even more protection for religious freedom and the free exercise of religion even than the Constitution does; and therefore if the plaintiffs cannot establish their right to an injunction under the RFRA statute, the Court need go no further in exploring the other constitutional issues.

RFRA has two basic parts. The first part is a burden on the plaintiff. The plaintiff must show that the government action has substantially burdened the plaintiffs' exercise of sincerely held religious beliefs. If the plaintiff presents a *prima facie* case of substantial burden, then it turns to the government to show that there is, notwithstanding the burden, a compelling governmental interest that furthers the existence of

the burden and that the way in which the government tackled the compelling governmental interest is the least restrictive means of furthering that compelling interest.

And that takes me to the Hobby Lobby case. I'm speaking of Hobby Lobby Stores, Inc., vs. Sebelius, reported at 2012 WL 6930302, a decision of a two-judge motions panel from the Tenth Circuit issued in November 2012. The panel was addressing a request for an injunction pending appeal of a decision of Judge Heaton of the western district of Oklahoma, which decision is reported at 870 F.Supp.2d 1278, also a 2012 decision. And in the underlying case in Oklahoma, the plaintiff raised substantially the same issues as are raised in the present case. That is not surprising at all because I have found in all of the cases I have read -- and I most certainly haven't read the 25 plus or minus cases, all of them, that the parties have referred to -- but in the ones that I have read, the issues are substantially the same.

And that is that a for-profit corporation is owned and operated by individuals who have sincere, very sincerely held religious beliefs and feel that it is offensive to and a burden on their religious beliefs if their company is forced to provide coverage, insurance coverage, so that females can obtain contraceptives and, as they see it, abortion products. They want no involvement in that; they want no association with that; and they feel that the federal statute that we're all

talking about here today -- I don't have the citation committed to memory -- the Patient Protection and Affordable Care Act, and regulations issued pursuant to that act, forces upon them.

In the Oklahoma decision by Judge Heaton, he examined the various issues in a really lengthy opinion in which he denied Hobby Lobby's request for a preliminary injunction. And according to the lawyers here today, or at least plaintiffs' counsel, that put Judge Heaton in the minority of district court judges around the country who have ruled on the issue. But for better or for worse, the plaintiffs in Hobby Lobby went to the Tenth Circuit and filed a motion for an injunction pending their appeal of Judge Heaton's decision. And that is how it came before Judges Ebel and Lucero of the Tenth Circuit.

In the written decision of the motion panel, the panel addressed a number of issues that we have heard discussed here today. To begin with, the panel noted, as Mr. Norton has also noted, that it would and did assess the same factors in dealing with the motion before them as will control the merits of the Tenth Circuit panel's review with respect to the injunction issue. So there is no distinction between considering it on a motion for preliminary -- for injunction pending appeal heard by the two judges than the factors that will control the merits of the issue.

They then went on to discuss whether there is a so-called heightened burden on the plaintiffs because it is one

of the disfavored types of injunctions, such as injunctions that alter the status quo, mandatory injunctions, injunctions that afford the movant all of the relief it could recover at the conclusion of a full trial on the merits. And the panel said no. It is not that type of injunction; we will apply the normal four-factor test for a preliminary injunction. To that extent, at least, the panel favored the position of the plaintiffs.

It's interesting here that to the extent that there are differences between this case and Hobby Lobby, one of them is that you could look at this case as seeking an injunction that alters the status quo. The status quo that affects the Cherry Creek plaintiffs is that whether or not they were aware of it or agreed to it, which they did not, their policy has been and is providing this kind of coverage and has been doing that for quite some period of time, many months at least. And so in that sense, the injunction that they ask the Court to issue today would alter that status quo.

However, I'm not sure that that's the way that we should look at it. I think the way that the Tenth Circuit seemed to look at it really was whether the injunction would alter the status quo that existed before this type of coverage was required. And in that sense, there wouldn't be a heightened burden. I don't have to decide that today. It's not material to me because I am perfectly comfortable applying

the normal four-part test, as did the Tenth Circuit panel.

Under that test, the moving party, here the plaintiffs, must show:

1. A substantial likelihood of success on the merits. That makes perfect sense. They're trying to stop this government program in its tracks pending the ultimate decision by the Court on the merits. And you can't come and ask a court to enjoin something unless you are prepared to show that there's a substantial likelihood that you ultimately will prevail.

Secondly, that you have suffered and are suffering irreparable injury.

Third, that the threatened injury outweighs any damage that the injunction may cause the opposing party.

And 4, that the injunction would not be adverse to the public interest.

There's been some discussion of the second of those factors today, irreparable injury. The government claims that there's no irreparable injury because the plaintiffs have sat on their rights. They knew in December that this was in their plan, but they did not file a case until March and so far as the Court is aware, made little, if any, effort to obtain an immediate, emergent, forthwith injunctive hearing, putting us here in May, five to six months after they learned of it.

I don't think I have to decide the irreparable injury

issue, but I do want to comment on one aspect of it that's a little unique here. And that is we are two weeks away from an argument in front of the Tenth Circuit *en banc* on the very issues that we are addressing today. It does seem to me that if the plaintiffs were willing to wait three months to file the suit and five months to have their argument, it's a little difficult for them to complain that they will suffer irreparable injury by having to wait two weeks, plus whatever amount of time the *en banc* panel may need to use to put together their decision. We are simply so close to having a decision that will control and bind the Court that I think their irreparable injury argument is difficult to make.

But the circuit doesn't discuss irreparable injury, and I'm not saying that I'm deciding this case based on the lack of irreparable injury. I don't think I need to do that.

The circuit then addressed the troublesome issue of what is the standard that applies to whether there is a substantial likelihood of success. You might think that substantial likelihood of success means just what it says, but courts find ways sometimes to interpret language in a different way than maybe other people would interpret the same language. And courts have said that if the other three factors; namely, irreparable injury, does the threatened injury outweigh any damage, would it be adverse to the public interest. If those factors weigh particularly heavily in favor of the plaintiff,

then the court is prepared to apply what it calls a relaxed type of standard regarding substantial likelihood of success. Basically if there are substantial, difficult, unresolved issues, we should keep our pants on and wait until we get to the merits; but it's good enough for a preliminary injunction.

The Tenth Circuit rejected the notion that the relaxed standard should apply. They did so because of previous Tenth Circuit law which they quoted, and I quote, Where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous "fair ground for litigation standard" should not be applied.

Let me pause for a moment to reflect on what the motions-panel decision means to me. Is it binding on me as binding precedent? No. The decision of the *en banc* panel will be. But the decision of Judges Ebel and Lucero is not. On the other hand, is it relevant to me? Absolutely relevant to me. I'm a trial court. The Tenth Circuit is my boss. They tell me what the law is, and I apply it. Even though we don't have a binding, final decision on the merits, that, again, to be discussed by the circuit in two weeks, we have the decision of two experienced, highly reputable judges who have said what they think about these issues that I face today; and it would be idiotic for me not to consider that to be relevant.

Furthermore -- and I'll come back to this point --

with respect to the decision on which it reached its decision -- on the basis on which it reached its decision, the motion panel said, quote, Again, we do not think there is a substantial likelihood that this court -- referring to the Tenth Circuit court -- will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship.

So what we have, folks, is two judges of the Tenth Circuit deciding these issues. Two judges of the Tenth Circuit saying, we do not think this court will view them differently. And a decision practically around the corner from that court. I cannot help but be affected in my thinking by that unusual combination of circumstances.

Anyway, having rejected relaxed standard regarding substantial likelihood of success, the panel then went on to say that the plaintiffs had failed to satisfy the first of the two RFRA elements, *i.e.*, that the challenged mandates substantially burdened their exercise of religion. I think it's only fair at this point to note that they did not, the government does not, and certainly I do not, doubt even for a second that the plaintiffs here not only have sincerely held religious beliefs as they have articulated them, but that they sincerely believe that this program imposes a substantial burden on those beliefs and their right to exercise those beliefs. That is clear to me.

But that isn't the issue. The issue is not whether do they believe it's a substantial burden, but whether it is a substantial burden, and on that issue the court found that the plaintiffs there had not shown that it was.

They then explained why, and they did so first by quoting from Judge Heaton's decision. They said -- and again I'm quoting now -- The particular burden of which plaintiffs complain is that funds which plaintiffs will contribute to a group health plan might, after a series of independent decisions by health-care providers and patients covered by the plan, subsidize someone else's -- and they emphasize someone else's -- participation in an activity that is condemned by plaintiffs' religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary substantial burden.

And that is what they said, what I quoted before, We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the conduct of third parties with whom plaintiffs' is only a commercial relationship. In short, they found that it was not substantially likely, or at least it had not been shown to be substantially likely, that the plaintiffs would succeed on the merits in establishing a substantial burden on their exercise of their religious beliefs; and therefore they, like the district court, in Hobby Lobby, denied the injunction.

I noted before and I note again that in doing so, they said that they were not addressing the issue whether a corporation has free exercise rights. They were not addressing the issue of whether or not the individual plaintiffs here have to go it alone or that Cherry Creek Mortgage as a company has its own right to free exercise of religion. That is an enormously difficult issue. It is the issue identified by Judge Kane as the substantial and difficult issue that under the relaxed standard convinced him that the -- there was for that purpose substantial likelihood of success.

But the relaxed standard does not apply, according to the panel. And they determined that they did not have to address that issue because either way, individually or corporate-wise, there was a common failure to demonstrate a substantial likelihood of success on the RFRA *prima facie* case, and that sufficed to dispose of the motion for an injunction.

And because I think that is relevant, I have decided that the proper thing for me to do is to follow the lead of the motions panel and therefore I deny the motion, which is motion no. 12, for a preliminary injunction.

In saying that, however, I recognize, as you all do, that what the Tenth Circuit will say soon enough may differ. The prediction of Judges Ebel and Lucero as to what the merits panel would do may not turn out to be accurate. And therefore if the Tenth Circuit comes out the other way, as at least three

circuits have, on the issue, the plaintiffs are in no way foreclosed from coming back to this Court and once again requesting a preliminary injunction. This Court will follow the lead of the Tenth Circuit, no matter what direction that lead takes; and in fact, I would anticipate that if the Tenth Circuit rules in plaintiffs' favor, that there is a very good chance that this will be another one of those situations where the government might stipulate to an injunction.

Ms. Bennett has taken on a tiger by the tail, but she also knows when to stop beating her head against the wall. But that, for today, will be my decision. As I said, it was very interesting, I really enjoyed reading your materials, and I appreciate the quality of your arguments.

Thank you, folks.

Are there any questions?

MR. NORTON: Your Honor, would there be a written order forthcoming, or is this --

THE COURT: I think if you want a written order, you'll need to order the transcript. I don't intend to write this up.

MR. NORTON: You what?

THE COURT: The transcript. The transcript will be my written order.

MR. NORTON: Okay. Thank you, Your Honor.

THE COURT: Miss Bennett.

MS. BENNETT: Nothing, Your Honor; thank you.

THE COURT: Then if that's it, we'll be in recess; but I want to do one more thing, because this is just my thing, and that is I would like to meet you folks.

(Recess at 11:45 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 17th day of May, 2013.

s/Kara Spitler
Kara Spitler